

CHILD SAFETY COMMISSION OF INQUIRY

Harry Gibbs Commonwealth Law Courts Building,  
119 North Quay, Brisbane

On Wednesday, 10 December 2025 at 10.35 am

Before: Mr Paul Anastassiou KC, Commissioner

Counsel Assisting: Ms Robyn Sweet KC  
Mr Nathan Boyd  
Ms Bianca Mendelson

2  
3 COMMISSIONER: Mr Miller, I think we left off yesterday  
4 with me asking you whether you wouldn't mind thinking  
5 overnight about some means that might enhance the ability  
6 of the department to work concurrently during the court  
7 process towards reunification of the child in question, and  
8 whether there's something about the process as it currently  
9 operates that could be improved with that objective in  
10 mind?

11 A. Yes, Commissioner, and the first issue I'd like to  
12 talk about is whether a different approach could be taken  
13 to having some type of engagement with the family in some  
14 type of alternative dispute resolution process before we  
15 even get to the point where an application in court, even  
16 an emergent order application, is considered.

17  
18 COMMISSIONER: Yes, please. Please do. Could you just  
19 speak up a little bit?

20 A. Yes, yeah.

21  
22 COMMISSIONER: Thank you.

23 A. And what I'd point you to, Commissioner - again,  
24 I made reference to it yesterday - in the United Kingdom,  
25 so this is in terms of England and Wales, there is a public  
26 law outline which in effect is a practice direction that  
27 provides guidance as to the approach that's to be taken in  
28 child protection matters.

29  
30 COMMISSIONER: What's it called? A public --

31 A. The public law outline.

32  
33 COMMISSIONER: Where would one find that, if you know?

34 A. If you were to search under even "PLO in the United  
35 Kingdom" and "care proceedings" it will provide you with a  
36 whole load of resources and with the public law outline.

37  
38 COMMISSIONER: Thank you for the assistance with  
39 the research. There are people back at the secretariat  
40 watching this and they will make note. Thank you.

41 A. Yes, yes, Commissioner. Now, a key part of the public  
42 law outline is it provides guidance as to what should  
43 happen pre-proceedings. So where their local authority  
44 which is the Queensland Department of Child Safety  
45 equivalent is worried about a child it outlines the steps  
46 that are to be taken prior to consideration of any  
47 application being made. A key part of that process is the

1 local authority, who has the benefit of legal advice, is to  
2 provide the parents with a letter that sets out what it is  
3 that they're worried about and invites the parents to a  
4 meeting with the local authority.

5  
6 Now, that letter, in addition to outlining the issues that  
7 the local authority are concerned about, it entitles the  
8 parents to access non-means tested legal aid, so legal  
9 representation, to attend that pre-proceedings meeting.  
10 Now, the pre-proceedings meeting is not in any way intended  
11 to be adversarial. It's a meeting with the family, local  
12 authority, legal representative involved. The purpose of  
13 it is to try and reach an agreement as to what should  
14 happen in order to avoid an application needing to be made.  
15 Now --

16  
17 COMMISSIONER: That's, as you understand it, routinely  
18 part of the process that's implemented in the United  
19 Kingdom?

20 A. Yes, Commissioner.

21  
22 COMMISSIONER: I take it that that process would be  
23 subject to circumstances where there is an urgent threat to  
24 the welfare of the child. But even in those instances that  
25 process could be invoked as soon as possible after, say,  
26 the removal of the child if the circumstances are such that  
27 urgent action needs to be taken?

28 A. Yes. So there is an ability in urgent or emergent  
29 matters to seek immediate relief from the court through an  
30 emergency order.

31  
32 COMMISSIONER: And there's an administrative power to  
33 remove the child also in urgent circumstances; I think it's  
34 section 18?

35 A. I would have to defer to you on that point,  
36 Commissioner as to --

37  
38 COMMISSIONER: Well --

39 A. In Queensland's context?

40  
41 COMMISSIONER: In the Queensland context, yes.

42 A. Yes. Sorry, Commissioner, yes. So here you are  
43 correct that either an authorised officer under the Child  
44 Protection Act or - sorry, a child protection officer or a  
45 police officer is authorised under section 18 to effect an  
46 administrative decision to immediately remove a child that  
47 can be in place for up to eight hours. So there are

1 emergent situations in the UK where action is taken. But  
2 the majority of matters proceed through this  
3 pre-proceedings meeting process.  
4

5 COMMISSIONER: And that doesn't happen in the Queensland  
6 context partly because, as I understand it, when it comes  
7 to seeking emergent orders the common practice is to apply  
8 ex parte for those orders? I know this is not your  
9 jurisdiction.

10 A. What I would point to, Commissioner, in answering that  
11 is in my statement, and I'll just make reference,  
12 Commissioner, to the paragraphs I'm referring to --  
13

14 COMMISSIONER: Sure. That's helpful.

15 A. And I'm not sure - I think it was at tab 57 of --  
16

17 COMMISSIONER: Yes, I have your statement.

18 A. Yes. Thanks, Commissioner.  
19

20 COMMISSIONER: Thank you.

21 A. At paragraph 16 on page 3 --  
22

23 COMMISSIONER: Yes.

24 A. -- I outline the number of investigations that are  
25 currently being undertaken in Queensland, and so you'll see  
26 here that there's reference to - this is from Child  
27 Safety's currently published data available on their  
28 website - there were 31,454 investigations commenced.  
29

30 Now, if I take you over the page, at paragraph 17 I make  
31 reference to the - it's referred to as "admissions to  
32 temporary assessment orders". Now, I read that as meaning  
33 orders have been made. I'm not quite clear on what the  
34 word "admission" means. It may signify that the order  
35 provides for a child to be in the custody of the Chief  
36 Executive. But, in any event, there were 1,785 admissions  
37 made to temporary assessment orders, and that was a big  
38 increase on the previous 12-month period that this figure  
39 is measured against; and then there were 2,168 admissions  
40 to court assessment orders.  
41

42 Now, the key - I must point out here that I'm going to be  
43 then comparing these orders that were in the 12 months to  
44 March 2024 with then the investigations commenced data,  
45 which was to the 12 months to 31 December. Now, in time,  
46 Commissioner, this data might be cleared up as further  
47 reporting's made by the Department of Child Safety. But

1 contained within the children who were admitted to court  
2 assessment orders - so the 2,168 - a large proportion of  
3 them, I would suggest, were already the subject of  
4 temporary assessment orders. So if we understand the  
5 system is there were 1,785 children the subject of a  
6 temporary assessment order. Many of those I would expect  
7 have then led through to being also the subject of court  
8 assessment orders. But even if you add both of those type  
9 of assessment orders together you still only get to a  
10 figure of around 21 per cent of investigations commenced  
11 would have involved the use of an emergent order.  
12

13 COMMISSIONER: Sorry, what percentage?

14 A. I make it at 21.7, but that's my own calculation, and  
15 that's the adding together - no, sorry, Your Honour, I step  
16 back a bit. That figure's wrong. What I'm saying is if  
17 you add all of the temporary assessment orders and all of  
18 the court assessment orders together I get a figure of  
19 3,953. If you divide that by the total number of  
20 investigations that were commenced, the 31,454, at its  
21 highest we get only 12.6 per cent of investigations would  
22 seem to make use of an emergent order. Now, I would  
23 suggest the figure's probably lower because many of  
24 the court assessment orders would concern the same children  
25 who were the subject of a temporary assessment order.  
26

27 COMMISSIONER: So embedded in the figure of 2,168 court  
28 assessment orders are some at least of the 1,785 temporary  
29 assessment orders?

30 A. Yes, Commissioner.  
31

32 COMMISSIONER: But you're not sure how --

33 A. No, I can't --  
34

35 COMMISSIONER: --- what the overlap is?

36 A. That's right. I would expect there would be a high  
37 degree of overlap. However, what we're really then talking  
38 about is at the moment 12.6 per cent at its highest of  
39 investigations involved the use of emergent order.  
40

41 COMMISSIONER: Because there are other options,  
42 non-custodial options, by agreement with the family?

43 A. That's so. And so this data, when you think about it  
44 in this way, suggests that upwards of 88 per cent of  
45 investigations are being undertaken through the agreement  
46 or consent of the family.  
47

1 COMMISSIONER: And that process or that outcome is not  
2 dissimilar to the process in the United Kingdom you  
3 described where there's an anterior letter setting out the  
4 concerns of the department, leading to a meeting with the  
5 family, represented by lawyers in the case of the United  
6 Kingdom, and leading presumably to some degree of  
7 resolution without the necessity of proceeding to a court  
8 for some form of order?

9 A. Yes, yes, Commissioner. It may be that there is very  
10 good work currently being undertaken where the family's  
11 being engaged as part of that investigation and solutions  
12 are being identified and implemented through the agreement  
13 of the family. But if I take you further then,  
14 Commissioner - this is looking at the commencement of  
15 investigations and the use of assessment orders. If I then  
16 take you over to paragraph 18 of my statement on page 4 --  
17

18 COMMISSIONER: Yes, I have it.

19 A. -- what this then provides - and again the period of  
20 time we're talking about are the 12 months to 31 December  
21 2024 - that there were 34,303 investigations completed.  
22 Now, this was an increase of 15.2 per cent on the prior  
23 12 months. Now, in terms of the outcome of those  
24 investigations, Child Safety has assessed substantiated  
25 findings, so that indicates either a child has been harmed  
26 or they are at an unacceptable risk of being harmed in  
27 respect of 7,448 investigations. So out of the completed  
28 investigations we have a substantiated finding being made,  
29 and this is the 21.7 per cent. So that's just simply  
30 dividing the substantiated outcomes by the total  
31 investigations completed.  
32

33 But then if you step through it further, in here I provide  
34 that out of the 744 - 748, sorry, investigations with the  
35 substantiated finding there were only 4,733 of those  
36 matters where the outcome actually included an ongoing  
37 assessment of child in need of protection. So we only have  
38 13 - in total, Commissioner, there's only 13.8 per cent of  
39 completed investigations resulting in an outcome that the  
40 child is in need of protection.  
41

42 COMMISSIONER: What do you draw from that data? I mean,  
43 there's so many different integers to it that it's --

44 A. That's so.

45  
46 COMMISSIONER: -- hard to be clear about what one can  
47 distil from it.

1 A. Yes. Commissioner, before I answer that question, if  
2 I may, I'll just take you through to paragraph 26 of my  
3 statement on page 5. This is where I then - again, it -  
4 there needs to be a degree of caution because now I'm  
5 comparing that earlier data, which was for the 12 months to  
6 31 December, with data that I produce that's based by  
7 financial year. However, in the financial year 2024/25  
8 I received a total of 4,126 referred matters. Each  
9 referred matter relates to an individual child. Within  
10 that group of matters 1,094 of them, or 26.5 per cent of  
11 the total, concerned children who were already the subject  
12 of an existing order, and then the --

13  
14 COMMISSIONER: So they would be custodial orders?

15 A. They could be any type of order, Commissioner, child  
16 protection order, which could be ranging from a directive  
17 order right through to the most intrusive, the permanent  
18 care order. But the key point here then is to focus on the  
19 remaining 3,032 matters. So these are the matters that  
20 concern children that were either on an assessment order,  
21 that being a temporary assessment order or a court  
22 assessment order, or the children who were subject to care  
23 agreements, both types, the assessment care agreements or  
24 child protection care agreements, and also another group of  
25 children who are 514 in total who were not subject to any  
26 order or any care agreement.

27  
28 So then when you take that figure, the 3,032 matters,  
29 concerning all of those types of matters and you divide  
30 that by - back to that substantiated finding figure of  
31 4,733 the data suggests that my office is then only  
32 receiving about 64.1 per cent of the matters where there's  
33 been that substantiated finding that a child is in need of  
34 protection. So it would indicate that upwards of  
35 36 per cent of those matters are being worked through an  
36 agreement with the family to address the concerns by the  
37 Department of Child Safety.

38  
39 So I put all that into place, Your Honour, to then answer  
40 the question around, "Well, what does this data show us?"  
41 It shows that at the moment - the system is very large.  
42 It's commencing currently - and, if I take you back to  
43 paragraph 13 of my affidavit, Child --

44  
45 COMMISSIONER: Could you just speak up a little bit?

46 A. Sorry, yeah.  
47

1 COMMISSIONER: That's all right.  
2 A. If I take you back to paragraph 13 of my affidavit,  
3 Commissioner, it commences with a huge number of concerns  
4 reported to Child Safety. So in the 12 months to 31 March  
5 2025 we commenced with over 142,000 intakes relating to  
6 89,845 children, and then there's a process that then  
7 distils these matters down through firstly the intake  
8 process, where Child Safety will undertake an assessment of  
9 the concerns as reported and determine whether or not to  
10 record them as a notification, and if that occurs Child  
11 Safety then has processes to respond in terms of priority  
12 as to how they investigate. But all of this data suggests  
13 at the moment it's only a small percentage of children who  
14 are the subject of one of these reported concerns that  
15 actually find their way into the current litigation part of  
16 the system.

17

18 COMMISSIONER: And what percentage is that, as best you  
19 can distil it?

20 A. That was that percentage I gave you, Commissioner,  
21 that - actually, no, I don't have that percentage, sorry,  
22 Commissioner. I could - it was the 64.1 per cent of  
23 children who were found to be in need of protection who  
24 then find their way to my office. But, again, when viewing  
25 the data it's not exactly a direct comparison of 12 months  
26 against 12 months because of the way Child Safety is  
27 currently reporting their data, and I understand they have  
28 some current difficulties in producing data through to  
29 30 June 2025.

30

31 But all of that said, Commissioner, the data would also  
32 suggest that there would be matters that would benefit from  
33 a more defined pre-proceedings approach to trying to make  
34 an agreement like an alternative dispute resolution type  
35 process in order to try and identify which matters the  
36 concerns involved can be met through further work between  
37 the Department of Child Safety and the family by agreement,  
38 which is what the scheme of the Act requires in terms, that  
39 the first consideration should be, "Can we?" - "Can we work  
40 with the family through an agreement?"

41

42 COMMISSIONER: That pre-proceeding process depends on the  
43 consent of the families concerned, doesn't it?

44 A. Yes, it does.

45

46 COMMISSIONER: So if that's not forthcoming then some form  
47 of emergent order will be required. It doesn't have to be

1 a custodial order but something that would empower the  
2 department to conduct such investigations as are  
3 appropriate in the circumstances?

4 A. Yes, Commissioner.

5  
6 COMMISSIONER: Yes.

7 A. But if there was --

8

9 COMMISSIONER: But that doesn't preclude the opportunity  
10 being taken if it's available either consensually or by  
11 some empowering order for such engagement with the family  
12 as may result or with a view to reaching a position where  
13 the child is safe without the necessity to remove the child  
14 into the custody of the State?

15 A. Yes, Commissioner, and it's my view critical that this  
16 part of the system, parents, the family, they need to have  
17 access to legal advice and assistance in that initial  
18 engagement in terms of trying to reach an appropriate  
19 agreement as to how the matter should proceed. Now,  
20 I can't talk to what the current approach of Legal Aid  
21 Queensland is in terms of their grants of aid for parents  
22 to access legal assistance beyond initial advice in that  
23 early part of the system, but it may be that there are  
24 various community legal centres that may be able to provide  
25 assistance. But, as I currently understand it, grants of  
26 aid commence once we're in the - once we've got court  
27 applications made.

28

29 COMMISSIONER: So does that mean that, as you understand  
30 Legal Aid's policy, legal aid is not generally available at  
31 the emergent order stage?

32 A. No, Your Honour, parents are able to seek legal  
33 assistance and seek grants of aid that would allow them to  
34 be represented on a court assessment order application.  
35 Those are the types of applications that are currently  
36 required to be personally served. It gives the parents  
37 then the actual application to go and seek legal advice.  
38 Now, where you have a system where parents - there's no  
39 requirement in the Act to provide them with a copy of  
40 the temporary order assessment applications, it makes it  
41 very difficult for Legal Aid, I would suggest, to provide  
42 grants of aid in that situation. But I'm really talking,  
43 Commissioner, about the access to representation pre any  
44 emergent order application.

45

46 COMMISSIONER: Sure. So, likewise in the case of a  
47 temporary custody order, that kind of application isn't

1 required to be served on the parents, as I understand it?

2 A. Yes, Commissioner.

3

4 COMMISSIONER: And therefore it sort of follows that if  
5 the parents aren't required or are not entitled to be  
6 present in court to oppose the application that legal aid  
7 is not granted for representation at a hearing they're not  
8 entitled as a matter of right to be present at; is that the  
9 position?

10 A. Yes, Commissioner, and, again, Legal Aid will be able  
11 to provide you information as to what documentation they  
12 may need before they can approve a grant of aid, but it  
13 will be predicated on an application having been filed.

14

15 COMMISSIONER: What I understand you to be saying further  
16 to that is, following the process that is undertaken in the  
17 United Kingdom, if the parents were given written notice of  
18 the department's concerns, invited to attend a meeting and  
19 provided with the opportunity to be legally represented at  
20 that meeting, there's at least an opportunity not presently  
21 available to avoid the outcome that the matter proceeds to  
22 some form of either emergent order or subsequently child  
23 protection order under your jurisdiction?

24 A. Yes, Commissioner. In the UK those initial meetings  
25 may lead to a four- or a six-week agreement as to what will  
26 occur. There are regular reviews about whether or not it's  
27 addressing the needs that have been identified, and in time  
28 it may lead to applications, but it will also lead to  
29 matters being resolved without the need to then invoke the  
30 jurisdiction of the court.

31

32 COMMISSIONER: Yes. So that's at the front end of  
33 the process?

34 A. Yes, Commissioner.

35

36 COMMISSIONER: As the system presently exists in  
37 Queensland, once the emergent order has done its work, once  
38 it's spent, there is a referral to your office, where you  
39 get to decide whether some form of child protection order  
40 should be sought?

41 A. Yes.

42

43 COMMISSIONER: And that might be a short-term custody  
44 order, it might be - what else?

45 A. It will be within that range of all of the orders that  
46 are set out in section 61 of the Child Protection Act --

47

1 COMMISSIONER: Yes.  
2 A. -- ranging from directive orders. Now, these can be  
3 for a parent to do something or not do something. They  
4 might be orders that parents are to have their children  
5 attend school. That could be also sought in combination  
6 with what's referred to as a protective supervision order,  
7 which places then obligations on the Chief Executive to  
8 supervise the child's care in respect of things stated in  
9 the order. It's also directive orders around a parent's  
10 contact. It might set out that a parent is to have no  
11 contact. Those applications are very rare. It's more  
12 often around putting limitations in respect of how a  
13 parent's contact will occur with the child. Then you step  
14 then up into orders that are seeking in effect for children  
15 to be placed in out-of-home care. That commences with the  
16 custody orders you mentioned, Commissioner. There are  
17 short-term guardianship orders available, and then there's  
18 a suite of long-term guardianship orders.

19  
20 COMMISSIONER: But the long-term guardianship orders, as a  
21 general rule, they're not made until some time towards the  
22 end of the two-year period; is that generally the case?

23 A. That's generally the case, Commissioner.

24  
25 COMMISSIONER: To allow for such efforts as can be made to  
26 reunify the child in the meantime?

27 A. Yes, Commissioner.

28  
29 COMMISSIONER: Right. So let's talk about that period  
30 where the child is in the custody of the Chief Executive  
31 under a temporary custody order, placed with - either in a  
32 family-based care situation, possibly a kinship care  
33 arrangement, possibly a foster care arrangement, or,  
34 failing that, in non-residential - sorry, non-family based  
35 residential care - they're the three options as  
36 I understand it that are presently available. In that  
37 period, that is to say prior to the making of a long-term  
38 guardianship order, what can be done better to facilitate  
39 the reunification of the child, to engage with the family  
40 of the child, to provide better opportunities for  
41 resolution once the child is in that stage of care by the  
42 State?

43  
44 Because there's been criticisms advanced that the legal  
45 process is somehow an impediment to the activities of the  
46 department operating concurrently to reunify the child, the  
47 criticism being that, in short compass, the child ends up

1 in the litigation process, that shifts the emphasis towards  
2 the adversarial system and removes the focus of the  
3 department away from what's described as a human services  
4 framework, distracting and debilitating efforts to reunify  
5 the child.

6  
7 Now, I've paraphrased what I understand the criticism to  
8 be, and I should add that it's my understanding that,  
9 notwithstanding that criticism, the department does operate  
10 in a concurrent fashion, that is to say concurrently  
11 working on the reunification of the child while at the same  
12 time the court proceedings are pending. So against that  
13 background I'm interested in what you say might be improved  
14 by way of participation in the court process that would  
15 provide better opportunities at an earlier point in time  
16 for the reunification of the child.

17 A. Yes, Commissioner, if I first focus on the period of  
18 time that the child protection proceeding is before the  
19 court. So this is the time from the moment I make an  
20 application, or lawyers on my delegation, through to  
21 whenever that application is finalised before the court.  
22 There is - and it's been recognised. It was - there was  
23 reference made to it within the Carmody Inquiry. There is  
24 this tension or even an internal conflict in the dual role  
25 that the child safety officer has. On the one hand, at  
26 times they're tasked with investigating the concerns and  
27 making an assessment, but on finalising their assessment  
28 they've then got the task of undertaking casework with the  
29 family. That casework is to commence within the  
30 investigation as they're building relationships with the  
31 family and trying to put in place things that can be done  
32 through agreement. But even on finalisation of the  
33 assessment that casework and that, if I use the word,  
34 active efforts, active steps is to continue throughout any  
35 child protection proceeding.

