

CHILD SAFETY COMMISSION OF INQUIRY

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

On Monday, 8 December 2025 at 10.01 am

Before: Mr Paul Anastassiou KC, Commissioner

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

1 COMMISSIONER: Mr Hastie.  
2  
3 MR HASTIE: Commissioner, I call Angela Schifilliti, who's  
4 in the witness box.  
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6 MS SWEET: Could I --  
7  
8 MR HASTIE: Sorry.  
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10 COMMISSIONER: Yes, I think Ms Sweet has something to say.  
11 Ms Sweet.  
12  
13 MS SWEET: It didn't occur to me to remind my learned  
14 friend that I would be making some opening remarks about  
15 this week. So I apologise to my learned friend for that.  
16  
17 COMMISSIONER: Ms Schifilliti, if you don't mind just  
18 waiting for a few minutes. I don't think this will take  
19 long. Thank you.  
20  
21 MS SWEET: Thank you, Your Honour. This week,  
22 Your Honour, the Commission of Inquiry conducts a public  
23 hearing into the child protection litigation model.  
24  
25 COMMISSIONER: Yes.  
26  
27 MS SWEET: Your Honour will hear from representatives of  
28 the Official Solicitor and also from the Director of Child  
29 Protection Litigation at the very least.  
30  
31 COMMISSIONER: Yes.  
32  
33 MS SWEET: And potentially other witnesses with direct  
34 experience of the litigation model. Decisions made by  
35 courts and tribunals under child protection law are by  
36 their nature intrusive and can be enormously impactful on  
37 the subject children and their families. The power of  
38 the State looms large here in circumstances where emergent  
39 orders, including those for temporary custody of the  
40 subject child, are predominantly heard ex parte - that is  
41 to say without notice to the parents - and there is limited  
42 legal representation for children and families caught up in  
43 the process, people who are often suffering from social  
44 disadvantage and in a vulnerable state.  
45  
46 In its final report in 2013 the Queensland Commission of  
47 Inquiry into Child Protection, known as the Carmody

1 Inquiry, identified a number of recommendations that were  
2 made to address issues within the child protection  
3 litigation model. Those recommendations included  
4 recommendation 13.16, which was that the then Department of  
5 Communities, Child Safety and Disability Services enhance  
6 its in-house legal service provision by establishing an  
7 internal office of the Official Solicitor within the  
8 department which will have responsibility for the following  
9 three things: first, providing early, more independent  
10 advice to departmental officers in the conduct of  
11 alternative dispute resolution processes and the  
12 preparation of applications for child protection orders;  
13 second, working closely with the proposed specialist  
14 investigation teams so that legal advice is provided at the  
15 earliest opportunity; and, third, preparing briefs of  
16 evidence to be provided to the proposed Director of Child  
17 Protection in matters where the department considers a  
18 child protection order should be sought.

19  
20 Other recommendations included recommendation 13.17 that  
21 the Queensland Government establish an independent  
22 statutory agency, the Director of Child Protection, within  
23 the justice portfolio to make decisions as to which matters  
24 will be the subject of a child protection application and  
25 what type of child protection order will be sought, as well  
26 as for the Director to litigate those applications.

27  
28 This recommendation adds that staff from the Director of  
29 Child Protection will bring applications for child  
30 protection orders before the Childrens Court and higher  
31 courts except in respect of certain interim and emergent  
32 orders where it is not practicable to do so. In the latter  
33 case, some officers within the department will retain  
34 authority to make such applications.

35  
36 Recommendation 13.18 provided for the department to move  
37 progressively towards requiring all court coordinators to  
38 be legally qualified and for their role to be recast to  
39 provide legal advice within the Office of the Official  
40 Solicitor or to transfer the role to the independent  
41 Director of Child Protection Litigation.

42  
43 Recommendation 13.20 was for the minister to propose  
44 amendments to the Child Protection Act to provide that  
45 before granting a child protection order the Childrens  
46 Court must be satisfied that the department has taken all  
47 reasonable efforts to provide support services to the child

1 and the family, and that participation by a parent in a  
2 family group meeting and their agreement to a case plan  
3 cannot be used as evidence of an admission by them in any  
4 of the matters alleged against them; and that in  
5 recommendation 13.21 that the department ensure that when  
6 filing an application for a child protection order its  
7 supporting affidavit material attests to the reasonable  
8 steps taken to offer support and other services to a  
9 child's family and to work with them to keep the child  
10 safely at home.

11  
12 These recommendations reflected the Commissioner's  
13 conclusion that there was a need for greater professional  
14 separation between the delivery of frontline child  
15 protection services and the provision of advice on child  
16 protection proceedings, as well as earlier access to legal  
17 advice within the department to resolve matters sooner.