36  
37 Now, the challenge we currently have is the key mechanism  
38 that exists within the Child Protection Act to provide  
39 guidance to this casework is what's referred to as the  
40 child's case plan. An initial case plan - so every child  
41 that has been assessed to be in need of protection, so that  
42 is in need of ongoing help under the Child Protection Act,  
43 is to have a case plan. The concept of the case plan, how  
44 it's developed and how it's then reviewed came about out of  
45 an earlier inquiry by the then Crime and Misconduct  
46 Commission that was undertaken, from memory, in 2003.

47

1 COMMISSIONER: Yes.

2 A. And then there were a series of amendments to the Act  
3 post that review that inserted the current case planning  
4 provisions. The whole concept of the case planning  
5 provisions is as quickly as possible to bring the family  
6 together in what's referred to as a family group meeting to  
7 consider what are Child Safety's concerns in respect of  
8 the child and then to develop with the family a plan for  
9 what it is that needs to happen to address those concerns,  
10 and the plan is also to outline where it is the child's  
11 going to be living and how it is that all of the child's  
12 needs are going to be met during the plan.

13  
14 One of the challenges we currently have, Commissioner, is  
15 that the case planning process is currently delayed. Now,  
16 it's taking longer and longer in order for a case plan -  
17 the initial case plan to be developed and endorsed, and  
18 it --

19  
20 COMMISSIONER: What's the reason for the delay, in your  
21 view?

22 A. It's a complicated process that's outlined in the  
23 legislation in terms of steps need to be taken - and when  
24 you read through the provisions, Your Honour, on the face  
25 of it they're all very sensible, they afford with  
26 procedural fairness, natural justice to all parties  
27 involved, it's giving appropriate notice and support.  
28 However, in practice coinciding with the commencement of  
29 the litigation model in Queensland there was a new approach  
30 to this introduced that is called a - the name escapes me  
31 at the moment, but I'm going to refer to it, Commissioner,  
32 as a family-led decision-making approach, and sitting  
33 alongside that you'll hear reference to the family  
34 participation program that's utilised where the matter  
35 involves an Aboriginal or Torres Strait Islander child, and  
36 it's really aimed at trying to task agencies other than the  
37 Department of Child Safety to lead and undertake the  
38 development of these case plans. So you'll have matters -  
39 if a child has been assessed as in need of protection in,  
40 say, the location of Townsville, Child Safety will then  
41 seek to engage an independent community-controlled agency  
42 to undertake that case planning process and to develop a  
43 case plan in partnership with the family.

44  
45 COMMISSIONER: Can we just skip ahead for a minute?

46 A. Yes.

47

1 COMMISSIONER: In relation to the case plan, that is  
2 documented in due - you know, when it's finalised it's  
3 documented?  
4 A. The case plan is documented, Commissioner, yes.  
5  
6 COMMISSIONER: Yes. And is the completed documented case  
7 plan a prerequisite for the making of a child protection  
8 order?  
9 A. Yes, Commissioner.  
10  
11 COMMISSIONER: Yes. And that case plan would include  
12 details such as where the child in question is to be placed  
13 in accordance with the case plan for the duration of  
14 the order that is being sought; so if it is a temporary -  
15 sorry, a short-term custody order the case plan in respect  
16 of that order would include reference to where the child is  
17 to be placed?  
18 A. Yes, it will include the details of the child's  
19 placement. Now, these plans are only developed for a  
20 six-month period.  
21  
22 COMMISSIONER: Yes  
23 A. And then they're reviewed as part of those case  
24 planning provisions.  
25  
26 COMMISSIONER: But the order's made by a - effectively a  
27 precondition to the making of the order is this case plan?  
28 A. Yes, it has to have been developed in accordance with  
29 the provisions.  
30  
31 COMMISSIONER: Yes.  
32 A. But there also needs to be a finding made by the court  
33 that the plan is appropriate and desirable to meet the  
34 child's needs.  
35  
36 COMMISSIONER: Yes. But the terms of the case plan are  
37 not terms of the court order --  
38 A. No.  
39  
40 COMMISSIONER: -- in the sense that the order of the court  
41 doesn't contain directions consistent with the terms of the  
42 case plan? It's not a schedule to the order, for example?  
43 A. No, it is not a schedule, Your Honour. What we're now  
44 starting to see is courts are taking that step and  
45 incorporating within child protection orders directives or  
46 supervision orders that directly make reference to the  
47 actions within case plans.

1  
2 COMMISSIONER: Yes. You see, I'm wondering whether, if  
3 the case plan were reflected in specific directions in the  
4 order or if the order provided that the case plan as a  
5 schedule to the order is to be complied with, which could  
6 readily be done, when it came to changed circumstances or  
7 some reason to review the case plan or make changes to it  
8 having regard to changed circumstances - bearing in mind  
9 that we're talking about a child and circumstances in  
10 relation to the child will continue to change in --

11 A. Yes.

12  
13 COMMISSIONER: -- the usual way that life changes for  
14 people - then rather than going to QCAT to review  
15 arrangements that are contained in the case plan the  
16 Childrens Court could be asked to amend the order,  
17 including aspects that are relevant in relation to the case  
18 plan?

19 A. Yes, Commissioner, you could have a system where the  
20 court plays a much bigger role in the implementation of  
21 what needs to happen in terms of assisting a child to be  
22 returned to their home.

23  
24 COMMISSIONER: I'm also thinking about a situation where  
25 the child, a parent, a kinship member might, because of  
26 circumstances that have changed, wish to vary the case plan  
27 to reflect conditions that pertain at the time that didn't  
28 necessarily exist at the time the order was made and the  
29 case plan effectively approved, so that there would be an  
30 opportunity by the court making the order in the first  
31 place to vary the order if there were reasons that the  
32 court were satisfied about that warrant a variation to the  
33 order. Would you think that that process would be a  
34 desirable change in terms of the litigation model?

35 A. Commissioner, so within the current case planning  
36 provisions I'd make reference to section 51X of the Child  
37 Protection Act. This is the provision - and I'll just find  
38 it myself, Commissioner.

39  
40 COMMISSIONER: Yes.

41 A. So this provision sets out, Your Honour, what must be  
42 included in a report about a review that's undertaken of a  
43 case plan. So where - when the matter before the court  
44 currently in proceedings where there's been an existing  
45 case plan that then during the proceeding has been  
46 reviewed, the Department of Child Safety produces a report  
47 under section 51X of the Act that provides details around

1 the outcome of that review. So it will or must include,  
2 you'll see under subsection (1), the following matters:  
3 details about the goals, including the goal for best  
4 achieving permanency, any changes to the goals in the  
5 revised case plan, any services provided, the extent to  
6 which any - the living arrangements, contact arrangements  
7 under the previous plan are meeting the child's needs.

8  
9 COMMISSIONER: Yes.

10 A. So there is a process, Commissioner --

11  
12 COMMISSIONER: That's a process for review. Is that a  
13 compulsory review on a certain timeframe?

14 A. This review is undertaken each six months,  
15 Commissioner.

16  
17 COMMISSIONER: Yes.

18 A. Now, I point to this provision to then respond to your  
19 question. It may be that on the review being undertaken  
20 and the report of the review being produced if a family  
21 member, a parent or somebody else that has an interest in  
22 the matter is not satisfied with the review and the new  
23 plan that they then, what I understand you're proposing,  
24 would be empowered to bring the matter back before the  
25 court.

26  
27 COMMISSIONER: Well, yes, that might be one circumstance.  
28 But there might be merit in a person affected by the order,  
29 including the child through the child's litigation  
30 guardian, or the parent on the parent's motion, or possibly  
31 a carer or a kinship member who's a carer, to move the  
32 court for a variation --

33 A. Yes.

34  
35 COMMISSIONER: -- to the case plan, and not dependent upon  
36 the review by the department of the case plan, so that  
37 there are those directly affected by the order, which has  
38 effectively embedded in it the terms of the case plan,  
39 although not expressly a term of the order, as things  
40 presently stand, the opportunity to move the court for a  
41 variation they consider is desirable in the interests of  
42 the child, and that might also include the child seeking a  
43 variation because circumstances have changed and the child  
44 is dissatisfied in some relevant way with the terms of the  
45 case plan.

46  
47 Now, at present, as I understand it, if a parent or other

1 interested person were dissatisfied with the terms of the  
2 case plan or the review of it, their recourse is to seek a  
3 merits review at QCAT; is that correct? That is to say  
4 presently the interests of others in a review of the case  
5 plan, if dissatisfied, leads to an application for a review  
6 at QCAT; am I right in thinking that?

7 A. Commissioner, it's - with many parts of the Act, it's  
8 a little more nuanced than that and if --

9

10 COMMISSIONER: It sort of resembles the Income Tax  
11 Assessment Act a bit in a way in terms of its complexity.

12 A. Yes, Your Honour. What I point you to is schedule 2  
13 of the Child Protection Act. Now, this appears, on at  
14 least my copy of the Act that's been provided to me, at  
15 page 372.

16

17 COMMISSIONER: Yes, I have that.

18 A. And you will see there are two columns. One on the  
19 left is entitled "The reviewable decision".

20

21 COMMISSIONER: Yes.

22 A. And then column 2 is entitled "The aggrieved person".  
23 Under the first entry in column 1 it provides an ability of  
24 somebody who is aggrieved of a decision to refuse a request  
25 to review a case plan to seek to review that decision in  
26 QCAT. Now --

27

28 COMMISSIONER: So that's a decision to refuse to review  
29 it?

30 A. Refusing a request to review it. Now, that, as  
31 I understand, is the only reviewable right before QCAT in  
32 respect of case planning.

33

34 COMMISSIONER: So in the circumstances where the case plan  
35 has been reviewed but the parent, say, is dissatisfied with  
36 the terms of the case plan following the review, there is  
37 no appeal right on the merits?

38 A. That's my understanding - well, no, there is no  
39 simplified review process provided under the Act through  
40 the QCAT mechanism. But, as with any exercise of  
41 administrative power, you would still have access to  
42 judicial review, perhaps, but that is not something that  
43 would occur in this jurisdiction, Commissioner.

44

45 COMMISSIONER: And it's likely in the nature of it that  
46 the review would be one as to the merits rather than a  
47 legal error?

1 A. Yes, that'd be --

2

3 COMMISSIONER: But of course legal error can have an  
4 elastic meaning, but it's often asserted it's something  
5 that is in substance a - a merit decision is a - can be  
6 characterised as a legal error, but that is a fraught sort  
7 of area of administrative law, about which there's much  
8 authority in other contexts. But the simple point is that  
9 there is not presently available a clear pathway to allow  
10 those affected by the order to bring an application to  
11 review or seek amendment to a case plan. If it were - if  
12 the case plan were a term of the order of the court, the  
13 Childrens Court, the Childrens Court would have power to  
14 vary its own order, would it not? Well, I'm asserting that  
15 as a general proposition in terms of --

16 A. Yes, yes, Commissioner, provided its jurisdiction is  
17 enlivened.

18

19 COMMISSIONER: Yes.

20 A. Or unless there was some mechanism within the Act that  
21 required matters on a regular basis to come back before the  
22 court.

23

24 COMMISSIONER: Well, if the order were made incorporating  
25 the case plan either by reference or explicitly in the  
26 order and the order were to provide "until further order",  
27 then the court would have - wouldn't be functus if power to  
28 amend its order, and then the only question will be on who  
29 has standing to seek an amendment to the order. Now, if  
30 the parents were properly parties to the proceeding at  
31 which the order was originally made, if the child was also  
32 a party, then plainly enough those interests would be able  
33 to move the court for a variation to the order?

34 A. Yes.

35

36 COMMISSIONER: And wouldn't that be a more  
37 straightforward, direct route to the review of  
38 the substantive provisions of the case plan rather than  
39 what presently exists, which seems to be a constrained  
40 right to seek a merits review at QCAT only in the context  
41 of a decision to refuse to review the case plan?

42 A. Yes, Commissioner.

43

44 COMMISSIONER: And wouldn't the process then remain with  
45 the court which has, impliedly at least, the expertise in  
46 relation to child protection, it being the court which is  
47 charged or given the jurisdiction to make orders of this

1 kind in the first place?

2 A. Yes, Commissioner. There are matters now where at the  
3 conclusion of the contested hearing the court will then  
4 direct that the Chief Executive of the Department of Child  
5 Safety is to convene a family group meeting to take into  
6 account the court's findings and to develop a new plan  
7 consistent that the court can then consider as to whether  
8 it's appropriate and desirable.

9

10 COMMISSIONER: Is there any reason to your knowledge why  
11 when making a child protection order the court could not be  
12 invited to include in the terms of the order made, either  
13 directly or by incorporating by reference, a case plan such  
14 that the case plan effectively becomes an order of  
15 the court?

16 A. No, Commissioner, and, as I said before, we are now  
17 starting to see the court, through different magistrates in  
18 some locations, incorporating into the order the parts of  
19 the case plan that they would like to also make directions  
20 or supervision orders about.

21

22 COMMISSIONER: Of its own motion you mean?

23 A. Of its own motion.

24

25 COMMISSIONER: And I might be wrong about this, but my  
26 general understanding is that the practice in Victoria is  
27 for the child protection orders to contain the detail, if  
28 I can put it that way, that one would find in the case plan  
29 as terms of the order directly or by incorporating it by  
30 reference. Are you aware of --

31 A. I'm not aware in any level of detail about the  
32 approach in Victoria. But I will say that I understand  
33 there's some type of mechanism to bring the matter back  
34 before the court for it to be reviewed in Victoria as to  
35 whether or not the order should be continued.

36

37 COMMISSIONER: If the court were to be more actively  
38 involved in the supervision of the working out of the  
39 order, then in principle would that not better connect the  
40 court process to the concurrent process that I think it's  
41 agreed should be underway to try and find ways to reunify  
42 the child where possible?

43 A. Yes, Commissioner, and in saying that I would refer to  
44 the evidence I gave yesterday as to the approach as it then  
45 was when I was in Colorado that the intervention is court  
46 led through to at least the first 12-month mark to try and  
47 get children home, and at the point I was there for

1 children under a particular age that could be extended out  
2 for a further 12 months, with the aim of the court helping  
3 to lead and implement the intervention that needs to happen  
4 in respect of the concerns.

5

6 COMMISSIONER: If that were to occur wouldn't it require  
7 some amendments to be presently unconstrained powers of the  
8 Chief Executive, for example under section 82?

9 A. Commissioner, what you're proposing or exploring would  
10 need amendments. I accept that. At the moment the court's  
11 ability to consider the placement option of a child can  
12 only occur - so if I step back a point. The court has the  
13 ability or the power to make orders that grant the custody  
14 of a child to a family member or could grant guardianship  
15 of a child to a family member. So in that aspect the court  
16 has an ability to make a decision that then will include  
17 where the child is placed.

18

19 COMMISSIONER: And that's harnessed to the permanency  
20 principle, isn't it --

21 A. Yes, or even on --

22

23 COMMISSIONER: -- and the order of priority --

24 A. Yes, Commissioner, or even on a short-term custody  
25 order - I use the "short-term", but it's just a custody  
26 order that can be up to a duration of two years. The court  
27 can grant custody of children to family members. Now,  
28 outside of those two options, either custody to family or  
29 long-term guardianship to family, the court is constrained  
30 in what role it plays in terms of the placement of a child.  
31 It can only consider that issue through the child's case  
32 plan, because the case plan must include in it - if I just  
33 refer you to the provision, Your Honour.

34

35 So, Your Honour, if I refer you to section 51B of the Child  
36 Protection Act, this is the provision that sets out what is  
37 a child's case plan. Now, there are some things that it  
38 must include. However, on review sitting here now,  
39 Commissioner, I can see under subsection (4) it may also  
40 include the following matters or "any of the following  
41 matters", (b), there - there is a provision under  
42 subsection (b), so this is 51B(4)(b), it can provide for  
43 the "arrangements about where or with whom the child will  
44 live, including interim arrangements". So the court  
45 currently --

46

47 COMMISSIONER: Sorry, which provision was that? Section?

1 A. That's section 51B(4)(b). However, I do concede that  
2 this provision outlines that the plan may include these  
3 things, but --  
4

5 COMMISSIONER: It's permissive?

6 A. It's permissive. It's not a must, Commissioner. And  
7 so short of that issue, Commissioner, yes, the court's  
8 oversight of placement of a child who an order's granting  
9 custody to the Chief Executive or guardianship to the Chief  
10 Executive, the ability of the court to have any oversight  
11 or influence as to placement would be through that case  
12 planning provision.  
13

14 COMMISSIONER: But take a case where the child in question  
15 is subject to a short-term custody order in favour of  
16 the Chief Executive and in due course an application is  
17 made for long-term guardianship to be granted to the Chief  
18 Executive. In that context the Chief Executive is  
19 empowered in relation to placement decisions to make such  
20 arrangements as are considered appropriate without any  
21 scrutiny of that issue, that is the placement of the child,  
22 being available to the court?

23 A. Yes, Commissioner.  
24

25 COMMISSIONER: So once a long-term guardianship order in  
26 favour of the Chief Executive is made the court's oversight  
27 effectively comes to an end, does it not, subject to the  
28 review that's required of the long-term guardianship  
29 order - is it every two years?

30 A. Commissioner, firstly I would concede, yes, it's only  
31 through that review process, and I would have to check the  
32 Act. I think at its highest it requires a review after the  
33 first two years. But, as I understand it, it's then not a  
34 requirement ongoing. But I might be wrong on that point,  
35 Commissioner. I'll review the Act over the break.  
36

37 COMMISSIONER: No, that's all right.

38 A. What I would also point out, Commissioner, is that  
39 there is a constraint on my role and also on the court's  
40 ability to make long-term guardianship orders to named  
41 people, individual people who are not family unless that  
42 person's nominated by the Chief Executive of the Department  
43 of Child Safety. So, although I have on my jurisdiction  
44 been enlivened, I'm not able to seek a long-term  
45 guardianship order to other unless the person's been  
46 nominated by the Chief Executive. I'm not able to seek a  
47 permanent care order to another person unless they've been

1 nominated, and in time the court's not able to make those  
2 orders unless the person has been nominated.

3  
4 COMMISSIONER: What is the provision of the Act that  
5 constrains you in that way?

6 A. It is - I would refer Your Honour to section 61, which  
7 sets out the types of orders that the court may make, and  
8 if I take you down, Your Honour, to section 61(f) we have  
9 then - (i), you can have a long-term guardianship order to  
10 "a suitable person, other than a parent of the child, who  
11 is a member of the child's family", but then the next order  
12 is "another suitable person, other than a member of the  
13 child's family, nominated by the chief executive"; and then  
14 the nomination also appears in 61(g), which is the  
15 permanent care order reference, where again the court can  
16 only make this order if the person is nominated by the  
17 Chief Executive.

18  
19 COMMISSIONER: Sorry, which section did you move to,  
20 sorry?

21 A. (g). So subsection (g). 61(g). It's over the page,  
22 Commissioner.

23  
24 COMMISSIONER: Yes. All right. So with section 61(f):

25  
26 *an order (a long-term guardianship order)*  
27 *granting long-term guardianship of the*  
28 *child to -*  
29 *(i) a suitable person, other than a parent*  
30 *of the child, who is a member of the*  
31 *child's family ...*  
32

33 So that - is that a person who is proposed as the long-term  
34 guardian is a member of the child's family you can seek  
35 that order?

36 A. I can seek that order, then the court can make that  
37 order, Commissioner, independent of a need for that person  
38 to be nominated.

39  
40 COMMISSIONER: But somebody not a member of the child's  
41 family needs to be a person nominated by the Chief  
42 Executive?

43 A. Yes, Commissioner. Yes. So in that group of people  
44 will be carers who have provided long-term care for  
45 children.

46  
47 COMMISSIONER: Yes.

1 A. Their ability or the ability for myself or the court  
2 to seek or for the court to make that order is constrained  
3 by the Chief Executive nominating that person.  
4

5 COMMISSIONER: All right. Just going back to  
6 subsection (f)(i), what is the meaning - is there a defined  
7 meaning of "a member of the child's family" and how is  
8 "family" defined for the purposes of that section? In  
9 particular, would it extend to kinship members in the  
10 Aboriginal and Torres Strait Islander context and the  
11 cultural understanding of a kin - a member of - of kin  
12 according to Aboriginal and Torres Strait Islander cultural  
13 concepts of the family in the broader sense as I understand  
14 it?

15 A. Yes, Commissioner. The reference to "family" in the  
16 context of that order is not defined in the Act. There is  
17 a definition provided within the dictionary, schedule 3 of  
18 the Act, of "family group", and it sets out a definition of  
19 who would be considered in a family group. Now, that  
20 includes members of a child's extended family, and, if the  
21 child belongs to a clan, tribe or similar group, members of  
22 that group and anyone else recognised by persons mentioned  
23 in paragraph (a) or (b) as belonging to the child's family.  
24 Now --  
25

26 COMMISSIONER: That's quite broad, isn't it?

27 A. Very broad. But, again, that is a definition defined  
28 as "family group", which in the scheme of the Act underpins  
29 then what's referred to as a "family group meeting". So in  
30 the context of who is in a child's family it's my view that  
31 that is really matter dependent and that it could be open  
32 to findings from the court as to for a particular child who  
33 the court may consider is a member of that child's family.  
34

35 COMMISSIONER: So are you saying in effect that family  
36 within the meaning of section 61(f)(i) doesn't necessarily  
37 mean family group as defined in the dictionary?