18  
19 As a result, in 2016, Your Honour, the Office of  
20 the Official Solicitor and the Director of Child Protection  
21 Litigation were established for the purpose of delivering a  
22 permanent child protection litigation model. According to  
23 submissions received by this Commission, there have been a  
24 number of reviews of this child protection litigation model  
25 by external consultants. All of the outcomes of those  
26 reviews have generally not been made public.

27  
28 Further, in early 2024 a child protection review project  
29 was launched jointly by the Department of Justice and the  
30 Attorney-General and the Department of Child Safety to  
31 deliver a permanent child protection litigation model,  
32 which means that as at early 2024 it was the position of  
33 the then government that there wasn't currently a permanent  
34 child protection litigation model and that the model - at  
35 the time the model that exists today was temporary. The  
36 outcome of that project is unclear and again has not been  
37 made public.

38  
39 In May 2025 the new government called this Commission of  
40 Inquiry. The terms of reference make specific reference to  
41 the court and tribunal processes in the context of fixing a  
42 broken system and the need to review the effectiveness of  
43 the child safety system to keep children safe. This  
44 Commission called for submissions into the child protection  
45 litigation model. There continues to be on this aspect and  
46 all other aspects an unprecedented level of engagement by  
47 the community with this Commission. The Commission has now

1 received over 700 submissions, more than twice that  
2 received by the Carmody Inquiry.

3

4 We have heard through submissions from those working within  
5 the model, including child safety officers and lawyers.  
6 We've heard from those who participate in the model or  
7 attempt to participate in the model, including parents and  
8 carers, and we've heard from peak bodies, legal services,  
9 unions and other interested organisations.

10

11 A brief summary of matters that we have been told about,  
12 including from parents, are various frustrations at being  
13 able to have their side of events heard by the court in a  
14 timely way, and often this is not occurring until well into  
15 the litigation process, such that there is a perception the  
16 department's narrative becomes a de facto uncontested  
17 record of events which is then difficult to rebut. We've  
18 heard from parents about being denied the opportunity to  
19 cross-examine child safety officers who had deposed to  
20 affidavits in proceedings. We've heard about frustration  
21 with the number of adjournments and how long matters,  
22 including interim matters, are taking to be finalised.  
23 We've heard frustrations about the lack of consistency in  
24 magistrates hearing child protection matters. We've heard  
25 about the process being overly complicated, about parents  
26 being the subject of allegations based on speculation and  
27 innuendo rather than fact, and the lack of enforceability  
28 of plans made in family group meetings, about the lack of  
29 consequences if the commitments set down in these plans are  
30 not followed through or actioned.

31

32 We've heard from frontline workers. We've heard that the  
33 litigation model creates barriers that undermine the  
34 department's work to achieve legal permanency for the  
35 children the subject of the orders. We've heard that  
36 timeframes to resolution, including interim matters, may  
37 take - particularly interim matters, can take up to  
38 18 months before finalisation. We've heard about alleged  
39 failures by OCFOS and the DCPL to prioritise planned  
40 referrals to commence applications for permanent care  
41 orders or long-term guardianship to other orders, leading  
42 to months of delay; and we've heard about the fact that  
43 court material or material that's put before the court goes  
44 through three sets of hands and then - the child safety  
45 service centre, the Official Solicitor's office and the  
46 Office of the DCPL, which we have heard creates room for  
47 error and delay due to the number of people through whom

1 the matter has to progress before being filed.

2

3 We've heard from lawyers that the litigation model is run  
4 on the basis that the matter should be ready to run to  
5 trial by the first mention date, which leads to child  
6 safety officers spending unnecessary and inordinate times -  
7 amounts of time preparing lengthy briefs at an early stage  
8 for matters that will ultimately often finalise without the  
9 need for a contested hearing. We've heard that there is a  
10 beyond reasonable doubt mindset that is used by the Office  
11 of the Director rather than a balance of probabilities  
12 mindset, which results in requirements for unnecessary  
13 documentary evidence to be provided, again for matters that  
14 more often than not will not progress to final hearing.

15

16 We've heard from carers that over time it has become  
17 increasingly harder for carers to understand, participate  
18 in or influence the legal proceedings that determine a  
19 child's long-term care arrangements, and we have heard from  
20 carers' perspective that there is a shift towards appeasing  
21 parents and allowing them to dictate the permanency pathway  
22 even when those parents are not complying with case plan  
23 requirements and which leads to outcomes that, at least  
24 from the carer's perspective, are not in the best interests  
25 of the child.