38 A. No, Commissioner, I think there will be matters where  
39 the court can and it might be open to the court on the  
40 evidence to make a finding that a particular person is  
41 family for that child.  
42

43 COMMISSIONER: Yes.

44 A. However, there's no real guidance within the Act.  
45

46 COMMISSIONER: It's a matter of construction, isn't it, as  
47 to whether one reads the definition of "family group" as

1 informing the reference to "family" --

2 A. Yes.

3

4 COMMISSIONER: -- per se in section 61? I can see a very  
5 strong argument that you should read them consistently, but  
6 there could be room for argument about that?

7 A. Yes. Yes, Commissioner.

8

9 COMMISSIONER: You're not aware of any authority on that  
10 question whether that issue has been argued or determined?

11 A. Not within a child protection proceeding, Your Honour.  
12 There's no, as I'm aware, guidance, any published decision  
13 on that point.

14

15 COMMISSIONER: Well, then coming back to the constraint  
16 that you face in relation to seeking the long-term  
17 guardianship other, it takes us, doesn't it, to  
18 section 51BA(4), namely the permanency principle and the  
19 prescribed order of preference in that section in relation  
20 to the making of child protection orders?

21 A. Sorry, Commissioner, which provision are you --

22

23 COMMISSIONER: It's at page 27. It's section 5BA(4).

24 A. Yes, Commissioner.

25

26 COMMISSIONER: Definition to the permanency principle --

27 A. Yes.

28

29 COMMISSIONER: -- in subsection (3), and prescribes an  
30 order of preference, or order of priority, to use the terms  
31 of the Act, in relation to the orders for long-term  
32 guardianship, first being, in (a), "the child to be cared  
33 for by the child's family", and that could include, subject  
34 to the question of what is meant by "family" and whether it  
35 is co-extensive with the definition of "family group",  
36 somebody other than the natural parents of the child;  
37 that's the first?

38 A. Yes. So the scheme of the Act does not make reference  
39 to - although sitting at the threshold, sitting essentially  
40 at the basic concept of the Act, a child in need of  
41 protection, and we covered this yesterday, Commissioner, is  
42 an assessment made in respect of that child's parents,  
43 although broadly defined in section 11, once the child is  
44 in need of protection. The scheme of the Act requires us  
45 then to work towards having that child with family.

46

47 COMMISSIONER: Yes, I follow. And the scheme gives effect

1 to that or the Act gives effect to the aspiration that the  
2 child be returned to the family by setting out an order of  
3 priority in terms of the making of long-term guardianship  
4 orders?

5 A. Yes, it --

6

7 COMMISSIONER: In whose favour they should be made, that  
8 is to say?

9 A. Sorry, what was that, Commissioner?

10

11 COMMISSIONER: That is to say in whose favour the order  
12 should be made in order of priority?

13 A. Yes, Commissioner, yeah, and I'd also refer you back  
14 to the general other principles that are outlined in  
15 section 5B. That also is relevant in that - again, if  
16 I refer you to principle (h), we have:

17

18 *If a child is removed from the child's*  
19 *family, consideration should be given to*  
20 *placing the child, as a first option, in*  
21 *the care of kin.*

22

23 Now, again, there's all these interchangeable terms used.  
24 "Kin" is something somewhat --

25

26 COMMISSIONER: Yes, I want to come back to that and also  
27 to the paramount principle in a minute. But just focusing  
28 on this order of priority in subsection (4) --

29

30 A. Yes.

31

32 COMMISSIONER: -- "the first preference is for the child  
33 to be cared for by the child's family". When we compare  
34 that with "the second preference is for the child to be  
35 cared for under the guardianship of a person who is a  
36 member of the child's family, other than a parent of  
37 the child, or another suitable person", the contrast  
38 between the use of "parent" in (a) and the reference to "a  
39 member of the child's family" in (b) suggests that the  
40 first preference is to return the child to the child's  
41 natural parents, not parent in the extended sense?

41

42 A. Commissioner, what I would point to is that  
43 subsection (4)(a) again the first preference is "family".  
44 It's more broad than "parent". Now, if we can have a child  
45 cared for by a family member outside of an order, any  
46 order, that's to be the preference.

46

47 COMMISSIONER: Well, what I'm struggling with is if you

1 look at (b), "the second preference is for the child to be  
2 cared for under the guardianship of a person who is a  
3 member of the child's family, other than a parent of the  
4 child" --

5 A. Yes.

6

7 COMMISSIONER: So distinction is being made here?

8 A. So my view of the (b) option, Commissioner, is that  
9 here we are talking about a long-term guardianship order --

10

11 COMMISSIONER: Yes.

12 A. -- granting guardianship to a family member. Now,  
13 this is --

14

15 COMMISSIONER: So that's (a), isn't it?

16 A. No, no, Commissioner, (a), in my view, really tries to  
17 encapture what has always been the way in terms of families  
18 and society that people at various times are raised by  
19 family and not necessarily by their biological parents.  
20 It's giving - it's seeking to have the decision-maker  
21 consider can this child be cared for, are their needs going  
22 to be met by family rather than, say, a parent. When you  
23 get to (b) we then move into if there's going to be a  
24 guardianship order made under this Act, well, the  
25 priority's got to be it's guardianship to a family member.

26

27 COMMISSIONER: Well, let me see if I can restate what my  
28 problem of construction is.

29 A. Yes.

30

31 COMMISSIONER: In (a), the first preference is the child  
32 is to be cared for by the child's family. In (b), the  
33 second preference is the child to be cared for under the  
34 guardianship of a person who is a member of the child's  
35 family. How should I understand the difference between  
36 "child's family" in (a) and "child's family" in (b)?

37 A. So, Your Honour, you may have a situation where  
38 there's been a short-term custody order made and during  
39 that custody order the child is placed with family, say a  
40 maternal grandmother, and at the end of that two-year  
41 custody order there may no longer be a need for a further  
42 order. It might be that at that point in time the child  
43 just remains with their grandmother without a need for an  
44 ongoing order, in effect we have a situation where through  
45 an agreement, or it could be a parenting plan that's put in  
46 place or it might be that we can achieve permanency without  
47 even an order.

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COMMISSIONER: Well, I still don't understand the difference on your construction between what is meant by a "child's family" in (a) and a "child's family" in (b). I understand that in (b) it means "other than the parent of the child" and it allows for "another suitable person", who may be outside the child's family?

A. That's so, and that's the two options in terms of long-term guardianship orders granting guardianship to a family member or another suitable person.

COMMISSIONER: If (a) should be read differently to (b) in terms of the meaning of "child's family", isn't there some sense in reading (a) as a reference to the child's natural parents --

A. Yes, so, Your Honour, I should --

COMMISSIONER: -- because guardianship has not left - the guardianship rights and duties remain with the child's family, have not been removed, but in (b) if a long-term guardianship order is made then that right is shifted to some member of the child's family or another suitable person. So shouldn't one read (a) as a reference to reunification with the actual family?

A. Yes, yes, and I apologise, Your Honour, yeah, included within (a) would be a child cared for by a parent.

COMMISSIONER: Pardon me?

A. Included within (a) is a parent as well of the child.

COMMISSIONER: Right.

A. It reflects that it will include parents, biological parents, and then also family.

COMMISSIONER: And so just coming to (b) --

A. Yes.

COMMISSIONER: -- when it comes to making an application in accordance with the second priority prescribed in the Act, assuming that there is no member of the child's family who is available, if the long-term guardianship order is to be made in favour of another suitable person, by reason of I think section 61 that you've referred me to, you can only make that application if another suitable person is nominated by the Chief Executive?

A. Yes, Commissioner.

1 COMMISSIONER: And yet the Act provides this  
2 non-discretionary, I would suggest, order of priority as to  
3 the orders to be sought when it comes to the question of  
4 long-term guardianship of the child. But you are dependent  
5 upon the identification of a suitable person for the  
6 purposes of making this application?

7 A. Yes.

8  
9 COMMISSIONER: That's correct. And what about if a member  
10 of the family is identified by you or - I mean, if the  
11 person concerned is a member of the child's family you're  
12 not subject to any constraint in terms of the nomination by  
13 the Chief Executive?

14 A. No, Commissioner, other than needing to make sure  
15 there is evidence before the court in respect of how that  
16 person meets the suitability assessment.

17  
18 COMMISSIONER: Yes. If you are to follow the order of  
19 priority set out in subsection (4), when making an  
20 application to the court for long-term guardianship I take  
21 it you need to put before the court material in turn  
22 provided to you by the department as to the efforts  
23 undertaken to ascertain whether there is a member of the  
24 child's family or another suitable person --

25 A. Yes, Commissioner.

26  
27 COMMISSIONER: -- available prior to making an application  
28 for long-term guardianship in favour of the Chief  
29 Executive, which is priority number 4?

30 A. Yes, Commissioner.

31  
32 COMMISSIONER: So in practice how does that - how are you  
33 satisfied that the application you're making for a  
34 long-term guardianship order is consistent with the order  
35 of priority set out in section (4)?

36 A. Commissioner, we would be looking to understand and  
37 try to evidence what work the Department of Child Safety  
38 has undertaken to identify anybody that would meet the  
39 definition of "family" or - as we understand it, or what  
40 consideration there has been of - if the child is in a  
41 family-based placement with a foster carer, what  
42 consideration they have had about that person's suitability  
43 to be granted guardianship and whether or not they are  
44 considering nominating.

45  
46 COMMISSIONER: So if I were to look at affidavits in  
47 support of applications for long-term guardianship to the

1 Chief Executive would I expect to find detailed  
2 explanations in those affidavits as to what has occurred in  
3 relation to the seeking out and investigation of the  
4 availability of either a member of the child's family or  
5 another suitable person as provided in subsection (b)?

6 A. Yes, Your Honour. The affidavit should outline the  
7 steps that Child Safety's undertaken to try to identify  
8 suitable family members or what their assessment is of the  
9 child's current carer if they aren't a family member.

10  
11 COMMISSIONER: And is that a subject about which your  
12 office requires detailed explanation from the department?

13 A. We would be making enquiries as to what efforts have  
14 been undertaken and seeking any case notes they can provide  
15 us or any suitability assessments they've undertaken of  
16 people they've identified.

17  
18 COMMISSIONER: Is it within the usual course of your  
19 practice to yourself, that is your office to investigate -  
20 independently investigate whether this scheme, this scheme  
21 of priorities, has been satisfied?

22 A. Commissioner, there are matters where the type of  
23 investigation or consideration you're talking about will  
24 happen within proceedings. Now, there are matters - as to  
25 the number, I could not say, but there are matters where we  
26 will make an application for long-term guardianship to the  
27 Chief Executive because at that point in time there has not  
28 yet been a completed assessment undertaken of the child's  
29 carer or another family member, or whether they will still  
30 be the child's carer, in terms of their suitability, and  
31 that will be in situations where we have the existing order  
32 ending.

33  
34 COMMISSIONER: So you've got an existing temporary or  
35 short-term custody order?

36 A. Could be a short-term custody order or it may be a  
37 short-term guardianship order. These matters are received  
38 by my office at times on the day that the order's ending,  
39 and we're seeking to, as best we can, get across the  
40 material, establish when it is or if a suitability  
41 assessment's been undertaken, and what the timeframes are.  
42 So there would be a small number of applications where the  
43 application will be for long-term guardianship to the Chief  
44 Executive.

45  
46 COMMISSIONER: So would you say that in those  
47 circumstances where the investigation as to the

1 availability of a person falling within subsection (b) is  
2 made it's made on some sort of provisional basis, is it?  
3 A. Yes. So there are matters that I'm aware of,  
4 Your Honour, where the assessment will be long-term  
5 guardianship to other, so other suitable person, yet the  
6 formal process within the Department of Child Safety has  
7 not occurred in terms of the person in law is not yet  
8 nominated, and so that will be sitting with the manager of  
9 the service centre, and so we are still constrained until  
10 we can evidence that the person has been nominated through  
11 the Chief Executive's processes.  
12

13 COMMISSIONER: What are the - I think you have said  
14 somewhere in your material but could you remind me what  
15 percentage of guardian - long-term guardianship orders that  
16 are sought are made in favour of the Chief Executive  
17 compared to a member of the child's family or another  
18 suitable person as in (b)? I think you did provide some  
19 figures and I had in mind it was about 80 per cent, but  
20 please correct me.

21 A. Yes, if you bear with me, Commissioner --  
22

23 COMMISSIONER: Yes, of course.

24 A. -- I'll find the relevant page. Now, if I refer you,  
25 Commissioner, to page 52 of my statement, on this page  
26 appears a table which sets out the initial assessment of  
27 Child Safety and applications made by myself. Now, what  
28 this table shows is that out of the total of all  
29 applications made 26.2 per cent of them were seeking orders  
30 granting long-term guardianship to the Chief Executive.  
31

32 COMMISSIONER: Sorry, how many?

33 A. It was out of the total number of applications made  
34 26.2 per cent. But, Commissioner, your question really, as  
35 I understand it, is what percentage of the long-term  
36 applications that have been made are seeking guardianship  
37 to the Chief Executive, and I may have in my narrative  
38 referred to an exact percentage, I just can't locate it.  
39 But if you're suggesting to me it's somewhere around  
40 80 per cent --  
41

42 COMMISSIONER: I don't want to mislead you, Director.  
43 I thought I'd seen a figure to that effect, but I assume  
44 you do keep data that would reveal the percentage in  
45 relation to long-term guardianship orders that are  
46 sought --

47 A. Yes, Commissioner.

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COMMISSIONER: -- those relating to the Chief Executive as the long-term guardian compared to the persons described in subsection (4)(b) that I've been referring you to and --  
A. I'm just undertaking a quick calculation here, Commissioner.

COMMISSIONER: You don't have to do it on the spot.

MR HASTIE: I tendered two documents, I think. One was from the Director's annual report.

COMMISSIONER: Yes. Thank you, Mr Hastie.

MR HASTIE: I don't think it had percentages in it. I think it just had numbers in it, but I could be mistaken about that. But I recall, Commissioner, you did a rough calculation I think when I did it --

COMMISSIONER: I have no confidence in my own arithmetic, Mr Hastie.

MR HASTIE: I also tendered a document from my client, and there was another one yesterday which went over the last five years or so. But again I don't think there were percentages in that.

COMMISSIONER: If you have the document that you have in mind handy it might help. Or we can just move on and come back to this issue when the Director's had an opportunity to have a look at it.

MR HASTIE: I can probably give the witness immediately his annual report, which --

WITNESS: Commissioner, it's going to be --

COMMISSIONER: Pardon me?

A. On my quick calculations in terms of the long-term orders I've sought on application, on a quick calculation, 82 per cent of those applications have been for guardianship to the Chief Executive.

COMMISSIONER: Yes.

MR HASTIE: Actually, I'm wrong. There was a percentage in the table that I tendered, because it was on page --

1  
2 COMMISSIONER: What was the exhibit, Mr Hastie, do you  
3 recall?  
4  
5 MR HASTIE: I can't.  
6  
7 COMMISSIONER: Doesn't matter, we can come back to it.  
8 What was the percentage?  
9  
10 MR HASTIE: The long-term guardianship to the Chief  
11 Executive in 23/24 was 28 per cent and --  
12  
13 COMMISSIONER: Twenty-eight per cent?  
14  
15 MR HASTIE: Sorry, of - sorry, that's a percentage of the  
16 whole orders, I'm sorry, Commissioner.  
17  
18 COMMISSIONER: Yes.  
19  
20 MR HASTIE: Not of the various long-term guardianships.  
21 So I'll need to --  
22  
23 COMMISSIONER: That's fine. If you can extract it from  
24 what you've already produced, that would be useful. But  
25 the Director has just indicated that the percentage for  
26 long-term guardianship orders that are referable to the  
27 Chief Executive is 82 per cent.  
28  
29 MR HASTIE: Yes, I think it was something like that.  
30  
31 WITNESS: So that was applications made, and there might  
32 be a slight then variation of the overall percentage of  
33 orders then made, Commissioner. But on the break I can  
34 undertake those calculations.  
35  
36 COMMISSIONER: Well, that would be helpful, thank you. So  
37 the point is, to come back to section 51BA, I had some  
38 evidence that as a matter of practice the department skips  
39 over (b) and (c) and as a general matter of practice moves  
40 to (d), long-term guardianship Chief Executive. Now, that  
41 evidence was contested by other departmental witnesses who  
42 said, in particular the Chief Practitioner, that there  
43 wasn't any policy to sort of move directly to seeking a  
44 long-term guardianship order in favour of the Chief  
45 Executive. So the question in my mind is what is in fact  
46 the case, and one can of course draw inferences from the  
47 data, and the data would suggest that overwhelmingly, to a

1 degree of 82 per cent, long-term guardianship orders are  
2 sought in favour of the Chief Executive, and that might  
3 suggest that the order of priority in subsection (4) is not  
4 being dutifully followed by someone in making decisions in  
5 relation to this matter concerning who or to be propounded  
6 as the long-term guardian. So I'm interested in exploring  
7 why the proportion of guardianship applications in favour  
8 of the Chief Executive is so high?

9 A. Yes, Commissioner.

10  
11 COMMISSIONER: So if you can offer any explanations for  
12 that I'll be grateful.

13 A. In response, Commissioner, I would first clearly  
14 accept that, yeah, on my quick calculations, 82 per cent of  
15 applications seeking long-term orders are to the Chief  
16 Executive. When considering these priorities, like, I've  
17 given evidence that Child Safety, part of their processes  
18 do consider and are to active efforts to identify --

19  
20 COMMISSIONER: Sorry, Director, would you mind just  
21 speaking up a bit?

22 A. Yes. Sorry, Commissioner.

23  
24 COMMISSIONER: That's all right.

25 A. Yes. Child Safety will undertake efforts to identify  
26 suitable family or to consider whether the current carer is  
27 suitable. But it will be matter dependent. It is -  
28 because of the nature of the orders being sought when it's  
29 long-term, those applications are more likely to be  
30 contested because of the long-term nature of them. One of  
31 the issues may be that at that point in time the carers for  
32 various reasons may not want to be considered for  
33 guardianship at that point. They may not want to be part  
34 of the litigation.

35  
36 What we then see is, as part of that review mechanism we've  
37 talked about, that once a long-term guardianship order of  
38 the Chief Executive is made Child Safety is again as part  
39 of their review to revisit these priorities to identify at  
40 that future time whether then there is another option to  
41 achieve permanency in terms of subsection (b), we are  
42 seeing more of those matters referred back to us, where at  
43 that point it's a - my words - more truncated application  
44 to then vary guardianship from the Chief Executive to  
45 another person.

46  
47 COMMISSIONER: That requires nomination by the Chief

1 Executive from another person, doesn't it?  
2 A. It does. It does, Commissioner. But those matters  
3 where we are seeking long-term guardianship to another,  
4 either family or other person, they proceed on average much  
5 quicker through the court process, less court events, and  
6 they're made in far fewer days on average.  
7  
8 COMMISSIONER: I understand there's an opportunity to  
9 review --  
10 A. Yes.  
11  
12 COMMISSIONER: -- within - is it no later than two years  
13 from the making of the original order, or what's the  
14 timeframe?  
15 A. Your Honour, it is set out within the case planning  
16 provisions.  
17  
18 COMMISSIONER: All right. I just put it to you.  
19 A. Yeah.  
20  
21 COMMISSIONER: I'm asking you questions to help me  
22 navigate this Act, but --  
23 A. Your Honour, I accept that. I think the review must  
24 be undertaken within I would - I think it was two years of  
25 the order being made.  
26  
27 COMMISSIONER: Let's put that aside for the minute.  
28 A. Yes.  
29  
30 COMMISSIONER: At the time that the application is  
31 originally made for a long-term guardianship order, then  
32 that application has to be made if the child is not  
33 returned to the family or reunified with the family within  
34 two years; isn't that the timeframe that's required?  
35 A. Yes, as a starting point. There are - there is an  
36 ability for the court to make a further short-term order on  
37 the basis that the court were able to make a finding that  
38 reunification is reasonably achievable in a further  
39 extended short-term order.  
40  
41 COMMISSIONER: Sure.  
42 A. But setting aside those matters, yes, after the  
43 two-year order we then move into seeking to achieve  
44 permanency for a child.  
45  
46 COMMISSIONER: So, just focusing on the application for  
47 long-term guardianship, are you not required to be

1 satisfied and in turn to satisfy the court on material that  
2 the permanency principle as set out in section 5BA and the  
3 order of priority prescribed in subsection (4) has been  
4 followed?

5 A. Yes, Your Honour, we are required to be satisfied. In  
6 reading these principles with the substantive section 59 we  
7 are required to be satisfied and in turn satisfy the court  
8 that there is nobody else. So if I also --

9

10 COMMISSIONER: And is that a matter that your office  
11 interrogates with the department?

12 A. Yes, Commissioner.

13

14 COMMISSIONER: What I'm really asking is do you take an  
15 independent look at the material that is provided by the  
16 department to ascertain whether all reasonable steps have  
17 been undertaken by the department to follow the order of  
18 priority in subsection (4) and to require the department to  
19 satisfy you that that's the case?

20 A. Yes, Commissioner.

21

22 COMMISSIONER: And then with that in mind can you - yes,  
23 in addition, in order for there to be another suitable  
24 person as a prospective long-term guardian you're dependent  
25 upon that person being nominated by the department?

26 A. Yes, Commissioner, if they're not part of --

27

28 COMMISSIONER: If they're not - how can you be - how do  
29 you go about reaching a state of satisfaction about this  
30 matter?

31 A. Now, Your Honour, there may be in matters reasons put  
32 forward as to why a child's carer may not be suitable at  
33 that point in time. Now, that is something that at times  
34 can be addressed through modifications made to the  
35 long-term guardianship order. So --

36

37 COMMISSIONER: Subsequently, you mean?

38 A. No, no, Your Honour. If I - sorry, Commissioner. If  
39 I refer you to - if I refer you to section 79A and  
40 section 80 of the Child Protection Act, these are  
41 provisions that set out the obligations of long-term  
42 guardians and also permanent care orders in respect of  
43 section 79A, and then 80 deals with obligations of family  
44 members and other persons to the child's parents under 80.

45

46 COMMISSIONER: Yes. So that --

47 A. Now, in each of these provisions there is an ability

1 for the court to make a modification to the person's  
2 obligations when making a long-term guardianship order.

3  
4 COMMISSIONER: So are you saying that the obligations in  
5 section 79 and 80 are perceived at least at times to be  
6 onerous and the person who might have been nominated seeks  
7 a variation to those obligations?

8 A. Yes, Commissioner. So it might be that we're able to  
9 proceed with a long-term guardianship to a family member  
10 with a modification as to around how contact is going to be  
11 arranged between the child and the child's parents under  
12 the long-term order. And so at times we'll seek to modify  
13 it and include within the order that the Department of  
14 Child Safety will give ongoing assistance in aspect. If  
15 there is a concern by a person as to whether or how they're  
16 going to meet their obligation under the order to provide  
17 ongoing contact, and if that's the barrier which is causing  
18 the person to have some reluctance on whether they want to  
19 seek guardianship or be granted guardianship, there is an  
20 ability for the court where appropriate to actually modify  
21 those obligations.

22  
23 COMMISSIONER: What, to impose affirmative - further  
24 affirmative obligations on the department?

25 A. Yes, and it might be, Your Honour, where we have a  
26 parent who at times presents with mental health concerns,  
27 and in that instance we would through the order give the  
28 guardian the ability to seek via Child Safety current  
29 information in terms of what their assessment is of the  
30 parent and what contact should look like. So we are now  
31 starting to make more use of these provisions to try and  
32 manage the concerns that another might have in terms of  
33 what obligations they have and how they're going to meet  
34 them under the order.

35  
36 COMMISSIONER: And do those modifications require the  
37 agreement of the department? I mean, if you're imposing an  
38 affirmative obligation on the department to do something,  
39 then can you seek that order without the agreement of  
40 the court? I mean, there must be some limits to the  
41 court's power to modify the obligations in a way that  
42 imposes additional obligations on the department?

43 A. Yes, Commissioner. That would be as a starting point  
44 a consultation that occurs between my office and the  
45 Department of Child Safety as to what the modification  
46 could look like. It will depend upon whether we're talking  
47 about a family member or somebody else that has been

1 nominated and whether there are any issues connected to  
2 that nomination that need to be managed. But these  
3 matters, as I understand, are proceeding with the support  
4 of the Department of Child Safety.

5  
6 COMMISSIONER: Yes.

7 A. Now, in saying that, they are - we need to make clear  
8 on the face of the order as to what the obligation of  
9 the Department of Child Safety is and what legal basis they  
10 are continuing to be engaged and who it is that's actually  
11 making the decision.

12  
13 COMMISSIONER: I would be assisted if you were able to  
14 produce to me some examples of the sort of modifications  
15 that have been sought and obtained --

16 A. Yes.

17  
18 COMMISSIONER: -- in relation to these obligations and -  
19 yes, that would be illuminating if you would in due course  
20 provide --

21 A. Yes, I'll undertake to locate some.

22  
23 COMMISSIONER: I'd be grateful. Thank you. But what  
24 you've moved to is a situation where an order to some other  
25 person, family member or other, as in subsection (b), is  
26 sought, and what I'm interested in understanding from your  
27 perspective is why 82 per cent of long-term guardianship  
28 orders are being sought not as per (b) but as per (d)?

29 A. And the other factor here, Commissioner, but I don't  
30 have clarity around numbers, but there will be a group of  
31 children who at this point in time when we're considering  
32 these applications that are placed in residential care. So  
33 we don't have at that point in time a family-based carer  
34 who could be considered as to whether or not they're able  
35 to be nominated, and so --

36  
37 COMMISSIONER: So just to pause there if you don't mind --

38 A. Yes.

39  
40 COMMISSIONER: -- I think it follows from what you've said  
41 that it is more difficult - and we can explore the reasons  
42 why - to find a long-term guardian other than the Chief  
43 Executive in the case of children who are placed in  
44 non-family based residential care?

45 A. Yes, Commissioner.

46  
47 COMMISSIONER: And I infer that's because the relationship

1 that is formed with the potential of being a long-term  
2 relationship in the family-based context is more likely to  
3 lead to the preparedness of the carer in question to  
4 undertake a long-term guardianship role; is that  
5 essentially it?

6 A. Yes, Commissioner.

7  
8 COMMISSIONER: Yes.

9 A. And what I would point to, that when looking at the  
10 average age - and I don't know if I've produced this in my  
11 statement, Commissioner, but I set it out in each of my  
12 annual reports. I provide data of the numbers of children  
13 that each age from zero through to 17, and I also produce  
14 an average age, and that seems to be in a band consistently  
15 over the years of between nine and 10 years of age, is the  
16 average of children who are the subject of long-term  
17 orders.

18  
19 COMMISSIONER: To others?

20 A. Or long-term orders.

21  
22 COMMISSIONER: To whom? To the Chief --

23 A. The granting of a long-term guardianship order, the  
24 average age of children, all of those types of orders, is  
25 in between over the years a band of nine up to 10 years of  
26 age.

27  
28 COMMISSIONER: What about the older children? What  
29 happens to them? Children who are over - not in the eight-  
30 to nine-year range?

31 A. Sorry, Commissioner, I'll try and explain this.  
32 That's on average. The age of children who are made the  
33 subject of a long-term order are between nine and 10 on  
34 average. But of course there's going to be very young  
35 children and there's going to be children who are 17 at the  
36 point the long-term guardianship order is made. But these  
37 are, talking averages, children who have already been in  
38 the out-of-home care system, subject to earlier short-term  
39 orders and may not necessarily at that point in time be in  
40 family-based placements.

41  
42 COMMISSIONER: And I'm just trying to understand what  
43 you're saying about that data. Is it the case that it's  
44 more likely that a long-term guardianship order would be  
45 made in favour of the child in respect of children who are  
46 in residential care as opposed to family-based care?

47 A. To the Chief Executive, if that is what your question

1 is?

2

3 COMMISSIONER: Yes. That's what I meant to ask --

4 A. Yes.

5

6 COMMISSIONER: -- if I didn't include it in it. Yes,  
7 that's right.

8 A. Yes.

9

10 COMMISSIONER: And you say on average that the children  
11 subject to long-term guardianship orders, irrespective of  
12 to whom the order is made in favour, are children between  
13 nine and 10 years of age?

14 A. I do, but, Your Honour, with time I will be able to  
15 produce data by different type of order, ages of children,  
16 under each type of order and then the overall average as  
17 well for each type of long-term guardianship order.

18

19 COMMISSIONER: What should I draw from that data about the  
20 age of the children subject to - the average age of  
21 children subject to long-term guardianship orders?

22 A. That we're talking about a cohort of children who are  
23 not young in terms of they're not between the age - when  
24 you look at the data, Commissioner, you see a group of  
25 children - a large number of children between the ages of  
26 zero and three entering the child protection system, the  
27 tertiary end where orders are made. The data suggests that  
28 these children then go on to short-term orders. Now, at  
29 different age levels there's different numbers of children,  
30 but short-term out-of-home orders are made for up to two  
31 years. Now, anywhere up to between - there is for them a  
32 percentage - and I won't give a particular percentage, it's  
33 unexact, but there is a percentage of children whose orders  
34 then are continued, further short-term orders. But then  
35 we're really - when we move into the permanency aspect of  
36 the Act the children have already been out of home for a  
37 number of years.

38

39 COMMISSIONER: And the longer they're out of home the more  
40 difficult it is to reunify them; is that generally speaking  
41 the case?

42 A. Yes, that's what I would suggest the data provides.

43

44 COMMISSIONER: Yes.

45 A. Now, the thing that I would like to understand, and as  
46 far as I'm aware there is no data, but I think there would  
47 be great value in us understanding what proportion of

1 children that are made subject to the very first order that  
2 occurs in time, the temporary assessment orders, what  
3 percentage of those children in time proceed to long-term  
4 guardianship orders and as a subset to the Chief Executive.  
5

6 COMMISSIONER: You don't have that data because you only  
7 track data from the point in time that you become involved,  
8 which is after the emergent orders have been made?

9 A. Yes, Commissioner, and it feeds back to the point  
10 I was making yesterday that there's not currently clarity  
11 around how many children we get home to either parents or  
12 family in the broader sense as opposed to how many children  
13 proceed through to long-term guardianship orders primarily  
14 to the Chief Executive.  
15

16 COMMISSIONER: And who remain in the care of somebody  
17 other than their family, because the long-term guardianship  
18 order in favour of the Chief Executive doesn't preclude the  
19 possibility of the child being reunified with a family  
20 member as a matter of custodial placement?

21 A. Yes, if I understand what you're suggesting,  
22 Commissioner, at any point if the child is in the  
23 guardianship of the Chief Executive they could then place  
24 the child with a family member --  
25

26 COMMISSIONER: Yes.

27 A. -- and through that placement the family member would  
28 have a degree of responsibility in terms of the day-to-day  
29 care of the child.  
30

31 COMMISSIONER: Well, perhaps I'm seeing this too  
32 simplistically, but the Chief Executive doesn't have  
33 custody in a practical day-to-day sense. What the Chief  
34 Executive has is guardianship and the responsibility to  
35 find a custodial placement for the child, and that might  
36 be, that is the custodial placement might be, in a  
37 family-based care arrangement, a foster care, kinship care,  
38 or non-family based residential care. But the Chief  
39 Executive represents the State, and the State doesn't have  
40 day-to-day custodial - sort of day-to-day custody of the  
41 child in a practical sense; that's the distinction I'm  
42 making?

43 A. Yes.  
44

45 COMMISSIONER: So you could have a long-term guardianship  
46 order made in favour of the Chief Executive, so the State  
47 remains in the legal sense the parent of the child, but the

1 day-to-day care of the child rests with whoever it is is  
2 the day-to-day carer, and the child might be able to be  
3 reunified with the child's family or kin notwithstanding  
4 the guardianship of the child following a guardianship  
5 order being made stays with the State; see the distinction?

6 A. Yes, I do. Yes.

7

8 COMMISSIONER: So I think that when there's reference to  
9 reunification it includes the return of the child in terms  
10 of custody, day-to-day custody, to the child's natural  
11 parents or the child's family in the broader sense or a  
12 kinship group member of the family. So that I think is  
13 understood or referred to as reunification of the child,  
14 even though the custody - sorry, the guardianship to  
15 the State remains on foot?

16 A. Yes, I understand what --

17

18 COMMISSIONER: Well, that's what I've understood from the  
19 evidence, but I might be misunderstanding it.

20 A. Yes, Commissioner, the only place, as I understand,  
21 there's any reference in the Act to the concept of  
22 reunification, it appears as part of the continuous care  
23 period within section 62 of the Child Protection Act --

24

25 COMMISSIONER: Well, that's I think why - there's a  
26 looseness in the use of the expression "reunification".  
27 It's used, as I've understood the evidence, to mean a  
28 number of different things or a number of different  
29 circumstances of restoring the child to the child's family  
30 or extended family or kin?

31 A. But if what you're suggesting, Commissioner, if we  
32 construct it this way, that - and I use the word  
33 "placement" --

34

35 COMMISSIONER: Yes. "Placement" is just as good as  
36 "custody", I think.

37 A. Yes. And so it's through that decision-making that in  
38 effect there is in a broad sense reunification of the child  
39 with family, where they are placed with somebody as in  
40 their family, or if it's a family-based placement, so a  
41 general foster carer, in effect, yes, that person then has  
42 responsibilities for the day-to-day care of the child  
43 whilst guardianship is retained by the State.

44

45 COMMISSIONER: So the State remains responsible for the  
46 child, but the day-to-day care --

47 A. Yes.

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COMMISSIONER: -- of the child is, as it must always be - where the State is even a temporary guardian or takes any action to remove the child from the child's family, the State doesn't have day-to-day custody of the child in a practical sense because the child's not placed with the Chief Executive, wherever she may reside?

A. That's right.

COMMISSIONER: So - that's all right. And, look, the - one of the things that you said yesterday is that you had no visibility about reunification. Given the range of things that might be covered by the idea of reunification, it would be useful to know, would it not, how successful - well, firstly, the incidence of reunification, however defined, and whether the reunification has been successful by some criteria; and I'll ask Mr Hastie whether data in relation to reunification is available from the department. It would be I think --

MR HASTIE: I was thinking the same thing, Commissioner. We'll make enquiries.

COMMISSIONER: Thank you, Mr Hastie. So --  
A. But, Commissioner, we embarked on this part of the evidence in response to your initial questioning around what can be done or what is currently occurring in terms of casework and how it underpins efforts that have been made to achieve reunification, if I understand what your original question was.

COMMISSIONER: We did that, that was a little while ago, and we've segued, and I think in a good way, frankly --

A. But all of this is relevant to that point, Commissioner.

COMMISSIONER: Yes. Yes. Indeed, I agree. And so the criticism - to come back to the proposition that I started with - is that somehow there is a tension between the legal process which causes impediments to the efforts that could be enhanced by the department in relation to reunification in that broad sense but are deflected by reason of the court process, and that's a broad way of putting it, but --

A. Yes.

COMMISSIONER: -- I don't understand that there is anything mutually exclusive in a concurrent process

1 involving the court's processes in relation to the making  
2 of child protection orders on the one hand and the efforts  
3 of the department on the other to reunify the child.  
4 I don't see why those two processes should fight against  
5 each other, and my question was directed to understanding,  
6 one, whether you agree that there's a conflict or a tension  
7 between the two processes, and, two, insofar as there may  
8 be, what can be done to improve the court process to  
9 ameliorate any such tension. So if we could perhaps return  
10 to that question, if you want to say anything further about  
11 that we can leave this topic?

12 A. No, I would very much like to address that,  
13 Commissioner.

14

15 COMMISSIONER: Please.

16 A. So yesterday, Commissioner, we were talking about the  
17 types of matters and the percentages of matters that  
18 I receive subject to a referral. This is important for me  
19 to take you through --

20

21 COMMISSIONER: Yes.

22

23 MS SWEET: -- as to then how Child Safety's work within  
24 the proceedings occurs, and I've just got to find the  
25 relevant part of my statement, Commissioner.

26

27 COMMISSIONER: Sure. Take your time.

28 A. Commissioner, if I refer you to page 35 of my  
29 statement, and here there is a table - table number 7 -  
30 where I set out at a broad level the types of intervention  
31 that's in place at the point that I receive referred  
32 matters.

33

34 COMMISSIONER: Yes.

35 A. Now, within this table you have what's referred to as  
36 the emergent orders or emergency orders. They appear as a  
37 temporary assessment order, and you'll see that in the year  
38 24/25 I only received five of those. Then there's court  
39 assessment orders at 1,253 or then there's the temporary  
40 custody orders at 1,241.

41

42 COMMISSIONER: Are they all custodial orders?

43 A. In which --

44

45 COMMISSIONER: Well, say, the temporary assessment order?

46 A. No, Your Honour, that may --

47

1 COMMISSIONER: It might be a custodial --  
2 A. That's so. They may not provide for custody, and  
3 likewise with the court assessment order. But, when you  
4 think about the system underpinning matters that I receive  
5 that are on emergent order, there's been a process occur in  
6 fairly quick time in respect of those matters in that each  
7 one of those there would have been a notification received  
8 or more than one. That notification would have been  
9 screened in - well, sorry, the concerns were received,  
10 Child Safety assessed those matters as being a  
11 notification. It would have been allocated to a child  
12 safety officer, and they would have undertaken an  
13 investigation as part of their response.

14  
15 COMMISSIONER: Yes.  
16 A. Now, the system --

17  
18 COMMISSIONER: There's an intake and assessment division  
19 within the department, an intake and assessment division  
20 within the Department of Child Safety?

21 A. Yes, yeah, there is a - as I understand it, within  
22 each region there is an intake process --

23  
24 COMMISSIONER: Yes.  
25 A. -- where there is an assessment made based on the  
26 information received. They have the ability to undertake  
27 some checks in terms of gathering information from other  
28 key agencies about the child. But they will make an  
29 assessment as to whether we have a notification. If  
30 something is classified as a notification we then have a  
31 response now under the current settings. But in effect  
32 it's still an investigation is undertaken.

33  
34 Now, under Child Safety's previous case management system,  
35 which you'll hear referred to as the integrated client -  
36 case management system, ICMS - and I might have the  
37 acronym - I know the acronym but I might not have the exact  
38 words right, Commissioner. But as part of the ICMS system  
39 or as part of the now Unify system there is a workflow  
40 which the allocated child safety officer will use as part  
41 of their investigation. Now, there will be - and no doubt,  
42 Commissioner, you've looked at this. There are various  
43 tools that Child Safety may rely upon as part of their  
44 assessment process.

45  
46 COMMISSIONER: Well, I've heard quite a lot of evidence  
47 about all of this, including the abandonment of certain

1 standard decision-making tools that were formerly in  
2 operation and are no longer, and so I have had quite a lot  
3 of evidence about the anterior investigative process  
4 undertaken by the department, including all of the practice  
5 manuals and criteria and so on and so forth pertaining to  
6 the department's assessment of risk, basically either to  
7 the assessment of the question of whether the child is in  
8 need of protection or whether the child - or whether the  
9 child is at risk but the investigation cannot be completed  
10 before some temporary assessment order is sought of some  
11 kind, or court assessment order. So I'm aware of all of  
12 that sort of anterior process.

13 A. And so as part of that, Commissioner, there are steps  
14 in which the child safety officer will document any  
15 interviews they've undertaken with people, they will set  
16 out their interview notes, they will set out what other  
17 information they may have gathered through their  
18 information-gathering powers, and then as part of this  
19 workflow they will set out their assessment. So it should  
20 set out the various facts which they've attempted to  
21 identify through their investigation, and then they will  
22 set out their assessment. That's a developed process in  
23 terms of matters that come through that notification. I'm  
24 going to use the word "process" again, but it is more  
25 workflow --

26  
27 COMMISSIONER: Can you just speak up again, I'm sorry?

28 A. Yes, sorry, Commissioner. It is - for the matters  
29 that come through this process in response to a  
30 notification there is a clearly identified workflow in  
31 which the child safety officer undertakes their  
32 investigation, sets out what they've done and then sets out  
33 their assessment, and it's that assessment, the assessment  
34 outcome, which forms one of the key pieces of information  
35 or evidence that then is sent to my office as part of  
36 the referral.

37  
38 And I take you all through this, Commissioner, because  
39 there, in my view, are then some issues in respect of  
40 the other types of intervention that's in place when we  
41 receive matters, and this goes back to the question around  
42 how do Child Safety then in an ongoing way undertake work  
43 with the child, the parents and the family, and how do they  
44 also keep track of that work and what their current  
45 assessment is through that process.

46  
47 COMMISSIONER: Just hold that thought.

1 A. Yes.

2

3 COMMISSIONER: In relation to the developed process or  
4 workflow process undertaken by the child safety officer in  
5 connection with the investigation of risk of harm to the  
6 child, that you say forms part of the material that you are  
7 referred - well, that is referred to you for your  
8 assessment at the child protection order stage where your  
9 jurisdiction is invoked; correct?

10 A. Yes.

11

12 COMMISSIONER: This is a separate issue, and perhaps you  
13 wish to come back to this, but what is your assessment of  
14 the quality of that output in terms of its ready  
15 suitability for you to rely on for the purposes of making  
16 applications for child protection orders and the material  
17 has to explain the basis for the emergent order that was  
18 made and why some further order, perhaps a short-term  
19 custody order or whatever it might be you consider  
20 appropriate, should be made? Now, if you want to come back  
21 to that question later, that's fine --

22 A. Yes.

23

24 COMMISSIONER: -- because you were developing some reasons  
25 associated with the other question that we've been  
26 discussing, namely what can be done better in terms of  
27 linking the court process to the work of child protection  
28 such that one complements the other rather than fights  
29 against each other in the way it's been suggested to me is  
30 the case.

31 A. Yes, and it's all interconnected, Commissioner.  
32 I will come back to that. I will cover that off as I take  
33 you through.

34

35 COMMISSIONER: Yes.

36 A. Connected with - if I may approach it this way.  
37 Connected with the assessment that we receive, and I'm  
38 talking about the matters that are proceeded through the  
39 emergent order path, there is still a requirement for the  
40 child safety officer, to give context to what's happened,  
41 to set out additional details within an affidavit, and this  
42 sits at the heart, Commissioner, of what I see to be one of  
43 the challenges we currently have. I'm going to address you  
44 on this in time as to one of the improvements we can make,  
45 but my view is we need to change our whole approach to  
46 affidavits, and I've held this view since very early in  
47 commencing this role, and there's currently ongoing work in

1 respect to try and change how we approach affidavits, and  
2 that is at the moment the child safety officer - and  
3 I think it's always been so - has viewed the work they need  
4 to do to set out their thoughts, to set out their evidence  
5 and to set our their assessment in the form of an  
6 affidavit - they view that as court work, where, if they  
7 had their own ongoing form/report in which they could set  
8 out their assessment and, as and when required or on a  
9 regular basis, review and update their assessment, that  
10 process would not necessarily be linked in their mind to  
11 court work. So --

12  
13 COMMISSIONER: It will be a record kept in the ordinary  
14 course of their business --

15 A. That's so.

16  
17 COMMISSIONER: -- in what they do. So are you saying that  
18 if that were to occur those reports would be more readily  
19 transmuted into some form of affidavit?