26

27 We've also heard from the Together union, which represents  
28 a great number of child safety workers, that their feedback  
29 from frontline workers said the current model has increased  
30 workloads, created extensive communication challenges and  
31 resulted in a disconnect between the legal and child  
32 protection frameworks, which affects the ability of these  
33 workers to deliver the best outcomes for children in care.  
34 We've also heard that the union supports the removal of the  
35 Director of Child Protection Litigation, or that office, as  
36 an independent statutory office, and a recommendation that  
37 the work currently conducted by OCFOS and DCPL be  
38 integrated into a singular legal body within the Department  
39 of Child Safety.

40

41 We will commence today, as my learned friend indicated,  
42 with the evidence from the Official Solicitor of the Office  
43 of the Child and Family Official Solicitor. Ms Schifilliti  
44 will give evidence about matters that have been - in  
45 addition to other things, the matters that have been the  
46 subject of a notice sent to her office by the department,  
47 including an explanation of why in some instances there is

1 no written legal advice recorded in the department's  
2 document management systems in respect of matters where  
3 emergent orders have been sought or where a matter has been  
4 referred to the Director for child protection orders.

5  
6 Ms Schifilliti will also give evidence about what role her  
7 office plays in providing early advice to the department  
8 through the investigation and assessment process in seeking  
9 emergent orders and providing legal advice regarding  
10 interactions with DCPL; and the office's rationale for its  
11 position that it is not appropriate for it to participate  
12 in decision-making processes such as practice panels and  
13 family group meetings; and, finally, evidence in respect of  
14 the office's workforce expenditure.

15  
16 Following hearing from the Official Solicitor, Your Honour,  
17 later in the week the Commission will call the Director of  
18 Child Protection Litigation, who will speak to, amongst  
19 other things, the office's functions, powers and structure;  
20 the child protection litigation model in practice; again,  
21 workforce expenditure; the operation of section 99 of  
22 the Child Protection Act, which, amongst other things,  
23 operates to continue a relevant order that is in force when  
24 the DCPL makes a child protection order application; the  
25 provision of information by the Director to interested  
26 parties in the proceeding; the relationship between the  
27 Director and the Official Solicitor, and generally about  
28 the bifurcation of the litigation model; and a high-level  
29 review of the office's performance across 2023 to 2025.

30  
31 Your Honour, those are my opening remarks.

32  
33 COMMISSIONER: Thank you, Ms Sweet. Mr Hastie.

34  
35 MR HASTIE: Ms Schifilliti, your full name is - your  
36 first name is Angela, and you are the Official Solicitor?

37  
38 MS SCHIFILLITI: That is correct.

39  
40 MR HASTIE: And you've prepared a statement, as my learned  
41 friend said?

42  
43 MS SCHIFILLITI: M'hmm.

44  
45 MR HASTIE: It's dated 3 November 2005, and the contents  
46 of that are true?  
47

1 MS SCHIFILLITI: Yes.

2

3 COMMISSIONER: We might just affirm the witness.

4

5 MR HASTIE: I beg your pardon.

6

7 COMMISSIONER: We should affirm or swear in --

8

9 MR HASTIE: Sorry, Commissioner, forgot about that.

10

11 COMMISSIONER: That's okay.

12

13 <ANGELA SCHIFILLITI, AFFIRMED

[10.17 am]

14

15 <EXAMINATION BY MR HASTIE

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17 MR HASTIE: Now you can swear the contents of that  
18 statement dated 3 November are true?

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A. M'hmm.

Q. And then became a solicitor in 2004?

A. Yes.

Q. And you worked then for the New South Wales Department  
of Communities and Justice in child protection?

1 A. Yes.  
2  
3 Q. And you did that between 2006 and 2018?  
4 A. That's correct.  
5  
6 Q. I'll return to that subject, Commissioner.  
7  
8 But then you became employed in the Queensland Office of  
9 the Child and Family Official Solicitor?  
10 A. M'hmm.  
11  
12 Q. In 2018?  
13 A. That's correct.  
14  
15 Q. And last year in June you became the Acting Official  
16 Solicitor and a year later you became the Official  
17 Solicitor?  
18 A. Yes.  
19  
20 Q. Right. In your statement, and as my learned friend  
21 said, you deal with the question of emergent orders?  
22 A. M'hmm.  
23  
24 Q. And I'd just like you to explain how that operates,  
25 they operate in practice?  
26 A. Thank you, Mr Hastie. If you might indulge me, I'd  
27 like to start by just explaining essentially what my team  
28 does.  
29  
30 COMMISSIONER: Sorry, Ms Schifilliti, you'll have to speak  
31 up a little bit.  
32 A. Sorry. Is that better?  
33  
34 COMMISSIONER: Yes. You'll have to keep your voice up a  
35 bit.  
36 A. Okay.  
37  
38 COMMISSIONER: I know it's difficult.  
39 A. So the Office of the Child and Family Official  
40 Solicitor consists of 77 positions. The majority of those  
41 positions are legal officer positions at varying levels,  
42 and we also have nine litigation support officers. My team  
43 is based in child safety service centres across the entire  
44 state. There are not many child safety service centres  
45 that do not have a legal officer based in them. The only  
46 reason why we would not have a legal officer based in one  
47 of those child safety service centres is due to the

1 inability to recruit staff to that office.