20 A. Yes, Your Honour. So my proposal - and, like I said,  
21 there's ongoing work that I'm undertaking with the Official  
22 Solicitor of Child Safety and also the Chief Practitioner's  
23 Office about, in my words, trying to reimagine how it is  
24 that the child safety officer might set out their  
25 assessment and how it is they might maintain their  
26 assessment through their casework with the family where  
27 that assessment, when needed, would form exhibit 1 to a  
28 very brief affidavit.

29  
30 COMMISSIONER: Yes. Just pausing on the question of  
31 affidavits, I've seen some pro forma affidavits, both for  
32 emergent orders and in support of child protection orders.  
33 They contain prompts in terms of what should be populated  
34 in the affidavit in particular sections to cover the  
35 matters that are required under the Act to be established.  
36 So one cause of the sort of complexity, I suppose, of the  
37 task or the arduousness of it is to demonstrate on  
38 affidavit the matters that are required to be proved.  
39 That's one aspect. And maybe that can be - the features of  
40 any such affidavit can be streamlined in some way, and I'd  
41 like to hear what you say about that.

42  
43 But the other thing that's become plain to me in hearing in  
44 detail the circumstances of a few cases is that the factual  
45 complexity of the cases is often surprisingly dense. One  
46 of the cases I've heard a good deal of evidence about  
47 concerned the removal of six children, one or perhaps two

1 at or near the birth of the child; but prior to certain  
2 removals there were earlier removals. And then there's a  
3 complex web of family relationships and changing intimate  
4 relationships between the mother concerned. And so you  
5 have this quite complex picture of the family  
6 circumstances, all of which are relevant to the assessment  
7 of the risk to the child or children.

8  
9 That needs to be distilled into some coherent affidavit so  
10 that, in the first instance, your office can make an  
11 assessment and then the court can understand what is  
12 involved in the context of the family concerned. So that's  
13 really challenging in terms of simplifying the process.  
14 But if you have some suggestions about how the process  
15 might be simplified I think there would be a strong  
16 interest in that on the part of anybody involved. But it's  
17 not a straightforward business, is it, in terms of the  
18 factual circumstances that pertain to the child in  
19 question?

20 A. No, no, Commissioner, it's not. However, at the  
21 moment the way that that's currently dealt with is through  
22 affidavits. But if we step back a bit and think about the  
23 role of the child safety officer they've got - firstly,  
24 they're obligated or tasked with responding to a  
25 notification and undertaking new investigation and setting  
26 out their assessment. If at the end of that they determine  
27 the child's in need of protection the Act then requires  
28 them to try and meet that need, and that can be through an  
29 agreement or through an order.

30  
31 COMMISSIONER: Yes.

32 A. The fact that if they - if the intervention is not  
33 through agreement, we are then in a court space under the  
34 current settings. And so suddenly we move to this sort of  
35 understanding, it seems, within Child Safety that their  
36 continued work and their continued documenting of that work  
37 with the family in terms of what they've done and what  
38 their current assessment is is viewed as court work rather  
39 than just part of their core role of, "I'm working with  
40 the family. I need to set out what I'm doing, why I'm  
41 doing it, and what I currently think in terms of my  
42 assessment."

43  
44 COMMISSIONER: That may be so. But you need to  
45 distinguish between the intake and assessment phase --

46 A. Yes.  
47

1 COMMISSIONER: -- where the child safety officers  
2 concerned are working on that one issue; that is, "Is the  
3 child in need of protection?" If the conclusion is yes, an  
4 emergent order of some kind is sought. Once the child is  
5 taken into the State's care then there's ongoing  
6 intervention and at that point, as I understand the way the  
7 department operates, the child safety officer concerned  
8 with the child will have a number of functions. That child  
9 safety officer will have a number of children that he or  
10 she is responsible for, ongoing relationships with, and  
11 including any child who is or remains the subject of active  
12 court proceedings.

13  
14 So it's at that point in the process that the child safety  
15 officer is, if you like, torn between fulfilling child  
16 safety officer functions outside participating in the court  
17 process - and there's a good deal of criticism by child  
18 safety officers that they're overwhelmed with the work they  
19 have to do in relation to the court processes - which is  
20 distracting and detracts from the other work that they  
21 could be doing.

22  
23 So a challenge is to work out how one might relieve the  
24 child safety officer of an expectation of doing everything,  
25 including all of the work associated with documenting  
26 necessary assessments and the like relevant to the ongoing  
27 court process. That's, as I understand it, how the child  
28 safety officer is sort of put in a vice between having to  
29 make difficult decisions about allocation of their time up  
30 against the strictures of the court process that impose  
31 timeframes on the doing of certain things, including the  
32 provision of affidavits. So that's the context, I think,  
33 that --

34 A. It is the context, Commissioner, and it's been a  
35 context that's always been present. I point to Child  
36 Safety produced to the Carmody Inquiry information about a  
37 workforce analysis they had undertaken in 2008 where at  
38 that point it showed that 47 per cent of a child safety  
39 officer's time was spent on court work. It's been a  
40 constant, constant message that's been received that much  
41 of the child safety officer's time is taken up with court  
42 work when their caseworking a matter that's before the  
43 court.

44  
45 COMMISSIONER: And one can therefore well understand why  
46 there might be a sort of reasonable degree of antipathy  
47 towards the court process as the child safety officer is

1 more strained by the many demands upon them to satisfy all  
2 sorts of functions. In any event, can we continue the  
3 conversation after lunch. We'll adjourn until 2 o'clock.  
4 Thank you.

5  
6 **LUNCHEON ADJOURNMENT**

[1.02 pm]

7  
8 COMMISSIONER: Director, before the adjournment we were  
9 talking about the burdens upon the CSOs in connection with  
10 court work. Can you tell me as you presently operate who  
11 does the primary drafting of the affidavits relevant to  
12 court applications?

13 A. The initial affidavit, the drafting of that is  
14 undertaken by a child safety officer.

15  
16 COMMISSIONER: Why shouldn't that be done by a lawyer on  
17 instructions based on the material provided to the lawyer  
18 by the child safety officer, and in that regard both in  
19 relation to emergent orders and in relation to the child  
20 protection orders that your office is responsible for? And  
21 I suggest to you that the role of drafting an affidavit is  
22 the sort of commonplace work of lawyers and, importantly,  
23 lawyers should understand the need to separate fact from  
24 conclusion and have some appreciation of the rules of  
25 evidence - whether they strictly apply or not, there's good  
26 reason for them - in terms of the ability of the court to  
27 understand what it is that's being put forward. And if the  
28 lawyers had the responsibility for drafting the affidavits  
29 then that has the potential to significantly reduce the  
30 burden on the child safety officers, does it not?

31 A. Yes, I agree, Commissioner.

32  
33 COMMISSIONER: Well, which part of my multiple  
34 propositions embedded in that long series of propositions  
35 do you agree with?

36 A. Initially, Commissioner, I agree there's no impediment  
37 or reason why the initial affidavit or --

38  
39 COMMISSIONER: I'm sorry, could you speak up; I'm sorry?

40 A. Sorry, Commissioner. There's no reason, there's no  
41 impediment why the initial affidavit and then any updating  
42 affidavits should not be or could not be drafted by a  
43 lawyer.

44  
45 COMMISSIONER: It's a resourcing issue, is it?

46 A. It would be - as I understand it within the Department  
47 of Child Safety, it is a resourcing issue. I understand

1 the OCFOS legal officers will draft the emergent order  
2 applications, but they do not draft the initial affidavit.

3  
4 COMMISSIONER: And when the matter comes within your  
5 jurisdiction the source of information continues to be the  
6 department and relevantly the child safety officer or team  
7 leader, whoever's involved in the ongoing intervention,  
8 which is what I think it is by the time the matter gets to  
9 you - even within your jurisdiction the primary drafting is  
10 done by the child safety officer, is it?

11 A. It will depend upon the service centre in which the  
12 child safety officer is based. Some child safety service  
13 centres have access to paralegals. Where there is a  
14 paralegal in place they work alongside the DCPL file lawyer  
15 to progress updating affidavits. In the absence of one of  
16 those paralegals, the updating affidavit would fall to the  
17 child safety officer. With the assistance of the DCPL  
18 lawyer they may provide short case plan - short updating  
19 affidavits; the purpose is to put a case plan before the  
20 court or some other documents. But, yeah, in the absence  
21 of a paralegal, it will fall to the child safety officer.

22  
23 COMMISSIONER: So even in the context of your jurisdiction  
24 the burden in terms of drafting the primary affidavit  
25 material falls upon the child safety officer as things  
26 presently stand?

27 A. Yes. I understand the initial affidavit that's used  
28 to send to me as part of a brief, I understand paralegals  
29 are not involved in that process. I might be mistaken  
30 there, but it's primarily the child safety officer that's  
31 drafting that document.

32  
33 COMMISSIONER: All right. But, once the matter has been  
34 referred to you and you or your office has made a  
35 determination as to the appropriate child safety order to  
36 seek, there might be a need to provide further material to  
37 the court. So leave aside the initial affidavit. Who  
38 prepares any further updating affidavits? Is that still  
39 with the CSO?

40 A. It's still with the CSO. The initial draft would - at  
41 times it commences with my lawyer, my lawyer will provide  
42 them with an initial draft of an affidavit that will  
43 exhibit their case plan. So the first affidavit in time -  
44 the first updating affidavit in time that's filed in most  
45 occasions will be exhibiting the case plan that's been  
46 developed through the family group meeting process, any  
47 other information that is relevant to the ongoing

1 progression of the matter.

2

3 COMMISSIONER: But, subject to there being sufficient  
4 resources within your body and there being sufficient  
5 resources within OCFOS, on the assumption that the present  
6 bifurcated arrangements were to continue, you agree that a  
7 lawyer would be better placed to have the primary  
8 responsibility for drafting the affidavit material?

9 A. Yes. Yes, I do. And, Commissioner, that's in the  
10 context with what I was talking to earlier where  
11 I commenced taking you through the process by which the  
12 initial assessment of the child safety officer is come to  
13 and then set out in what's referred to as an assessment  
14 outcome.

15

16 COMMISSIONER: Yes.

17 A. So that's an internal document where their first  
18 assessment in time it sets out what that is and what  
19 information they've relied upon as part of that assessment.  
20 Sitting alongside that are the various tools you've had  
21 regard to and other information; like, I was referring to  
22 any records of interviews they have or other information  
23 they've gathered. The difficulty we then have is once a  
24 matter is under way in terms of intervention - this is in  
25 both intervention with agreement or intervention under a  
26 court application for a child protection order - at the  
27 moment there is no clear way for the child safety officer  
28 to maintain their assessment and to set their assessment  
29 out other than through another document like an affidavit.

30

31 COMMISSIONER: When you say no way to maintain it are you  
32 talking about the absence of some Dropbox or IT structure  
33 that would enable a report to be progressively updated?

34 A. That's so, Commissioner. So the difficulty we have is  
35 if three months passes or six months pass since the initial  
36 assessment was set out and then there's some change in  
37 circumstances, that change and what the current assessment  
38 is is actually articulated in the form of an affidavit  
39 rather than just a child safety assessment.

40

41 COMMISSIONER: So, to be clear, I'm not suggesting that  
42 the lawyer should do the primary investigation work or even  
43 form the primary assessment as to risk or change in  
44 circumstances, whatever the facts might be, but that the  
45 work of translating or transposing that information into  
46 the form of an affidavit for the court's purposes could  
47 readily be done by a lawyer such that, provided good

1 records are kept of the kind you describe in the ordinary  
2 course of the CSO's work as a CSO, then that has the  
3 potential to substantially relieve the burden of much time  
4 being spent by CSOs preparing court material?

5 A. Yes, Commissioner. What I'm proposing should result  
6 in a very brief affidavit which serves the purpose of  
7 attaching the source documents and whatever the current  
8 assessment is.

9  
10 COMMISSIONER: Yes. All right. It was suggested by the  
11 OCFOS solicitor who I've heard from, Ms Schifilliti, that  
12 affidavits are longer and more extensive than they need to  
13 be for the purposes of many applications. And she  
14 suggested - and I am paraphrasing, so I hope I don't get it  
15 wrong - that there should be a more simplified, more  
16 streamlined approach to the material that is required to be  
17 put before the court, particularly where the application is  
18 not a contested application. Now, in your assessment is  
19 the material that is put before the court once you become  
20 involved more detailed or extensive than you think it needs  
21 to be?

22 A. Commissioner, I would say no. One of the issues we  
23 face is just the volume of the material, and that is often  
24 connected to the complexity of the matter. You made  
25 reference to a matter that involved six different children.  
26 When we start to talk about matters that involve even three  
27 children or four children or greater, when you get to a  
28 scenario where every child's case plan will be 15 to 20  
29 pages in length, then there's all the associated structured  
30 decision-making tools, any reviews of that case plan, so a  
31 section 51X report, any other information that's been  
32 gathered by, say, the Department of Health or Education or  
33 Police, very quickly you get to hundreds of pages of  
34 material.

35  
36 COMMISSIONER: Yes, and complexity of the family  
37 relationships, particularly with extended families and  
38 changing relationships and dynamics within the family  
39 bearing upon the risks to the child, that all becomes  
40 relevant?

41 A. It does, and very quickly the number of exhibits  
42 increase, which increases the overall size of the  
43 affidavit. Now, we - there was - if I put it this way.  
44 There was a system implemented alongside when the current  
45 litigation model commenced on 1 July 2016 where there would  
46 be - and I'll refer to the initial affidavit was simply a  
47 narrative affidavit that had no exhibits, but it would make

1 reference to what would then come to life further into the  
2 proceeding, a rule 13 affidavit. So there is a rule, rule  
3 13 of the Childrens Court Rules, that prescribes a list of  
4 documents that if held by Child Safety - and the critical  
5 part is if relevant - I have an obligation to put that  
6 before the court.

7  
8 What we found - and this dual affidavit approach was in  
9 place for the first three years, we found that the rule 13  
10 affidavits were very voluminous, huge in size, and it  
11 seemed to be simply if the document was referred to in rule  
12 13 it was exhibited.

13  
14 In 2019 we changed the settings to incorporate the exhibits  
15 back into the one initial affidavit which helps to focus  
16 the child safety officer, the deponent, in terms of trying  
17 to identify whether it's relevant. So if it's a document  
18 that they've had no regard to, albeit it's mentioned in the  
19 rule, if they've not considered it relevant as part of  
20 their assessment, we shouldn't be putting it before the  
21 court. That's not to say it might not then become relevant  
22 and it might be something we disclose to the other parties  
23 to consider, and in time we might have to put it before the  
24 court. But we went from a scenario where if a child had  
25 been on a series or an earlier short-term order granting  
26 custody and through that order they'd been through a number  
27 of case plans and reviews and new revised case plans, very  
28 quickly we're talking hundreds if not a thousand pages of  
29 material.

30  
31 COMMISSIONER: And is rule 13 still in operation in the  
32 same way --

33 A. It's still in operation in the same way, Commissioner.  
34 However, by incorporating the source documents mentioned in  
35 the rule into the initial affidavit it has helped to reduce  
36 the size because it more easily allows the deponent and  
37 then my lawyer in settling it to identify whether  
38 something's not relevant.

39  
40 COMMISSIONER: Yes. Are there categories of documents in  
41 rule 13 that you consider are unnecessary for the proper  
42 consideration of the application?

43 A. If I just consult rule 13, Commissioner.

44  
45 COMMISSIONER: Yes. Counsel is going to give me a copy.  
46 You understand that the rules are rules made by the court,  
47 but I imagine that the court would listen to sensible

1 feedback about the rules themselves and the contents of  
2 them if there was reason to consider their contents.  
3 A. So, Commissioner, if you do read through rule 13  
4 subrule (2) --

5  
6 COMMISSIONER: Yes, I'm reading it now.  
7 A. -- on the face of it there is no issue. It lists out  
8 a series of documents that, on the face of it, are  
9 relevant. So the initial requirement is any assessment.  
10 Now, that's clearly relevant. Where a child has been  
11 subject to ongoing intervention, though, at this point the  
12 form of that assessment, it won't at times be a standalone  
13 assessment document. This is what I'm referring to this  
14 assessment then needing to be set out within the body of  
15 the affidavit.

16  
17 COMMISSIONER: So --  
18 A. Now - sorry, Commissioner.

19  
20 COMMISSIONER: No, that's all right.  
21 A. Now, the rule only requires at the point that the  
22 application, the original application, is made that we put  
23 before the court a copy of the most recent case plan. So  
24 if there's been a series of four case plans and reviews we  
25 start with the current plan and what will be the review of  
26 that plan. But that's not to say that a matter - suddenly  
27 the focus of the matter might become whether or not Child  
28 Safety has undertaken active efforts or has made reasonable  
29 steps to try and have a child returned to their family.

30  
31 COMMISSIONER: So you don't suggest that the matters that  
32 are covered in rule 13(2) are not necessary or are not  
33 relevant --  
34 A. No, Commissioner. There may be a degree of  
35 consideration in terms of 13(2)(e), the referrals made to  
36 any external agencies. It will really depend upon what are  
37 the concerns, what are the grounds, as to whether every  
38 single referral needs to be put before the court or it  
39 might be that just reference to the referral can be made,  
40 and then in time if needed that can be disclosed or put  
41 before the court. But, on the face of it, this rule is  
42 making reference to at a very high level key documents.

43  
44 COMMISSIONER: And matters.  
45 A. Yes.

46  
47 COMMISSIONER: So the approach to compliance with this

1 rule is now to cover the subject matter of the rule within  
2 the narrative affidavit, and exhibit to the one affidavit  
3 such documents that are in the possession of the Chief  
4 Executive falling within those categories in compliance  
5 with this rule?

6 A. Yes.

7  
8 COMMISSIONER: And that's preferable, you've discovered,  
9 to having a rule 13 affidavit, so to speak, and then a  
10 separate narrative affidavit?

11 A. Yes, it's worked much better in terms of managing the  
12 relevance and the size of the affidavits by having it  
13 incorporated into the one originating affidavit.

14  
15 COMMISSIONER: All right. While we're on the subject of  
16 the role of the lawyer within the system relative to the  
17 role of the CSO can I ask you whether the decision at the  
18 emergent order stage to make an application is one that  
19 ought be made by the OCFOS lawyer or by the child safety  
20 officer or team leader combined. When it comes to your  
21 jurisdiction, the decision to proceed to a child protection  
22 order is made by your officers who are lawyers?

23 A. Yes.

24  
25 COMMISSIONER: The position initially within OCFOS, as  
26 I understand it, was that the decision to make an  
27 application for an emergent order and the applicant upon  
28 that application was the OCFOS lawyer, and there remain in  
29 place delegations to OCFOS which will allow them to perform  
30 that role. However, somewhere between 2016 and 2020 -  
31 I have different sort of evidence about when the change I'm  
32 about to mention occurred - there's been an internal  
33 decision within the department that the decision-maker for  
34 the purposes of making the application is the child safety  
35 officer or team leader with OCFOS characterised as  
36 performing a role on instructions. So an instructional  
37 model is the phrase or something like that is used to  
38 describe the OCFOS solicitor's role in connection with  
39 making the decision to apply for a court order.

40  
41 Do you have a view about whether the decision to apply for  
42 a court order based upon obviously material that emanates  
43 from the investigation and assessment of the child safety  
44 officer is one that is better made by the child safety  
45 officer or team leader, as is presently the case within the  
46 department, or do you think it's preferable that that  
47 decision is made by the lawyer?

1 A. In response, Commissioner, my view is that that  
2 application or determination as to whether one should be  
3 made and then the application made should be undertaken by  
4 a lawyer. Now --

5  
6 COMMISSIONER: Yes. Will you speak up and explain why you  
7 say so?

8 A. Yes, sorry. I would say that based on my experience  
9 and the experience of my lawyers in the functions we  
10 currently perform in considering whether or not an  
11 application should be made for a child protection order,  
12 it's the legal analysis we undertake, albeit based on Child  
13 Safety's assessment and their documents. But, if we look  
14 at what's occurred or currently occurring in the emergent  
15 order space, I understood that it was an instructional  
16 model.

17  
18 COMMISSIONER: Well, it is presently an instructional  
19 model.

20 A. It is. However, though, I understand the OCFOS  
21 lawyers are also authorised officers. And so at times it  
22 would seem over the period from 1 July 2016 to perhaps an  
23 ill-defined date they were actually, in effect, using their  
24 legal skills to determine which application should be made  
25 on the basis but albeit as an authorised officer. And now  
26 I understand you're saying that, although they might remain  
27 authorised officers, they're very much now just acting on  
28 instructions.

29  
30 COMMISSIONER: Well, it's an instructional model, so  
31 described. And the department has decided that the  
32 decision-maker is the team leader and the applicant for the  
33 order is the team leader, whereas previously the position  
34 was that the decision-maker and applicant was the OCFOS  
35 lawyer. And so as things presently stand - and I don't  
36 think I need to describe in more detail what I've just  
37 explained to you because I've heard a lot of evidence in  
38 the last few days about this - the model is correctly  
39 characterised by the department itself as an instructional  
40 model where, as I say, the decision-maker in terms of - in  
41 relation to the question of whether an application for an  
42 emergent order should be made and, if so, what order should  
43 be sought is the CSO together with the team leader who  
44 makes that decision. So that is this the position. That's  
45 not a surprise to you, is it?

46 A. No, no, Commissioner, I understood that it was  
47 proposed from the beginning that it would be an

1 instructional model. So it doesn't surprise me now. I had  
2 understood it to be the team leader who --

3  
4 COMMISSIONER: Yes, well, it is formally the team leader.  
5 Whether in substance the decision-maker is the CSO is a  
6 different question.

7 A. That's so, and whether it's the team leader endorsing  
8 the child safety officer's decision. But I am aware that  
9 in the earlier years of the model at times it was not clear  
10 on the assessed order as being appropriate and desirable as  
11 appears in what I refer to as my form A. So under  
12 guidelines I have issued I have a form A which is an  
13 overview in summary form of the referred matters that have  
14 been sent to me. In the early years of the model at times  
15 it was unclear whether the order as set out in that form A  
16 as being appropriate and desirable was in fact the order as  
17 assessed by OCFOS or was in fact the order assessed by the  
18 team leader, because there would be matters where my  
19 lawyers would see - on the form A would have order type A  
20 yet, when you found the assessment amongst the source  
21 documents, the assessment would be for order type B. And  
22 so in those early years there was a degree of - a lack of  
23 clarity at times as to which order or which type of order  
24 had been referred to us as opposed to which type of order  
25 had been assessed by a team leader.

26  
27 COMMISSIONER: But by the time it gets to you the order is  
28 made, either A or B, depending on what was sought by --

29 A. Sorry, Commissioner, this is in terms of what Child  
30 Safety had assessed was needed in a child protection order.

31  
32 COMMISSIONER: Sorry, in terms of your role?

33 A. In terms of my role and what order we should be  
34 seeking in that at times there was not consensus amongst  
35 what the OCFOS lawyer had referred to the DCPL as opposed  
36 to what the senior team leader had assessed was needed.  
37 But I hadn't appreciated that whether or not an emergent  
38 order was to be sought and what type sat with the OCFOS  
39 lawyer; I hadn't appreciated that in the early part of  
40 the model.

41  
42 COMMISSIONER: Well, there might be some debate - and I'll  
43 leave it to Counsel Assisting me to take you to some  
44 passages from the Carmody report recommending this new  
45 model, generally speaking. It is a recommendation in the  
46 report which on its plain reading might be taken, I think,  
47 to suggest that the decision-maker in relation to emergent

1 orders should be the lawyer. But we can take that up in  
2 due course.

3 A. Yes.

4

5 COMMISSIONER: In any event, let me move on to another  
6 question relating to the relationship between OCFOS and  
7 your office, and that is what, if any, difficulties do you  
8 perceive emerge from the bifurcation of the role of OCFOS  
9 on the one hand in the emergent order context and your  
10 subsequent role in having responsibility for making child  
11 protection applications? I'll leave it as open as that.  
12 Would you care to comment on your experience of any  
13 difficulties associated with that division?

14 A. Thank you, Commissioner. The way the model operated  
15 across the first three years was quite markedly different  
16 to the way the model operates today. So it was operated -  
17 from years 1 through 3 it was different to then what is now  
18 from year 4 through to current date. In those first three  
19 years the OCFOS officer maintained involvement and  
20 maintained their own file from the moment they were engaged  
21 or retained by a team leader to provide legal advice,  
22 through to including emergent orders and any referrals to  
23 myself, through to the ongoing child protection proceeding,  
24 through to final hearing and, if appeal, during appeal. So  
25 for those first three years, outside of a court ordered  
26 conference, there was no direct communication between my  
27 lawyers and the child safety officers or senior team  
28 leaders. It was very much embedded in those initial three  
29 years as the DCPL was to engage with and deal only with the  
30 in-house lawyers, that being OCFOS. So all communication  
31 would be through the OCFOS lawyer. All requests for  
32 information --

33

34 COMMISSIONER: Do you recall whether during that  
35 three-year period the named applicant for the emergent  
36 order was the OCFOS lawyer?

37 A. I don't recall, Commissioner.

38

39 COMMISSIONER: All right. In any very event.

40 A. Yes.

41

42 COMMISSIONER: So it was a lawyer to lawyer dialogue --

43 A. Yes, Commissioner. I understood even in those early  
44 years it was the team leader or the child safety officer  
45 that was in effect swearing to the contents of the  
46 application for emergent orders, but I might have that  
47 wrong. It may have --

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COMMISSIONER: Well, swearing to the contents is a different matter --

A. That's being named as the applicant on the face --

COMMISSIONER: As the applicant?

A. Yes. So the emergent order applications are sworn or affirmed.

COMMISSIONER: Yes.

A. And they are to contain --

COMMISSIONER: Yes, I've seen some pro formas.

A. Yes. And so they're to contain in addition to the asserted facts also the assessment or the opinion that underpins that. And so it will only be if an emergent order application is contested that then there will be further material filed by way of affidavit in those emergent order proceedings.

But, in terms of the model as it worked in those first three years, it was very much lawyer to lawyer and that caused difficulties in terms of information sharing. It caused issues in respect to determining relevance of a document. It just wasn't conducive to the relationships that are needed between, say, the DCPL lawyer and the senior team leader and the child safety officer where there was no direct communication other than when a matter proceeded to a court ordered conference. So that was the one event in which the OCFOS lawyer wasn't involved. So a court ordered conference is still a court event. But we found that that was the first time that the DCPL lawyer running the application was able to have a direct conversation with the team leader and address any issues there might be, unmediated or from going through the internal OCFOS lawyer.

There were changes that were made to the way the model worked from 1 July 2019 that allowed then direct communication from once we receive a matter and then, with the current settings, once the initial affidavit has been filed and affidavits of service filed the OCFOS lawyer's role then ends in the matter and they then focus back at the start in terms of any emergent matters that are needed.

COMMISSIONER: So the instructions about matters which require instructions after 2019 were conveyed by direct

1 communications between one of your staff and the relevant  
2 child safety officer or team leader?

3 A. Yes, and that's what happens today, Commissioner.

4

5 COMMISSIONER: Right.

6 A. Throughout a proceeding there's backwards and forwards  
7 communication the whole way along.

8

9 COMMISSIONER: All right. And that's improved things so  
10 far as you're concerned? That's improved the process?

11 A. It has. It has. Child safety officers or team  
12 leaders you will hear, Commissioner, they are relational.

13

14 COMMISSIONER: Yes.

15 A. They want to have a relationship with people. Now, my  
16 lawyers now from 1 July 19 have been able to attend child  
17 safety service centres, been able to work from them when  
18 they're in location. When they've travelled for court they  
19 will, if there's a service centre there, attend the service  
20 centre, work from the service centre. They have ongoing  
21 contact, and that's helped no end to establish those  
22 relationships. So I have - in terms of the way the work is  
23 managed before the court - a role that's undertaken by  
24 what's referred to as a DCPL file lawyer, and they are  
25 assigned to a location in terms of the court and any  
26 service centre work that may be managed in front of that  
27 court. And so they've now got the opportunity to build up  
28 strong relationships with the team leaders from those  
29 service centres and the child safety officers.

30

31 COMMISSIONER: Is there any reason that you can think of  
32 why there is today a bifurcation between the emergent order  
33 jurisdiction and the child protection order jurisdiction in  
34 the way that it presently operates?

35 A. I would say no, Commissioner. I understand that there  
36 would be maybe concern that, because of the emergent or  
37 urgent nature of those early orders, that you would want a  
38 lawyer based in the service centre. But there's no reason  
39 why that lawyer can't be and should not be independent  
40 exercising their own legal analysis of the matter.

41

42 COMMISSIONER: And in principle there's no reason why  
43 those lawyers currently undertaking work done under the  
44 aegis of OCFOS couldn't do so under your authority?

45 A. That's so, Commissioner. When the current model was  
46 being implemented or being proposed the approach taken to  
47 the then court coordinators, who were legally qualified,

1 was to give them an option of either joining my office or  
2 joining OCFOS. And for those court coordinators joined my  
3 office they then had a choice to remain in situ, so in the  
4 service centre they were based, or to join me in terms of  
5 where we're based in Brisbane.  
6

7 COMMISSIONER: There would be a practical argument in  
8 favour of having - I'm suggesting for your comment -  
9 lawyers embedded, as it were, on location in child safety  
10 service centres in order to assist in the ready exchange of  
11 information, the taking of urgent instructions, all sort of  
12 practical reasons why having lawyers handy when one is  
13 considering how to institute or whether court proceedings  
14 should be instituted.

15 A. Yes, Commissioner. However, if I explain, so for the  
16 first number of years I did have a DCPL lawyer - for the  
17 first seven-plus years I had a DCPL lawyer based in the  
18 Atherton Child Safety Service Centre. So, although he was  
19 part of my staff and undertook functions for me, he  
20 remained sitting in a workstation - he had been for a  
21 decade prior to the changes and undertook DCPL work,  
22 although embedded within a service centre. And I had  
23 another lawyer who was embedded in one of the Cairns child  
24 safety service centres for the first couple of years, but  
25 they were the only two that elected to join my office but  
26 stay in location.  
27

28 COMMISSIONER: Sure. But really what I'm getting at is do  
29 you accept that particularly in respect of emergent orders  
30 it is desirable to have lawyers on the spot at the various  
31 child safety centres?

32 A. Yeah, if you can recruit them and they're there, it  
33 works. But what I'd also say is that now, really in  
34 response to the pandemic, day in day out there's Teams  
35 meetings, face-to-face consultations going throughout the  
36 day. I jump into consultations with team leaders, with  
37 child safety officers. It's instantaneous. It's shifted  
38 to the point where you need to be at the next workstation.  
39 Times have changed.  
40

41 COMMISSIONER: So the need for FaceTime direct contact may  
42 not be as significant as it was prior to all of the remote  
43 ways of working generally in the community but including in  
44 this area --

45 A. Yes.  
46

47 COMMISSIONER: -- because of Teams --

1 A. Teams. But when it comes to court, Commissioner, our  
2 preferred setting is that the lawyer will be there in  
3 person.  
4

5 COMMISSIONER: Yes.

6 A. So there is a travel burden on my staff. We are  
7 Brisbane based.  
8

9 COMMISSIONER: Yes.

10 A. And they constantly travel. And when they are in  
11 location they are spending time not just at court but also  
12 at the local child safety service centre where they can.  
13 However, there is - at times there would be a benefit,  
14 whether it be - if there was no bifurcation you would seek  
15 to try and keep as many lawyers in situ in the service  
16 centres as you could.  
17

18 COMMISSIONER: Yes. I've heard criticism that the present  
19 bifurcated arrangements lead to duplications and  
20 inefficiencies and extra cost and delay.

21 A. If I could talk to that, Commissioner.  
22

23 COMMISSIONER: Yes.

24 A. In terms of the duplication it would manifest itself  
25 in two areas. First, it's in the area of legal advice. So  
26 the current instructional model that's embedded in terms of  
27 OCFOS, they become involved in a matter once their services  
28 are retained by a team leader. When and how often or in  
29 what circumstances that retainer happens outside of  
30 emergent orders it's not clear to me. As to how many of  
31 the other matters, the investigations, the assessments that  
32 don't lead to an emergent order have any legal oversight  
33 I don't know or how many safety plans, intervention with  
34 parental agreements are done so with the benefit of legal  
35 advice, I don't know.  
36

37 But in the matters that are referred through to my office  
38 that there's been OCFOS engagement under the emergent order  
39 settings that engagement could be through to even eight  
40 weeks in length if we start with a temporary assessment  
41 order, then a court assessment order is sought, and that is  
42 extended, and even a temporary custody order. The OCFOS  
43 lawyer has got a very good knowledge of the matter and no  
44 doubt has given legal advice in respect of the matter in  
45 terms of what are the legal issues, where are the problems.  
46 One of the difficulties in the current model, the  
47 bifurcation model, is that the internal legal advice is

1 never shared with my office. It's been an issue we've not  
2 been able to resolve.

3  
4 COMMISSIONER: And in terms of the facts, which are often  
5 complicated in the way that we've discussed, complicated  
6 family arrangements --

7 A. Yes.

8  
9 COMMISSIONER: -- moving parts, as it were, in terms of  
10 the position that the child is in, your lawyer, once you  
11 are seized of the matter, somebody needs to get on top of  
12 all of that material, don't they?

13 A. Yes.

14  
15 COMMISSIONER: And so like any new brief you have to read  
16 into it, work out what it's about, and that necessarily  
17 involves a degree of duplication, doesn't it, because you  
18 need another lawyer to be seized of the matter in terms of  
19 understanding the circumstances of the particular case?

20 A. And that's so. So that's an area - so it's the  
21 understanding and involvement at the early stage from the  
22 OCFOS lawyer. That knowledge then is not necessarily -  
23 it's a new lawyer needing to read into the matter, one of  
24 my lawyers.

25  
26 COMMISSIONER: Sorry, can you say that again?

27 A. It's one of my lawyers, in terms of the duplication,  
28 needing to read into the matter.

29  
30 COMMISSIONER: Yes.

31 A. Now --

32  
33 COMMISSIONER: Which if the lawyer handling the file, so  
34 to speak, handled it from the outset and continued through  
35 the continuum into the child protection order in the  
36 context of ongoing intervention then that lawyer would  
37 already have the background by reason of having done the  
38 work at the emergent order stage and wouldn't need to  
39 relearn that background, necessary background, but would  
40 simply build as the circumstances may evolve and as the  
41 matter proceeds through the court process?

42 A. Now, there's always going to need to be - you have to  
43 take into account the complexity of the matter.

44  
45 COMMISSIONER: Yes.

46 A. Now, the decision about whether or not to make a child  
47 protection application and, if so, what type, that decision

1 is made by lawyers in my office on my delegation that sit  
2 either at the senior lawyer level, so that's professional  
3 officer 5, or the principal lawyer level, professional  
4 officer 6. These are lawyers that have substantial  
5 experience in terms of child protection. A great number of  
6 my applicant lawyers have been with me since we commenced.  
7 And so when they're engaging with a matter often they will  
8 have the most expertise out of anybody involved in the  
9 matter in terms of child protection. There are going to be  
10 some matters where you might have a very junior lawyer  
11 in situ at a regional location because that's the only  
12 lawyer you can recruit in that location, and the matter  
13 because of the complexity may still need or there might  
14 still be a requirement that a more experienced lawyer  
15 oversees their work or steps in to take the lead.

16  
17 COMMISSIONER: Well, certainly, that is typical in any law  
18 firm.

19 A. Yes.

20  
21 COMMISSIONER: It's typical at the Bar. There is a need  
22 in terms of quality control, if nothing else, to provide  
23 guidance and review by more senior lawyers to assist the  
24 junior lawyer --

25 A. Yes.

26  
27 COMMISSIONER: -- as that junior lawyer becomes more  
28 experienced and presumably over time can take on more  
29 independent responsibility.

30 A. Yes.

31  
32 COMMISSIONER: But that's commonplace --

33 A. Yes.

34  
35 COMMISSIONER: -- in probably any professional context.  
36 But if the one lawyer, possibly a junior lawyer requiring  
37 oversight, were to see the case through from start to  
38 finish, so to speak, then, notwithstanding the oversight  
39 role, there would be potentially a very significant  
40 avoidance of the duplication involved in the lawyer in your  
41 office needing to get on top of the matter from scratch  
42 once the matter is referred to your office, wouldn't  
43 there --

44 A. Yes, Commissioner.

45  
46 COMMISSIONER: -- in the ordinary course?

47 A. Yes. And we find ourselves in the situation where

1 often we don't have the time we would like in order to  
2 consider matters, the complexity and the number of  
3 documents. And connected to this issue of duplication then  
4 is the OCFOS lawyer has provided their - I think it's  
5 referred to as - quality assurance of the initial  
6 affidavit; they've reviewed it. It may have gone backwards  
7 and forwards between them and the child safety officer.  
8 And then it comes to my office. My lawyer is then  
9 reviewing the same affidavit as part of settling the  
10 affidavit and at times, without knowing what issue may have  
11 already been flagged because the legal advice is not  
12 shared, the child safety officer at the time might be  
13 getting advice that's the same or slightly different.

14  
15 COMMISSIONER: Can you just explain to me why the legal  
16 advice isn't shared under the present arrangement?

17 A. I understand or I've been told it's because of  
18 privilege issues, Commissioner.

19  
20 COMMISSIONER: Yes, let's accept that the advice is  
21 privileged. It doesn't mean that privilege can't be waived  
22 in favour of your office, does it?

23 A. Yes, or even it's very clear within the Child  
24 Protection Act, if I refer you to --

25  
26 COMMISSIONER: I mean, you would have a common interest in  
27 privilege, wouldn't you?

28 A. That's so, Commissioner. If I refer you to  
29 section 191 of the Child Protection Act, this is a  
30 provision that outlines on what basis information may be  
31 withheld in terms of disclosure or withheld from any court  
32 proceeding. And under 191(2)(a) the first basis is whether  
33 or not the information is the subject of legal professional  
34 privilege. My view has been consistent in that the Act  
35 provides a basis if there was - the Act provides a basis  
36 for the sharing of this information. And if there was some  
37 view taken that in some way the sharing of it was to have  
38 waived privilege, well, then there is provision under  
39 subsection (2)(b) still to withhold that information.

40  
41 COMMISSIONER: So, in other words, are you saying that if  
42 the OCFOS privileged material was shared with you and that  
43 material was sought by someone else you could resist the  
44 production of it --

45 A. Yes.

46  
47 COMMISSIONER: -- because of subsection (2), and the

1 provision of the privileged material to you by OCFOS would  
2 not be a general waiver of the privilege because it would  
3 be shared under a common interest privilege?

4 A. That's so, and any privilege --

5

6 COMMISSIONER: That seems like a sound analysis to me.

7 A. And any privilege is actually held by the  
8 Attorney-General, Commissioner.

9

10 COMMISSIONER: Pardon?

11 A. And any privilege is actually held by the  
12 Attorney-General.

13

14 COMMISSIONER: In both cases?

15 A. Yes. Any legal advice given on behalf of the State,  
16 the person who holds that or the person who can authorise  
17 the waiving of that is the Attorney-General.

18

19 COMMISSIONER: Well, on that analysis I don't understand  
20 why privileged material created as the attorney work  
21 product by OCFOS shouldn't be shared with your office.

22 A. Yes, Commissioner.

23

24 COMMISSIONER: Have you sought to remedy that situation?  
25 Have you asked for it?

26 A. I have, Your Honour. It's been the subject of various  
27 discussions over the years. It's been the subject of the  
28 reviews that have been undertaken. But the issue is still  
29 not resolved.

30

31 COMMISSIONER: So you've asked for it?

32 A. Yes.

33

34 COMMISSIONER: Have you explained in the course of asking  
35 for it why you think it would be of assistance in terms of  
36 efficiency or otherwise?

37 A. Efficiency, yes, Your Honour. You have a situation  
38 where the State now through OCFOS has the benefit of this  
39 early legal advice to help scope the matter as it proceeds  
40 through the emergent stage, yet then when it comes to my  
41 office and my role as the State I then don't have the  
42 benefit of it.

43

44 COMMISSIONER: Therefore requiring a lawyer in your office  
45 to undertake investigations and evaluations that might have  
46 been truncated or avoided --

47 A. Yes.

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COMMISSIONER: -- had you had the benefit of that advice?  
A. Yes, Commissioner.

COMMISSIONER: Have you asked for that in writing to OCFOS?

A. I would have to go back and look at my records over the years, Commissioner, as to whether - I'm sure it's been in writing, it's been orally, it's been raised, it's been raised as part of the various reviews, it's been flagged as an issue that needs to be considered and settled.

COMMISSIONER: Well, if you have any evidence in writing of this issue having been raised I'd appreciate the production of it. I can send you a notice to ask you to produce it. And I'll likewise ask the department to produce any records they have of this issue being raised, discussed, reviewed as between your office and the department. Now, while we're on the subject of privilege, it was suggested to me that a reason why the OCFOS lawyer should not be the applicant in making an emergent order was because of some perceived conflict arising from the fact that OCFOS provides legal advice to the department. That's as well as I can explain the objection. Do you have a view about that?

A. No. What I would say, Commissioner, is that I perform my role under clear statutory provisions.

COMMISSIONER: Yes.

A. But connected to my role I would say at times my lawyers and as part of the process maps even that underpin the model my lawyers provide advice to the child safety officers and team leaders as needed. Whether or not in some way that creates a conflict on --

COMMISSIONER: Well, I'm personally struggling to see where the conflict is, because you have to identify a different interest in order to have a conflict. What's the different interest? The interest, I would have thought, is common: make the best possible application or the application that should appropriately be made in the circumstances for the relevant order.

A. M'hmm.

COMMISSIONER: Now, how does the fact that a lawyer at OCFOS gives advice to the department about that matter, about those issues, create a conflict if the lawyer would

1 be the applicant? I don't follow that analysis.  
2 A. No, that's - so, Commissioner, it would only be - the  
3 potential for conflict on the instructional model will only  
4 be now where the lawyer is being instructed to make an  
5 application that is not open on the evidence.

6  
7 COMMISSIONER: Well, precisely. The conflict is the other  
8 way.

9 A. Yes, it is.

10  
11 COMMISSIONER: Yes. Thank you. I wanted to come back,  
12 because I think we got - my fault - sort of segued into a  
13 number of different topics, to see if you can give me some  
14 kind of crisp explanation as best you can as to why  
15 82 per cent of the long-term guardianship orders of the  
16 universe of long-term guardianship orders are made in  
17 favour of the Chief Executive. I think we got a bit  
18 distracted in our discussion.

19 A. Yes, Commissioner. The points I'd made first was that  
20 there may be issues where there is a family based  
21 placement, the point I'd made was that there might be some  
22 issue or reluctance on behalf of the carer to take  
23 guardianship that I suggested could at times be modified  
24 their obligations on the face of the order. And I had also  
25 made reference to there also being a cohort of the children  
26 who are in residential care which would then explain that.