2

3 Our role is primarily to provide legal advice and  
4 representation to the Chief Executive, and by way of their  
5 delegates to the child safety officer and the senior team  
6 leader, with legal advice and representation on emergent  
7 orders, with legal advice on expiring orders - so that's  
8 where there's a child protection order that may have been  
9 in effect for two years that's expiring - as well as  
10 variations of long-term orders, which are usually long-term  
11 guardianship orders. We're also responsible for doing  
12 referrals across to the Office of the Director of Child  
13 Protection Litigation, or DCPL. Because we're based in  
14 child safety service centres, we also do a lot of training  
15 of child safety officers and senior team leaders.

16

17 Mr Hastie, in relation to your particular question around  
18 emergent orders, so emergent orders consist of temporary  
19 assessment orders, court assessment orders and temporary  
20 custody orders.

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22 COMMISSIONER: Just say those again, please?

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1 A. So for temporary assessment orders I think I probably  
2 need to make the distinction between - temporary assessment  
3 orders are heard by a magistrate, as are temporary custody  
4 orders, and those applications can be ex parte  
5 applications. They differ from court assessment orders, or  
6 CAOs, in that those applications are actually filed in the  
7 Childrens Court and they're heard by the Childrens Court,  
8 and they require personal appearances. So there's a  
9 distinction in those particular types of emergent orders.

10  
11 COMMISSIONER: Do TAO and the temporary custody order --  
12 A. M'hmm.

13  
14 COMMISSIONER: -- each order is made by the Childrens  
15 Court, aren't they?

16 A. By the magistrates. You actually make the application  
17 to a magistrate. So they're not actually - they're not  
18 filed and listed for mention. Only the CAOs are filed and  
19 listed for mention.

20  
21 COMMISSIONER: But they have to come before the magistrate  
22 in some way?

23 A. Yes, they do.

24  
25 COMMISSIONER: And is the magistrate a magistrate sitting  
26 in the Childrens Court? Magistrates sit in both the  
27 general --

28 A. Yes.

29  
30 COMMISSIONER: -- lists of the Magistrates' Court and  
31 I imagine also in the Childrens Court when the magistrate  
32 or the Magistrates Court is sitting as the Childrens Court?

33 A. There's a distinction under the Act between them,  
34 but - between making an application to a magistrate and  
35 making an - and essentially filing in the Childrens Court.

36  
37 COMMISSIONER: Yes. But in any event the temporary  
38 assessment order either as a TAO or a CAO or a temporary  
39 custody order are each orders of the court?

40 A. Yes.

41  
42 COMMISSIONER: Yes. And on application by the department?

43 A. That's correct.

44  
45 COMMISSIONER: And they're routinely ex parte, are they  
46 not?

47 A. They may be ex parte, and that's at the discretion of

1 the particular magistrate.

2

3 COMMISSIONER: But --

4 A. So the legislation allows for that.

5

6 COMMISSIONER: So the magistrate may require you to serve  
7 the parents or some other interested person?

8 A. So what can happen is that if we - in making the  
9 application we would always ask the CSO and the senior team  
10 leader whether or not the parents want to be heard on that  
11 application, and the parents contact details, and when we  
12 send that application through to the court through the  
13 registry we would actually include that information so the  
14 magistrate is aware of whether or not the parents want to  
15 be heard, and if the parents do want to be heard we would  
16 provide them with a copy of that application.

17

18 COMMISSIONER: And adjust the timing of the application to  
19 allow the parents to be represented, if necessary?

20 A. That would be a matter for the magistrate.

21

22 COMMISSIONER: You're the moving party, and the matter  
23 comes to the magistrate and he's told that the parents want  
24 to be heard?

25 A. M'hmm.

26

27 COMMISSIONER: That's the case, isn't it?

28 A. Yes, yes.

29

30 COMMISSIONER: And then you say it's a matter for the  
31 magistrate whether he allows time for the - if necessary,  
32 for the parents to be represented and be heard?

33 A. Yes.

34

35 COMMISSIONER: Yes. All right. I had understood from  
36 other evidence that routinely the applications are made  
37 without notice to the parents?

38 A. No.

39

40 COMMISSIONER: That's wrong, is it? Is that incorrect?

41 A. I'm not saying that's incorrect. I'm - it's an  
42 expectation that I would have of our lawyers to always ask  
43 the question of CSOs and of senior team leaders as to  
44 whether or not parents want to be heard on the application.