27  
28 COMMISSIONER: Yes.

29 A. The other issue that at times you see is just the high  
30 needs of the child and there being at times a lack of  
31 clarity. As I understand it, it's still a discretion that  
32 sits at a manager level within a child safety service  
33 centre as to whether or not there will be ongoing  
34 allowances provided to a carer if they were to hold  
35 guardianship. At various times it seems that - it's  
36 suggested that, well, the same level of assistance may not  
37 be available to a carer if they were to be the guardian as  
38 opposed to having a child placed with them where the  
39 guardianship sits with the Chief Executive. So some of  
40 these children do have high needs in terms of both medical  
41 and/or behavioural, and that might be one of the reasons  
42 put forward in the material as to why guardianship needs to  
43 sit with the Chief Executive.

44  
45 COMMISSIONER: When an application is made for long-term  
46 guardianship who has a right to be heard on that  
47 application?

1 A. For a long-term guardian - so it's the people who meet  
2 the narrower definition of "parent" within the Act. So  
3 these are people who have a legal right.  
4

5 Q. So the natural parents?

6 A. Natural parents. Yes, so natural parents, yes,  
7 provided - at times there might be no presumption open on  
8 the evidence as to who the child's father is; so that is  
9 the child's born and there's no marriage, there's no  
10 evidence of cohabitation, there's no-one on the birth  
11 certificate. But we're talking about a child's mother and  
12 father or anybody else that meets the narrower definition;  
13 so anyone who's got a level of parental responsibility  
14 through a family law order or through a testamentary sort  
15 of basis or they might hold a level of guardianship or  
16 custody through the law of another state or guardianship  
17 here in Queensland.  
18

19 COMMISSIONER: So where's the narrow definition of  
20 "parent"?

21 A. It's set out in the dictionary, Your Honour.  
22

23 COMMISSIONER: All right.

24 A. Schedule 3.  
25

26 COMMISSIONER: Not the section 11 "parent"?

27 A. That's so.  
28

29 COMMISSIONER: And what opportunity, if ever, is there for  
30 let's say a long-term kinship carer or foster carer to  
31 contest an application for long-term guardianship to the  
32 Chief Executive? Is there any provision?

33 A. It would only be, Commissioner, if they have become  
34 involved to the point where they seek to make an  
35 application under section 113 to be involved as a  
36 non-party. But there is a limitation built into  
37 section 113 in that it needs to be in response to an  
38 application by the person. So if I put it this way. It's  
39 not something the court of its own initiative can do or  
40 I can do. We need to very much have this person - that  
41 being the carer - engaged, attend court and make that  
42 application.  
43

44 COMMISSIONER: So section 113 is a provision allowing a  
45 non-party to have leave to intervene in a proceeding?

46 A. Yes.  
47

1 COMMISSIONER: And what have they got to do in order to be  
2 heard on such an application?

3 A. They have to make an application in the proceeding.  
4 Now, the rules provide that an application in the  
5 proceeding can be both in writing or an oral application.  
6

7 COMMISSIONER: I mean, what application would they need to  
8 make? What's the substantive application?

9 A. The substantive application is they're seeking the  
10 status of a non-party under section 113.  
11

12 COMMISSIONER: So they have to make an application for  
13 leave to intervene, essentially, in the proceeding?

14 A. Yes.  
15

16 COMMISSIONER: And, if granted that leave, they could  
17 then --

18 A. Through the provision they could acquire, if the court  
19 allows, all the rights and responsibilities of a party. So  
20 if the court provides them with that level of participation  
21 that will also include through to appeal rights of any  
22 decision that is made. So in more recent times there has  
23 been an appeal even brought by a section 113 non-party and  
24 it was determined they had the status even to bring that  
25 appeal. Now, the condition that this applicant would need  
26 to address is what appears in section 113(3)(b), and that  
27 is the court's got to consider whether the person may be  
28 able to assist it to inform the court about a matter  
29 relevant to the proceeding and the court's also got to take  
30 into account the person's relationship with the child. But  
31 it's a very broad provision.  
32

33 COMMISSIONER: Yes.

34 A. And I've given guidance to my staff that we should  
35 take a very expansive approach to this and to the group of  
36 people who may be able to assist the court with a matter  
37 that's relevant.  
38

39 COMMISSIONER: And not oppose leave for the sake of it --

40 A. That's right.  
41

42 COMMISSIONER: -- if there's an apparently good interest  
43 that seeks to be heard?

44 A. That's so. That's so, Commissioner. It might be that  
45 initially there might be some constraints put around as to  
46 the extent of the participation. It might be that they be  
47 given leave to access some of the material or at times it

1 might be - if it's, say, for instance, a member of the  
2 father's family, a paternal grandparent, it might be that  
3 their engagement in the matter is to seek guardianship to  
4 them and through that they might not necessarily need to be  
5 served with all of the information as it relates to the  
6 mother in terms of the concerns about her. It might be  
7 that their participation's very much forward focused and  
8 giving them the ability to satisfy the court that they are  
9 suitable to be granted guardianship.

10  
11 COMMISSIONER: But that's a matter for the court to  
12 determine, its processes and protect other interests in the  
13 course of it.

14 A. Yes, Commissioner.

15  
16 COMMISSIONER: So can I come back to section 82.

17 A. Yes.

18  
19 COMMISSIONER: Section 81 is a section which invests in  
20 the Chief Executive the power to place the child in various  
21 different placement options where the child is in care. So  
22 it assumes that the child is subject to some form of child  
23 protection order, either an emergent order or a child  
24 protection order.

25 A. Yes, or it could be even under a care agreement, a  
26 child protection care agreement, that then places an  
27 obligation on the Chief Executive to place the child.

28  
29 COMMISSIONER: Yes. And then section 82(2), if the child  
30 is in the Chief Executive's custody or guardianship, so  
31 here we are talking about - well, at least in one case a  
32 custodial order has already been made and in the second  
33 case the guardianship order could be a short-term  
34 guardianship order, couldn't it?

35 A. Yes.

36  
37 COMMISSIONER: Or a long-term guardianship order?

38 A. Yes.

39  
40 COMMISSIONER: So once the child as a result of a court  
41 order is in the custody or guardianship of the Chief  
42 Executive, short-term or long-term, the Chief Executive has  
43 the power to place the child in the care of a parent of the  
44 child; that's the extended meaning of "parent" in  
45 section 11?

46 A. Yes.

47

1 COMMISSIONER: So that might be described as  
2 reunification --  
3 A. Yes.

4  
5 COMMISSIONER: -- at least in the broader sense, if it's  
6 not reunified to the natural parents from whom the child  
7 was taken, assuming the child was taken from the natural  
8 parents.  
9 A. Yes, Commissioner, I view that as reunification.

10  
11 COMMISSIONER: Yes, I'm not saying you shouldn't.  
12 A. Commissioner, I am aware - I think there is a  
13 definition, a standard definition, that may be used not  
14 just at a state level but at an Australia wide level that  
15 might also have as part of it a consideration of how long  
16 the child has been placed back with a parent as to whether  
17 or not it's been a reunification or a successful  
18 reunification.

19  
20 COMMISSIONER: Yes. But the reason I've been trying to  
21 make a distinction about what kind of reunification you're  
22 talking about is that, if it's reunification to the parent  
23 from whom the child was taken and assuming that that parent  
24 was the natural parent, and no guardianship order had been  
25 made in the meantime, then the child is sort of restored to  
26 the parent and the parent's rights have been unaffected in  
27 terms of guardianship --  
28 A. Yes.

29  
30 COMMISSIONER: -- and the parent now has, on reunification  
31 in that sense, custody of the child.  
32 A. Yes.

33  
34 COMMISSIONER: So there's a sort of restitution that's  
35 occurred.  
36 A. There is.

37  
38 COMMISSIONER: I'm not saying there's anything wrong with  
39 the broader notion of reunification. But it is relevant at  
40 a legal level to distinguish what we're talking about in  
41 terms of what rights are either restored or not. So, if it  
42 is reunification in a broader sense to a person who does  
43 not have guardianship, the guardianship would remain with  
44 the Chief Executive?  
45 A. Yes. So in the scenario, if I understand,  
46 Commissioner, if the child is the subject of a long-term  
47 guardianship order of the Chief Executive and under that

1 order a decision is made to place the child back with their  
2 parent, guardianship still sits with the State.

3  
4 COMMISSIONER: Yes.

5 A. Yes.

6  
7 COMMISSIONER: And the decision as to where the child is  
8 placed is not something over which the court has any  
9 oversight because, once the order for long-term  
10 guardianship is made, it becomes purely a matter for the  
11 Chief Executive, doesn't it?

12 A. That's so, and it's not something that I have any  
13 involvement in unless a new matter is referred to me.

14  
15 COMMISSIONER: Yes.

16 A. So it's not something that, once an order has been  
17 made, of my own volition I can commence a new proceeding.  
18 So, if it's a long-term guardianship to the Chief Executive  
19 that needs to be either revoked or varied, I can't do that  
20 unless a new matter is referred to me.

21  
22 COMMISSIONER: And when you seek long-term guardianship to  
23 the Chief Executive do you need to put before the court  
24 material that explains to the court where the child is to  
25 be placed or where the child has been placed on an  
26 aspirationally long-term basis or on whatever basis happens  
27 to be the case?

28 A. It will be part of the affidavit and the source  
29 documents setting out what the placement history has been  
30 or where the child is placed and what's proposed going  
31 forward. And I think I made reference, Commissioner, to  
32 the scenario that's not uncommon in that at the end of a  
33 short-term order there will be references made that the  
34 assessment then is long-term, but further work is to be  
35 undertaken in terms of assessments of suitable people. And  
36 so at the point the matter's received the assessment is  
37 long-term guardianship to the Chief Executive, but with  
38 the clear stated aim that a further assessment will occur  
39 of a suitable person. I note just over the lunch break  
40 I clicked on one of the new matters my office had received  
41 and it was that very scenario.

42  
43 COMMISSIONER: So the child could be, at the time the  
44 application for long-term guardianship in favour of  
45 the Chief Executive is made, in foster care, say. But,  
46 subsequent to the order being made, the Chief Executive  
47 could decide that the child should be removed from that

1 arrangement and placed somewhere else?  
2 A. Yes. What you might see, Commissioner, or what you do  
3 see is that there will be a plan to assess the carer as to  
4 their suitability to be a guardian; however, it's not been  
5 undertaken during the duration of the short-term order.  
6

7 COMMISSIONER: But shouldn't it, if one was following the  
8 priority in the Act, be undertaken before the  
9 application --

10 A. Is made.

11  
12 COMMISSIONER: -- for a long-term guardianship in favour  
13 of the Chief Executive is made?

14 A. It should if you look to the priority, but in practice  
15 at times that assessment has not been undertaken or has not  
16 been finalised.

17  
18 COMMISSIONER: Shouldn't you be satisfied and shouldn't  
19 the court be satisfied --

20 A. And so that --

21  
22 COMMISSIONER: -- the Act and the priorities set out in  
23 the Act are not being avoided by delaying the assessment of  
24 whether others might be suitable as the long-term guardian?  
25 I mean, shouldn't that be a matter of close scrutiny by you  
26 and by the court?

27 A. It should be and it is during proceedings,  
28 Commissioner, in that in terms of the scenario I put  
29 forward what tends to happen is the way the provisions in  
30 the Act now work you'll have scenarios where you have the  
31 continuous care period running, so you have a limitation  
32 built into the Act through section 62 where in order to  
33 file an application for a further short-term order you need  
34 clear evidence as to how the court in the further continued  
35 period is going to be satisfied that the child is going to  
36 be successfully reunified in that period.  
37

38 COMMISSIONER: Well, that might be so. There's a time  
39 limit of two years.

40 A. That's so. But these are matters where there is no  
41 evidence that would underpin a further short-term  
42 application; we have a custody order that's ending  
43 tomorrow; on the face of it we're now going to do some work  
44 to assess the carer as to their suitability; but as at  
45 right now, today, the only option we have open to us is  
46 long-term guardianship to the Chief Executive.  
47

1 COMMISSIONER: Is that a function, the position you face  
2 in the scenario you've just identified, a consequence of  
3 the delay in providing material to you in order to be in a  
4 position to follow the scheme of priorities in the Act?

5 A. Yes, Commissioner, it might not be a delay in  
6 providing information per se; it just may be a delay in  
7 undertaking the suitability assessment. And so you would  
8 find that there will be instances where during the  
9 proceedings related to an application seeking long-term  
10 guardianship to the Chief Executive that the amendment made  
11 in those proceedings are then to seek long-term  
12 guardianship to other because during the proceeding we then  
13 obtain a suitability assessment.

14

15 COMMISSIONER: After the long-term guardianship order is  
16 made?

17 A. No, whilst the matter's before the court, Your Honour.  
18 So at times we find ourselves needing to commence with a  
19 long-term guardianship application to the Chief Executive  
20 with the clear intent during the proceeding we will seek  
21 then the suitability assessment to be completed.

22

23 COMMISSIONER: So shouldn't the suitability assessment of  
24 others as per the priorities set out in the Act be  
25 undertaken expeditiously --

26 A. Yes.

27

28 COMMISSIONER: -- so that it is practical within the  
29 two-year period, which is quite a long period, to be able  
30 to ascertain whether there is another suitable person and,  
31 in your experience, is such suitability assessment  
32 undertaken in a timely way by the department?

33 A. In some matters it would be, Commissioner, but in  
34 other matters it's not. In other matters at the point we  
35 need to make an application the suitability assessment has  
36 not been completed.

37

38 COMMISSIONER: So you're left with effectively a fait  
39 accompli?

40 A. Yes, because we can't - it is not open to us to file  
41 for a further short-term order because of the limitations  
42 I've outlined in section 62. So where there is no evidence  
43 that --

44

45 COMMISSIONER: Have you raised concerns with the  
46 department about that circumstance, about being placed in a  
47 position where, due to omission in relation to the

1 undertaking of a suitability assessment, you have no choice  
2 effectively but to seek long-term guardianship in favour of  
3 the Chief Executive?

4 A. No, I could not point to an issue where I've raised  
5 that at a systemic level, Commissioner.

6  
7 COMMISSIONER: But it is an issue of concern, do you not  
8 agree?

9 A. It is, Commissioner. It's something that I have  
10 raised but not in a systemic way in terms of looking to  
11 either legislative amendment or as to some sort of  
12 understanding as to why it is that suitability assessments  
13 aren't being undertaken routinely during a two-year order.

14  
15 COMMISSIONER: I don't follow why that is not occurring  
16 given the evidence I've heard that the department is  
17 engaged promptly in concurrent planning. From the moment  
18 that an emergent order is made the emphasis swings to  
19 concurrent planning with a view to early as possible  
20 reunification of the child. Now, if one was doing that  
21 then that will necessarily involve or throw up other  
22 potentially suitable persons who might be prepared to take  
23 on the long-term guardianship of the child. There seems to  
24 be a disconnect here between what is said to be done in  
25 relation to reunification, which is entirely congruent with  
26 looking for another suitable person, and what you're  
27 telling me occurs in practice.

28 A. Yes, Your Honour, in that what I'd also point to is -  
29 and we've discussed this - those case planning then  
30 provisions that then create that additional obligation,  
31 referring you back to the permanency principles but at the  
32 two-year mark after which a long-term guardianship of  
33 the Chief Executive has already been made. What influence  
34 that has over internally in Child Safety and their practice  
35 I can't say. But best practice would be that, when they're  
36 considering placement of a child, from the outset they  
37 should also be considering, "What is the parallel plan?  
38 What is the plan here for this child if we are unsuccessful  
39 in getting this child home?" Are we putting them into a  
40 placement from the commencement that in time could also be  
41 a long-term placement providing them with that permanency?"

42  
43 COMMISSIONER: And in that order of priority as the third  
44 order in the case of non-Aboriginal children and Torres  
45 Strait Islander children is adoption.

46 A. Yes, Commissioner.

47

1 COMMISSIONER: What can you tell me about adoption and how  
2 that is considered in the process?

3 A. What I can say about that is, firstly, it's not part  
4 of my core functions in that I am unable to seek an  
5 adoption order unless I'm engaged by Child Safety on  
6 instructions to do so. So there is reference in my  
7 functions to being able to give advice about adoption  
8 and/or to represent the State on an adoption application.  
9 But that's very much part of if I'm engaged on a fee for  
10 service basis, and to date in terms of adoption that's not  
11 occurred. I've never been engaged to provide advice or to  
12 represent the State in adoption.

13

14 COMMISSIONER: Not in one single case?

15 A. No. No, Commissioner. Then outside of that I would  
16 say that when a matter has been referred to my office with  
17 an assessment that a child protection order is needed  
18 that's a key indicator that adoption may not be open for  
19 that matter. As I understand it, we're not talking about  
20 forced adoptions where applications are being brought to  
21 dispense with a parent's consent to the adoption. But in  
22 looking at this issue all I can point to is that it's part  
23 of Child Safety's case planning process that they do ask -  
24 how that's done I'm not sure, Commissioner, but they do  
25 enquire or ask of the parents whether adoption is something  
26 that they have considered and would consent to. When  
27 looking at this issue in every case I saw it's always a no.

28

29 COMMISSIONER: What is the basis for you saying that  
30 adoption as referred to in 5BA(4)(c) means adoption by  
31 consent, effectively?

32 A. Well, it may not be. Built into that, Commissioner,  
33 there is it must be a consideration of whether we're going  
34 to undertake what I refer to as a forced adoption.

35

36 COMMISSIONER: Forced in the sense of without the consent  
37 of the parents?

38 A. Without the consent. So adoption is a dual  
39 application approach.

40

41 COMMISSIONER: Yes.

42 A. If consent has not been provided there is an ability  
43 to bring an application to seek the dispensation of that  
44 consent.

45

46 COMMISSIONER: But in subsection (4)(c) --

47 A. Yes.

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COMMISSIONER: -- the third prescribed option, leaving aside Aboriginal and Torres Strait Islander children, which is expressly the last option, but leaving those children aside, the next preference is for the child to be adopted under the Adoption Act?

A. Yes, and there might --

COMMISSIONER: Now, it doesn't --

A. I was going to say, Commissioner, there may be instance - I'm just not aware - where a child that but for adoption may have been referred to my office has been adopted. I just don't know how many matters this may be taken into account. A parent may or parents may consent to adoption as being the option, but that's not something that is referred to my office.

COMMISSIONER: Okay. But what is it in that section in its reference to the Adoption Act leads you to believe, if I understand you properly, that adoption here doesn't mean what you've described as forced adoption?

A. Well, I just - again, I don't know. I read either option would be open to the Chief Executive to either seek an adoption order with consent or to seek an adoption order without consent. I'm just not aware of either of those things occurring.

COMMISSIONER: But in relation to the material that you've put before the court in connection with a long-term guardianship order in favour of the Chief Executive doesn't that material need to go through this order of priority and including, in the case of non-Aboriginal and Torres Strait Islander children, that adoption is not available and why?

A. Yes, Commissioner. In hearing this issue be raised I did actually in response to commence - response to commencing a review of material of a notice received started to review matters to see whether reference has been made to adoption either in the application or in any submissions. I was unable to see any reference to it, clearly.

COMMISSIONER: But doesn't it follow that - I mean, you've already said you haven't received a single reference to act for the State in relation to any single application for adoption.

A. Yes.

1 COMMISSIONER: So, that being the case, how can you be  
2 satisfied and how can the court be satisfied therefore that  
3 the order of priority set out in subsection (4) is being  
4 followed?

5 A. Other than pointing, like I said, Commissioner, to  
6 it's only a brief reference that appears as part of the  
7 case planning provisions. In terms of the review of case  
8 plans there is a question that's asked as to whether or not  
9 the parents would or had considered adoption in terms of  
10 consenting. In each of the examples I looked at the  
11 parents were recorded as a no. But that was the sum total  
12 of consideration. I could see to the option of adoption  
13 other than only in one of the matters I had regard to it  
14 was referred to as an option, but I would say in the  
15 context of a threat being made by one of the parents.  
16

17 COMMISSIONER: So, if I'm understanding you correctly, as  
18 part of a pro forma list of questions in connection to the  
19 case plan there's a question frequently asked, as it were,  
20 "Do you consent to adoption"?

21 A. Or, "Have you considered?" I'll have to look at the  
22 wording. It may be, "Has a parent or parents considered  
23 providing the consent to adoption as a permanency option,"  
24 and it's recorded as no.  
25

26 COMMISSIONER: Well, it's a bit of a different question.  
27 If the question is, "Do you consent" - the question  
28 directed to the parent, "Do you consent to adoption? No."  
29 That's different to, "Have you considered?"

30 A. Yeah, and I would have to go back and look at the  
31 wording, Commissioner.  
32

33 COMMISSIONER: Let's assume that it said, "Do you consent"  
34 - the question is, "Do you consent to adoption?" If the  
35 answer is "no" that's an end to the matter in terms of  
36 consideration of adoption?

37 A. Unless an application is going to be brought to  
38 dispense with that consent.  
39

40 COMMISSIONER: But there's nothing in (4)(c) in the  
41 meaning of "adoption" under the Adoption Act to consensual  
42 adoption?

43 A. That's so, Commissioner. That's the point I'm making.  
44

45 COMMISSIONER: But it's been apparently construed as  
46 limited to that?

47 A. Within the child protection material that I've read

1 it's very much approached from a basis of whether consent  
2 would be provided or not.

3

4 COMMISSIONER: So effectively, therefore, adoption - save  
5 for asking the parents the question, "Do you consent," to  
6 which presumably the invariable answer is "no", as you  
7 understand the material - is not considered?