45

46 COMMISSIONER: So you expect your lawyers to notify the  
47 parents that they can be heard?

1 A. It wouldn't be the lawyers notifying. It would be the  
2 CSO or the senior team leader notifying the parents to say,  
3 "Would you like to be heard on this application?"  
4

5 COMMISSIONER: And if they say yes?

6 A. Then usually we would provide them with a copy of  
7 the application and we would notify the magistrate that the  
8 parents would like to be heard on that matter, and then  
9 it's then a matter for the magistrate, and there's a  
10 provision in the Act around matters being heard *ex parte*  
11 and the discretion of the magistrate to make those orders  
12 *ex parte* if they choose to do so.  
13

14 COMMISSIONER: What is the timeframe between the making of  
15 the application to the magistrate for one of these  
16 temporary or emergent orders and the hearing of the  
17 application by the magistrate?

18 A. There's no set timeframe unless a child is removed  
19 under section 18 of the Act.  
20

21 COMMISSIONER: That's very urgent circumstances?

22 A. Yes, so where - yes, so where there's immediacy and  
23 the child needs to be brought into the Chief Executive's  
24 custody, and in those circumstances the application needs  
25 to be made and the matter needs to be heard within eight  
26 hours, otherwise the Chief Executive loses custody.  
27

28 COMMISSIONER: Yes. That's because in those circumstances  
29 under section 18 the child is removed by the exercise of  
30 power under the Act delegated to the Chief Executive, and  
31 there are other officers as well who can take those steps?

32 A. Yes.  
33

34 COMMISSIONER: Police, for example?

35 A. Police. That's correct, yes. Yeah.  
36

37 COMMISSIONER: What I'm trying to understand is what  
38 opportunity at a practical level is afforded parents who  
39 may wish to be represented at the TAO stage or the emergent  
40 order stage to be represented and put submissions to the  
41 magistrate?

42 A. One of the considerations that we will always take  
43 into account is whether or not there are safety concerns  
44 and whether or not the parents might flee with the child,  
45 and in those particular circumstances then we would not  
46 seek for the parents to be heard on the matter due to those  
47 safety concerns. So that's always a factor.

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COMMISSIONER: So where there's an apprehension that the parents are a flight risk with the child --

A. M'hmm.

COMMISSIONER: -- then you would move ex parte?

A. Then we would inform the magistrate that we thought the matter should be heard ex parte because of those safety risks to the child if the parents were to be informed ahead of time.

COMMISSIONER: So you would be making an ex parte application because of the flight risk?

A. M'hmm.

COMMISSIONER: Yes?

A. Yes.

COMMISSIONER: Yes. What other circumstances would you choose to make an ex parte application?

A. That would be - that would probably be the biggest factor that I hear of, and I haven't made an application in my - in the position that I'm in at the moment, but certainly that's what I hear of the most.

COMMISSIONER: Have you made applications in your more junior roles in the Office of the Official Solicitor?

A. No, I haven't. When I entered this role in 2018 I entered at a director level.

COMMISSIONER: So you've never been a sort of on-the-ground lawyer making these kind of applications yourself?

A. Not in Queensland. I worked for 12 years in New South Wales working in child safety service centres down there as a lawyer and as a senior lawyer doing this kind of work day in, day out.

COMMISSIONER: Making applications for court orders?

A. Yes.

COMMISSIONER: And in broad terms what's the difference in practice as between New South Wales in this regard and Queensland, to your knowledge?

A. In New South Wales they are administrative decisions to remove a child from the care of the parents. So they don't seek emergent orders as such in the same way that

1 Queensland does. So the equivalent of a CSO will go out  
2 and if they believe that the child is at immediate risk of  
3 harm - and I'm quoting information from seven years ago,  
4 Commissioner --

5  
6 COMMISSIONER: That's all right.

7 A. -- so please bear with me, there may be some fuzziness  
8 around this. If they deem that the child's at immediate  
9 risk of harm and an order is required to ensure their  
10 safety, then they will remove the child without an order,  
11 and they have to then make an application to the court.  
12 From memory, it's within three business days.

13  
14 COMMISSIONER: So it's not dissimilar in a way?

15 A. No.

16  
17 COMMISSIONER: It's just that the first - the  
18 administrative power is more limited here under section 18,  
19 isn't it?

20 A. That's correct.

21  
22 COMMISSIONER: In Queensland?

23 A. That's correct. And, yes, they will then file an  
24 application in the Childrens Court down there, and that is  
25 essentially - there's no emergent order application, so it  
26 just goes straight to a child protection order application.

27  
28 I think one of the major differences in New South Wales is  
29 that prior to actually taking any removal action there is a  
30 significant body of work done on assessing risk to the  
31 child, and there's a lot of work that's done  
32 collaboratively with the family in the lead-up to that.  
33 There's a lot of prior alternative action in that space,  
34 I guess to work with the family to keep children safe, and  
35 that investigation has occurred without an order.

36  
37 COMMISSIONER: But that occurs in Queensland as well, does  
38 it not?

39 A. Yes, some --

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41 COMMISSIONER: I've heard from other witnesses there are  
42 manuals and all sorts of processes that are directed to  
43 making an assessment of the risk of harm to the child?

44 A. Yes, there is. Yes.

45  
46 COMMISSIONER: Yes. So there's a pretty thorough  
47 investigation undertaken by the department before seeking

1 advice from your office to make an application for an  
2 emergent order?

3 A. Yeah, that can vary. Sometimes there will be - so for  
4 a temporary assessment order, for example, on the system  
5 there may be something like a notification, there may be a  
6 request of Queensland Police Service for information as to  
7 what they have, there may be an interview with parents in  
8 relation to that, and that information may be sufficient to  
9 say, "We've got some concerns that would warrant an  
10 emergent order application," and then we will obviously  
11 make a TAO application to the court enabling us to carry  
12 out that investigation.

13  
14 COMMISSIONER: So you make a TAO application where you're  
15 not sure whether the criteria in section 10 of the Act is  
16 satisfied or not; is that the --

17 A. So the TAO application is made to investigate whether  
18 or not the child - I'll just refresh my memory - to  
19 investigate - the investigation is necessary to assess  
20 whether a child is in need of protection, and the  
21 investigation cannot be carried out unless the order is  
22 made, and reasonable steps have been taken to obtain  
23 appropriate parental consent to do the things authorised  
24 under the order.

25  
26 COMMISSIONER: But in the absence of parental consent you  
27 make an application for a TAO, do you?

28 A. Yes.

29  
30 COMMISSIONER: And that's all directed to making an  
31 assessment as to whether the child is in need of protection  
32 as defined in section 10 of the Child Protection Act?

33 A. Yes. Yes.

34  
35 COMMISSIONER: But if the department forms a view without  
36 the need for further assessment that the child does meet  
37 the criteria in section 10 you then seek, what, a temporary  
38 custody order?

39 A. No. So if you're granted a temporary assessment  
40 order, so it can be up to three days, it may not  
41 necessarily be for custody; it may be for something else.  
42 So it may be to enable you to enter or search a premises.  
43 It may be for an authorised officer to have contact with  
44 the child. It may be for - to enable the Chief Executive  
45 to seek medical examination or treatment. So they're not  
46 always custodial orders. But they are for a period of up  
47 to three business days. After that, if the investigation

1 is not yet complete, then the senior team leader or the CSO  
2 may come back to OCFOS and say, "We need further time to do  
3 this investigation. We're not yet finalised." OCFOS will  
4 then give advice on the merits of possibly a court  
5 assessment order application. The senior team leader will  
6 then give instructions to proceed with that application,  
7 and OCFOS will then draft the application on behalf of  
8 the CSO and/or the senior team leader.

9

10 That application will then be provided to the CSO, who then  
11 makes any necessary amendments that are required. It's  
12 then endorsed by the senior team leader, and OCFOS then  
13 file that application with the registry, and a mention date  
14 is --

15

16 COMMISSIONER: And that's the CAO, what you called the  
17 CAO?

18

19 A. That's the CAO, yes.

20

21 COMMISSIONER: And that's all under the control of the  
22 department and OCFOS?

23

24 A. That's correct.

25

26 COMMISSIONER: And when it comes to a CAO are those  
27 applications made by the department as a matter of practice  
28 on an ex parte basis or on notice?  
29 A. No. No, CAO applications are not on an ex parte  
30 basis. Personal appearances are required on those. So  
31 those applications are listed and there's a mention date  
32 provided, and so once it's listed OCFOS will actually  
33 prepare letters that go to the parents as well as the young  
34 people advising them that the matter has been - that an  
35 application has been made, that it's been listed in court,  
36 and recommending that they seek legal representation.

37

38 Those letters are then given to the CSO. It will then be a  
39 matter for the CSO as to whether or not they provide the  
40 child or the young person with a copy of that letter, and  
41 that will be largely based on whether or not the child has  
42 the required level of understanding, and their age, which  
43 to understand that.

44

45 COMMISSIONER: And are you able to say what sort of notice  
46 as between the decision to make an application for a CAO  
47 and the hearing date, the listed hearing date, for the  
application might be? I'm asking you just to give a  
context because I'm interested in knowing whether the

1 parents are given a practical opportunity to be represented  
2 and heard on the application?

3 A. That varies depending on courts, and often courts in  
4 regional areas may not sit as frequently as courts in the  
5 metro areas.