8 A. That's based on my review of some of these matters,  
9 Commissioner.

10

11 COMMISSIONER: So that sort of priority is simply  
12 effectively skipped over, in substance? I'm putting a  
13 conclusion to you.

14 A. Yes.

15

16 COMMISSIONER: You don't have to agreed with  
17 the conclusion.

18 A. No. That priority, there is not evidence of there  
19 being consideration other than what I've put forward before  
20 matters are then resulting in long-term guardianships to  
21 the Chief Executive. So it's the same, Commissioner.  
22 It's, to make use of your words, skipped over where it's  
23 something that's --

24

25 COMMISSIONER: Well, not addressed seriously; let me put  
26 it that way.

27 A. Other than, yeah, a very simple question that's asked  
28 as part of a review process of a case plan.

29

30 COMMISSIONER: All right.

31

32 MR HASTIE: Commissioner.

33

34 COMMISSIONER: Yes.

35

36 MR HASTIE: I thought I was going to tender the Adoption  
37 Act. I thought you had it, but I might be mistaken.

38

39 COMMISSIONER: No, I've got the Adoption Act.

40

41 MR HASTIE: I thought its provisions effectively operate  
42 only if there was consent.

43

44 COMMISSIONER: In this context or generally?

45

46 MR HASTIE: Well, if it's an adoption under the Act, it  
47 has to be under the Act, which only allows for adoption by

1 consent.  
2  
3 COMMISSIONER: Well, if that's so the question is - yes,  
4 well, if that's the case, that's the case.  
5  
6 MR HASTIE: Yes, I just thought I would assist the  
7 Commissioner and this witness.  
8  
9 COMMISSIONER: Thank you for that.  
10  
11 MR HASTIE: But I think that's what this witness initially  
12 said anyway. But I think that's the position, but I'll  
13 clarify that overnight, Commissioner.  
14  
15 COMMISSIONER: All right. Thank you, Mr Hastie. That's  
16 helpful.  
17  
18 MR O'BRIEN: Commissioner, just if it assists.  
19  
20 COMMISSIONER: Yes.  
21  
22 MR O'BRIEN: Under section 39 of the Adoption Act there is  
23 a court power to dispense with consent, which may be what  
24 Mr Miller was speaking to or perhaps alluding to in that  
25 context. But I'm certain he would be able to assist you,  
26 Commissioner, about that.  
27  
28 COMMISSIONER: Well, thank you. Really my question is  
29 adoption under the Adoption Act in this context -  
30 specifically the reference to the Adoption Act in  
31 subparagraph (c) - confined to consensual adoption not  
32 necessarily so if there's power to dispense with consent in  
33 - what was the section?  
34  
35 MR O'BRIEN: Section 39.  
36  
37 COMMISSIONER: 39. So one doesn't know from simply  
38 reading subparagraph (c) - well, the question is what is  
39 meant by "adoption" under the Act.  
40  
41 MR O'BRIEN: Quite so. And I think that Mr Miller -  
42 I expect him to explain it. There are real policy concerns  
43 obviously with forced adoption in the context of which has  
44 historically occurred.  
45  
46 COMMISSIONER: Of course.  
47

1 MR O'BRIEN: But I'm certain that he'd be able to assist  
2 you, Commissioner, on those issues.

3

4 COMMISSIONER: Of course. Thank you. Thank you very  
5 much. Mr Miller, you've heard that exchange. Do you want  
6 to add something in relation to what we've discussed in  
7 relation to adoption as an option?

8 A. Other than again expressing that taking into account  
9 the history of forced adoptions --

10

11 COMMISSIONER: Yes.

12

13 A. -- that, like I said, the evidence as I've seen it in  
14 the matters I've reviewed, the only reference to adoption  
15 is in the context of consent and whether or not it would be  
16 provided. Prior to my appointment to this role I had some  
17 involvement in a small number of adoptions, and one of  
18 those included an application to dispense with consent.  
19 But it's not been - I guess, in terms of on the  
20 commencement of this role and my office, it's not been  
21 something that we've ever been engaged in in terms of  
22 providing instructions or appearing on an adoption. So  
23 I can't give any evidence as to whether in fact adoptions  
24 do occur and, if so, how many and whether they're all based  
25 on consent only.

25

26 COMMISSIONER: Yes. And I'm not interested in this issue  
27 from the point of view of whether - well, contesting the  
28 merits of adoption as such but rather whether the Act and  
29 what it presently provides for as a sequence of priorities  
30 is being complied with. And just on a quick reading of  
31 section 39 of the Adoption Act I see the opportunity or the  
32 scope for dispensing with consent is pretty limited under  
33 the Act. In fact I will have to digest that, but it's a  
34 pretty narrow area and no doubt with good reason.

35

36 A. And when viewing the orders or the principles around  
37 the achieving permanency of a child we've been referring to  
38 section 5BA(4). If you also then have regard to the  
39 earlier principles in 5BA(2) where there's reference to  
40 ensuring the wellbeing and best interests of the child the  
41 action or order that should be preferred, having regard to  
42 the principles in 5B and C, "is the action or order that  
43 best ensures the child experiences or has". What I would  
44 say is if you look at subsection (a), so 5BA(2)(a), these  
45 things in terms of taking into account the ongoing  
46 relationships with people of significance, including their  
47 parents, siblings or extended family members, separate to  
carers who they will be living with --

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COMMISSIONER: I mean, there's an argument, isn't there, that in the order of priorities in subsection (4) (c) is in the wrong place, arguably; that that should come after (d)? It should be (d), maybe, rather than (c).

A. Well, that's so, Commissioner. The point I'm making is adoption as a legal mechanism is very different to any child protection order we have. It severs all legal connection between the child and their family. Now, there is some flexibility, as I understand it, based solely on the agreement of the people involved that there may be a level of contact post-adoption. There might be, you know, an agreement that yearly updates might be provided or something. But if a child is adopted that severs any relationship and any legal relationship they have with their family.

COMMISSIONER: I understand your point. You're saying that really (c) fights against (2)(a).

A. It very much does in terms of the practical effect. So in order and what sits along parallel with these permanency principles is the permanent care order that was introduced to in effect attempt to provide the same legal permanency in terms of I'm the only person that's empowered to try and revoke or vary one of those orders. But sitting alongside those orders is very much an ongoing obligation on the permanent carer to maintain the child's connection with their family and their siblings.

COMMISSIONER: Well, as I say, there may be very good reason to downgrade or sort of adjust the order of priorities in subsection (4) in relation to adoption for a variety of reasons, including arguably an internal inconsistency or conflict between the principles in 5BA(2)(a), perhaps (b) as well and adoption.

A. Because what you do see, Commissioner, in terms of the social science that underpins that 5BA(2)(a), you will consistently see within reports, within independent social assessment reports the value that's placed on a child's relationship with their siblings, and it's often referred to as the longest relationship a person will have in terms of relationships throughout their lifetime will be their relationship with their siblings.

COMMISSIONER: Yes, I appreciate that. Thank you for clarifying that. But while we're on the principles in the Act I wonder if you might help me with the paramount

1 principle, section 5A, because again you could say in a  
2 particular case that the paramount principle might in any  
3 event override the order of priority in section 5 - well,  
4 it would override because it is paramount --

5 A. Yes, it does.

6  
7 COMMISSIONER: -- if it were in conflict with the order of  
8 priority in section 5BA(4).

9 A. Yes.

10  
11 COMMISSIONER: Because the Act says in terms in section  
12 5(2), "All other principles stated in this Act are subject  
13 to the principles stated in section 5A."

14 A. That's so, Commissioner.

15  
16 COMMISSIONER: So that would be another sort of argument  
17 in relation to adoption.

18 A. That's so. And there's been amendments made to the  
19 paramount principle, Commissioner, in that the original  
20 iteration of it was very much just mirroring what you see  
21 in the Family Law Act, taking into account the best  
22 interests of the child, their safety, wellbeing and best  
23 interests. But there has been an amendment made to this  
24 that has you have regard to not just what is in that  
25 child's best interests at that point in time but looking  
26 forward to what you're doing and how it may have impact  
27 throughout their life.

28  
29 COMMISSIONER: Well, that's precisely what I wanted to ask  
30 you about because I'm aware that the addition of the words  
31 "both through childhood and for the rest of the child's  
32 life" were added by amendment - I'm not sure, I think - but  
33 I can't remember now precisely what it was --

34 A. I can't remember, Commissioner, but it was relatively  
35 recently in terms of the scheme of the Act.

36  
37 COMMISSIONER: Yes. I find that addition troubling  
38 analytically for this reason. Any assessment of what's in  
39 the best interest of the child requires an evaluation and  
40 some projection, some forecast, based on known facts at the  
41 time: the circumstances of the child, the family  
42 arrangements, all sorts of factors that would bear upon an  
43 assessment of what is in the best interest of that child  
44 there and then.

45  
46 To add to that consideration of what's in the best interest  
47 of the child at, let's say, today as a point in time both

1 through childhood and for the rest of the child's life  
2 seems to me on its face to impose a highly speculative  
3 element that one could at best guess about because the  
4 journey of the child's life as we sit here today - let's  
5 assume the child is 10 years old - is unknowable to those  
6 asked to make this assessment.

7

8 So for my own part I'm not sure how it adds clarity to  
9 anything. Indeed I would suggest it makes the exercise  
10 that is to be undertaken by those charged with making that  
11 assessment a highly speculative venture. But if you have a  
12 different view to that or would like to express a different  
13 view I would welcome it. Can I ask that you think about  
14 that overnight, it being 4 o'clock. And I'm sorry to get  
15 you back for another day, but I promise - well, I better  
16 not make any promises.

17 A. Yes, Commissioner. And I should say if I'm turning my  
18 head, Commissioner, it's just that I have some problems  
19 with my hearing in my left ear.

20

21 COMMISSIONER: No, that's all right. Tell me if I'm not  
22 speaking loudly enough to hear, please.

23 A. Yes. And so would you like me to consider that  
24 overnight; is that --

25

26 COMMISSIONER: Yes. I'm not sure what it adds other than  
27 uncertainty.

28 A. Yes, Commissioner.

29

30 COMMISSIONER: But there might be some good thinking  
31 behind it. I would like to know what that is.

32 A. I'll consider it.

33

34 COMMISSIONER: All right.

35

36 MR HASTIE: Commissioner, can I just tender the  
37 alternative language guide which was referred to by the  
38 witness yesterday, just before we break?

39

40 COMMISSIONER: Yes, the updated version.

41

42 MR HASTIE: The updated version.

43

44 COMMISSIONER: Yes, thank you, Mr Hastie.

45

46 MR HASTIE: Commissioner, you might recall there were two  
47 components of that which my learned friend asked the

1 witness about. If you go to the second page with the  
2 heading "Advice versus instruction", on the right-hand side  
3 you'll just see the commentary now is, "If you have any  
4 concerns about the instructions received you should discuss  
5 these with your senior legal officer."  
6

7 COMMISSIONER: Yes.  
8

9 MR HASTIE: And as I recall it, Commissioner, the other  
10 component was on page 3 where there's the heading "A clear  
11 distinction between practice and legal advice". There's  
12 the same statement that, "OCFOS lawyers do not provide  
13 practical advice." You might recall the witness was unable  
14 to assist you, Commissioner, with what that meant. But if  
15 go down further you will see, for instance, what the OCFOS  
16 lawyer has suggested that they say. The third comment  
17 perhaps is a good example above from the bottom. It says:  
18

19 *Your STL/senior practitioner can help you*  
20 *map out your practice options and go*  
21 *through how to approach conversations with*  
22 *the family. "The legal advice I can offer*  
23 *is".*  
24

25 In other words, a clear distinction is drawn between the  
26 OCFOS lawyer in effect saying, "Look, I'm not a social  
27 worker. You're the social worker. You might want to go to  
28 someone else about your practical options, but it's not my  
29 role to give professional advice in the nature of a social  
30 worker or a psychologist," although lawyers profess to do  
31 that from time to time, I suppose. The other thing --  
32

33 COMMISSIONER: We profess all sorts of expertise,  
34 Mr Hastie.  
35

36 MR HASTIE: Yes. The other thing, Commissioner, is, like  
37 this witness, my client is unable to provide any data that  
38 shows the transition or the number of transition or the  
39 percentage of transition of people or children who go from  
40 what might be described as emerging orders to guardianship  
41 orders. In other words, you might recall this witness gave  
42 evidence that what he wasn't sure - he could tell you the  
43 number of people who had emergent orders and guardianship  
44 orders from both statistics from my client, that is the  
45 department, and his office, there would be an overlap  
46 between the two, but we weren't able to tell this  
47 Commission where the overlap was.

1  
2 COMMISSIONER: So do you mean custodial emergent orders  
3 or --  
4  
5 MR HASTIE: Yes. In other words, some children might be  
6 subject to emergent orders but never get to a guardianship  
7 order or a long-term guardianship order.  
8  
9 COMMISSIONER: Or any our kind of --  
10  
11 MR HASTIE: Or any other kind of order. I just don't have  
12 that --  
13  
14 COMMISSIONER: So a short-term custody order, for example,  
15 none of that data --  
16  
17 MR HASTIE: Unless it's captured by those orders, but we  
18 wouldn't be able to tell you whether or not a further order  
19 was made.  
20  
21 COMMISSIONER: But you have data as to the number of  
22 emergent orders and the kinds of emergent orders --  
23  
24 MR HASTIE: Yes.  
25  
26 COMMISSIONER: -- or the number of emergent orders by  
27 category; do you have that data?  
28  
29 MR HASTIE: Yes, and I think that data has been provided.  
30 What we can't tell you is whether of the guardianship  
31 orders, for instance, how many of those people who were on  
32 emergent orders --  
33  
34 COMMISSIONER: The later guardianship orders --  
35  
36 MR HASTIE: Yes.  
37  
38 COMMISSIONER: -- how many of those children were subject  
39 to earlier --  
40  
41 MR HASTIE: No, how many of those earlier orders those  
42 children went on to get later orders.  
43  
44 COMMISSIONER: Or the reverse; how many of the later had  
45 earlier been made the subject to an emergent order?  
46  
47 MR HASTIE: Well, you'd probably get the later because

1 I think in this witness's statement and in the report you  
2 can see the number of emergent orders that is transferred  
3 to the Director's office. One of the tables he took you  
4 to, Commissioner, showed you that. So we know that  
5 information. What we don't know is whether or not some of  
6 the emergent orders just weren't carried - didn't go  
7 anywhere after that.

8

9 COMMISSIONER: So there was no referral?

10

11 MR HASTIE: Or there might not have been any referral, or  
12 indeed I suppose there might be the short-term orders - we  
13 can't provide data about that either - short terms that  
14 didn't go to long-term orders; would that be correct?

15 A. Yeah, sorry, the point, Commissioner, I was making was  
16 that I don't know what proportion of children who are  
17 removed under a temporary assessment order in time end up  
18 on a long-term order. So it's the same question about we  
19 don't know how often children are being reunified.

20

21 COMMISSIONER: Prior to the matter getting to your hands?

22 A. Or even after. So I don't - there would be a large  
23 proportion of children that I receive on a temporary  
24 custody order that may have been already the subject of a  
25 court assessment order or even a temporary assessment  
26 order, and then if we go forward in time how many of those  
27 children move through the system and end up on a long-term  
28 order. It's about --

29

30 COMMISSIONER: You have good data about what your  
31 activities involve?

32 A. Yes. From the moment we take over and in time perhaps  
33 with somebody with the requisite skills as my dataset  
34 increases in size with all the end dates of orders that  
35 have been made and linking them back to matters that might  
36 be re-referred we might be able to start to establish how  
37 often children by absence of being re-referred to my office  
38 are being reunified. But otherwise I just don't know how  
39 often we are successful in the best laid plans through  
40 these case plans to getting kids home.

41

42 COMMISSIONER: All right. Well, Mr Hastie, are you  
43 telling me that your client doesn't have data in relation  
44 to the number of emergent orders that result in a  
45 reunification or some other arrangement without proceeding  
46 further to the child protection order stage? I think what  
47 I will do, Mr Hastie, is this. At the moment I'm

1 struggling to digest all the dimensions of the data that is  
2 and isn't available. It would be better, I think, if we,  
3 so to speak, take this off-line and I'll ask somebody from  
4 - one of counsel to speak to you or others to see what we  
5 have got and what's missing so I can understand that, and  
6 then if need be we can have a further discussion about it.

7

8 MR HASTIE: Yes. Thank you, Commissioner.

9

10 COMMISSIONER: Is that convenient?

11

12 MR HASTIE: Yes, that's convenient.

13

14 COMMISSIONER: Because I feel like I'm getting lost in  
15 this data set at the minute.

16

17 MR HASTIE: Commissioner, the only other thing that  
18 I thought I'd ask with your indulgence, it was proposed  
19 that there be another witness called this week,  
20 Clair Martin.

21

22 COMMISSIONER: Yes.

23

24 MR HASTIE: I'm assuming Counsel Assisting has some  
25 questions of this witness at some point.

26

27 COMMISSIONER: She may.

28

29 MR HASTIE: And I do.

30

31 COMMISSIONER: Yes, of course.

32

33 MR HASTIE: I'm assuming Mr Creamer does. So I'm just  
34 trying to work out whether - I wouldn't want to be in the  
35 situation where Ms Martin is sort of part-heard or only  
36 just gets to start on Friday and I'm just wondering whether  
37 we could make an election about her being called.

38

39 COMMISSIONER: A perfectly reasonable enquiry, Mr Hastie.  
40 I would expect - sorry to convey this to you, Director, but  
41 I would expect that the Director will be here for tomorrow,  
42 or most of it. If we finish a bit early, so be it. So for  
43 the purposes of making arrangements I would say your  
44 witness, the next witness, not before Friday.

45

46 MR HASTIE: Yes.

47

1 COMMISSIONER: Does that assist you?  
2  
3 MR HASTIE: That assists.  
4  
5 COMMISSIONER: Or are you concerned that we won't get to  
6 her?  
7  
8 MR HASTIE: I'm concerned that, even if we started Friday  
9 at some point, we wouldn't finish her.  
10  
11 COMMISSIONER: Well, we might just - is the witness in  
12 Brisbane?  
13  
14 MR HASTIE: Yes, Commissioner.  
15  
16 COMMISSIONER: Okay. So if we review --  
17  
18 MR HASTIE: She's South East Queensland.  
19  
20 COMMISSIONER: If we reviewed the position at, say,  
21 lunchtime tomorrow we would be able to decide I think then  
22 whether to have to defer that witness or whether we think  
23 it's realistic that we can start and make some progress at  
24 least on Friday.  
25  
26 MR HASTIE: Thank you.  
27  
28 COMMISSIONER: Is that convenient to you?  
29  
30 MR HASTIE: Yes, thank you, Commissioner.  
31  
32 COMMISSIONER: All right. And I'll just mark - the  
33 alternative language guide dated November 2025 will be  
34 CL-75.  
35  
36 **EXHIBIT #CL-75 - ALTERNATIVE LANGUAGE GUIDE DATED NOVEMBER**  
37 **2025**  
38  
39 MR HASTIE: Thank you, Commissioner  
40  
41 MR O'BRIEN: Commissioner, if it's convenient, might  
42 I raise one issue that's not data related?  
43  
44 COMMISSIONER: Yes, please. That's a relief.  
45  
46 MR O'BRIEN: Commissioner, you asked my client some  
47 questions about adoption. I wanted to draw your attention,

1 if you haven't seen it already, that there is a bill  
2 pending in Victoria, the Children, Youth and Families  
3 Amendment (Stability) Bill of 2025, and one of the proposed  
4 amendments is to remove adoption for the hierarchy of child  
5 protection considerations, and the explanatory memorandum  
6 goes into some detail about the policy reasons behind that.  
7 So I could tell that was one thing you were interested in  
8 and that might provide some guidance.

9  
10 COMMISSIONER: Well, that's very helpful. Thank you very  
11 much for bringing that to my attention.

12  
13 MS McMILLAN: Mr Commissioner, I might just add there is  
14 another adoption process of course under the Family Law  
15 Act, section 60G. That is the stepparent adoption.

16  
17 COMMISSIONER: Yes.

18  
19 MS McMILLAN: So you're no doubt aware of that.

20  
21 COMMISSIONER: Well, in a general sense.

22  
23 MS McMILLAN: Yes. And also, this witness, you've asked  
24 him to look at the paramountcy issue overnight. He would  
25 no doubt be aware, as you would be, that paramountcy  
26 appears in a lot of legislation.

27  
28 COMMISSIONER: Yes.

29  
30 MS McMILLAN: So like working with children clearance.

31  
32 COMMISSIONER: Of course. The Family Law Act, isn't it?

33  
34 MS McMILLAN: Well, it doesn't actually define; it just  
35 says "best interests".

36  
37 COMMISSIONER: Isn't that the paramount principle?

38  
39 MS McMILLAN: Well, it is. But a recent UK I just saw was  
40 that it doesn't convey a hierarchy but the virtue of a  
41 item's position in the list of what's best interest.  
42 Anyway, on that note, I will leave the witness to think  
43 about it overnight.

44  
45 COMMISSIONER: Yes, thank you. Thank you very much. Do  
46 you want to say anything, Counsel Assisting? All right.  
47 There's virtue in silence. I should learn that.

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MS SWEET: I'm saving my voice for tomorrow.

COMMISSIONER: All right. Thank you very much, everybody.  
We'll adjourn until 10 o'clock tomorrow.

**THE HEARING WAS ADJOURNED AT 4.14PM UNTIL THURSDAY,  
11 DECEMBER 2025**

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