6

7 COMMISSIONER: But as the moving party on the  
8 application - you're the department?

9 A. Yes.

10

11 COMMISSIONER: You can nominate a date that may or may not  
12 be the precise date that the court can accommodate you on;  
13 isn't that the case? I mean, if you say to a court, "Look,  
14 we need to make this application for a TAO. We also need  
15 to give adequate notice to the parents so they might be  
16 represented, or some other interested person might be  
17 represented," then it's a sort of negotiation, isn't it, as  
18 to the date upon which the hearing is fixed?

19 A. No, it is not, Commissioner. It's a decision that's  
20 made by the court. And we can certainly advocate for  
21 earlier court dates. But that may not be - that may not be  
22 granted, and I'm aware of matters in the past where it  
23 hasn't been.

24

25 COMMISSIONER: Do you agree it's desirable that the  
26 parents be heard on the application if possible?

27 A. Oh, absolutely.

28

29 COMMISSIONER: Yes.

30 A. Yes.

31

32 COMMISSIONER: And that they have a practical opportunity  
33 to be represented at the hearing?

34 A. Most definitely, and often matters will be adjourned  
35 of CAOs to give parents the opportunity to get legal  
36 representation if they haven't already.

37

38 COMMISSIONER: So prior to the CAO being made where is the  
39 child? In the custody of the parents?

40 A. If it's come off a TAO and that TAO was a custodial  
41 TAO, then that child will still be in the custody of the  
42 Chief Executive.

43

44 COMMISSIONER: So the TAO transmutes into a CAO?

45 A. Under section 99. Section 99 applies. So if the CAO  
46 is filed before the TAO expires then section 99 applies.

47

1 COMMISSIONER: Section 99 has a lot of work to do, doesn't  
2 it?

3 A. It sure does, Commissioner.  
4

5 COMMISSIONER: So what it does is in effect allow one  
6 order, a three-day order, to become a 28-day order and,  
7 then once the Director becomes involved, potentially an  
8 order up to two years, doesn't it?

9 A. Once the CAO, but, is heard then the provisions of the  
10 CAO will apply.  
11

12 COMMISSIONER: Yes, one replaces --

13 A. So the 99 is until the CAO is heard, yes.  
14

15 COMMISSIONER: So one order supplants an earlier order?

16 A. M'hmm.  
17

18 COMMISSIONER: But the earlier order remains in operation  
19 because of the effect of section 99?

20 A. That is correct. The only exception to that is  
21 extensions of CAO applications. So for a CAO extension,  
22 which you can have a CAO application with an order made for  
23 up to 28 days, and then if you - if you haven't yet  
24 finished your investigation and you require more time you  
25 can file what's called a CAO extension to obtain another  
26 28 days to complete that investigation, and section 99  
27 doesn't apply, so the extension to the CAO must be filed  
28 and heard before the substantive CAO expires.  
29

30 COMMISSIONER: I see. So you've got to make an  
31 application for an extension, the first CAO, before its  
32 expiry?

33 A. That's correct.  
34

35 COMMISSIONER: But, if successful on that application, you  
36 have another 28 days, and in that time there's an  
37 opportunity for the Director to make application for  
38 another kind of order, isn't there?

39 A. No. So - because the Director of Child Protection  
40 Litigation, I'm assuming you're referring to --  
41

42 COMMISSIONER: Yes.

43 A. -- their jurisdiction hasn't been enlivened and won't  
44 be enlivened unless a referral is made by OCFOS to their  
45 agency.  
46

47 COMMISSIONER: And you do that and then what happens?

1 A. Not yet. Not yet. So what happens is if you go  
2 through, say - look, I think it's probably important to  
3 note at this point that sometimes even in regional and  
4 remote areas if the court doesn't list a CAO application  
5 for, say, a couple of weeks and section 99 is in operation,  
6 doesn't necessarily mean then that there's going to be a  
7 28-day order from when the matter's heard.

8  
9 What it might mean is - and usually I would expect our  
10 OCFOS lawyers in the interests of fairness to parents and  
11 if the matter's already progressed through the  
12 investigation, it is likely that they would then go to  
13 court and say, "Look, the assessment has or the  
14 investigation has sufficiently progressed. We're going to  
15 amend our application to only require a 14-day order. We  
16 don't need a further 28 days," so you would take into  
17 account the period that's already passed; or,  
18 alternatively, if the investigation has been completed and  
19 the child's not a child in need of protection, you could  
20 withdraw that CAO application at that point in time.

21  
22 COMMISSIONER: Let's suppose the investigation's completed  
23 within the 28 days or within some extension to that,  
24 somewhere into the second month, and OCFOS forms the view,  
25 or perhaps it's not OCFOS --

26 A. No, it's not.

27  
28 COMMISSIONER: -- perhaps it's the department who forms  
29 the view - we'll come back to that issue - that the child  
30 continues to be in need of protection, your role then is to  
31 make a referral to the Director of Child Protection  
32 Litigation?

33 A. So what happens then towards the end of the CAO period  
34 if the child is assessed as being a child in need of  
35 protection there will be a practice panel that will occur.  
36 OCFOS are not involved in practice panels because they're  
37 practice decision-making processes. So typically how that  
38 would occur - and I'm assuming that my learned friend  
39 Victoria talked about that, but just in case - practice  
40 panels would usually occur towards the end of the CAO  
41 period. The CSO will turn up with their practice  
42 assessment. It's put before a panel. I haven't been to  
43 one, so I don't know how they play out, but after the panel  
44 has occurred and the practice assessment has been endorsed  
45 then they will then come to OCFOS with their practice  
46 assessment and including their evidence. OCFOS will then  
47 have a look at that, will then review that, will have -

1 they'll then provide advice on whether there's sufficient  
2 evidence to support the level of intervention that they're  
3 requiring. Based on that legal advice the senior team  
4 leader will then give instructions. If they give  
5 instructions then to proceed with a referral to DCPL for a  
6 child protection order, the CSO will start drafting the  
7 initial affidavit to support that referral.

8  
9 COMMISSIONER: So it's not OCFOS's decision whether the  
10 matter is referred to OCFOS - to the Director?

11 A. No, it's a decision that is made by usually a senior  
12 team leader.

13  
14 COMMISSIONER: And the senior team leader also makes the  
15 decision as to whether an emergent order should be sought?

16 A. That's correct, because OCFOS act in an instructional  
17 role.

18  
19 COMMISSIONER: Yes. So OCFOS acts on the instructions of  
20 the department?

21 A. Yes.

22  
23 COMMISSIONER: Yes. And so just explain to me what  
24 independence OCFOS brings to the decision-making as to  
25 whether an emergent order should be made or whether a  
26 referral in the circumstances you've just described should  
27 be made to the Director for a further child protection  
28 order?

29 A. When you talk about independence I think for OCFOS  
30 I think what we have - the systems that we have set up have  
31 a really clear distinction between the legal advice that's  
32 provided by OCFOS and practice decisions of child  
33 protection practitioners, be it CSOs or senior team leaders  
34 or managers.

35  
36 COMMISSIONER: Does that mean that the decision as to the  
37 risk to the child, whether or not the child is in need of  
38 protection, because that's the essential question --

39 A. M'hmm.

40  
41 COMMISSIONER: -- is not a decision for OCFOS but a  
42 decision for the assessment of the department?

43 A. That's correct, and I'd - that's because the  
44 practitioner's the expert, not OCFOS. They're the expert  
45 in assessing risk to a child.

46  
47 COMMISSIONER: Well, we'll come back to that topic.

1 A. M'hmm.

2

3 COMMISSIONER: But I'm sure you're aware that prior to  
4 2018, when the OCFOS office was first established, the  
5 decision as to whether an application for an emergent order  
6 should be made rested with OCFOS and not with the  
7 department, but in 2018 there was a change in practice; are  
8 you aware of that?

9 A. It was 2020 that we moved towards an instructional  
10 model.

11

12 COMMISSIONER: It was 2020. We can come back to that  
13 topic in due course.

14 A. Yes. Yes.

15

16 COMMISSIONER: But prior to that the decision was one made  
17 by OCFOS, not by the department, that is to say the  
18 decision as to whether an application ought to be made for  
19 an emergent order?

20 A. M'hmm.

21

22 COMMISSIONER: That's right?

23 A. It wasn't consistent across the state. There were  
24 some inconsistencies across the state as to whether or not  
25 an OCFOS legal officer was the applicant on those emergent  
26 order applications or whether or not the CSO or senior team  
27 leader was the applicant, and in mid-2020, yes, there was a  
28 shift and, to ensure consistency, it was that OCFOS would  
29 act on instructions unless --

30

31 COMMISSIONER: So just --

32 A. Sorry.

33

34 COMMISSIONER: I'd like to understand how that change  
35 occurred, and perhaps Mr Hastie will ask you some questions  
36 to elicit that in due course, and I'm jumping ahead a bit.  
37 But I just want to understand presently what the  
38 substantive role of OCFOS is, and from what you've said -  
39 if I can summarise it and put it to you, you can tell me  
40 that I'm wrong in my understanding.

41 A. M'hmm.

42

43 COMMISSIONER: As I understand it, the investigation as to  
44 the risks associated with the child, or the perceived  
45 risks, that's all done by the department through the CSO,  
46 and then the decision is made between the CSO and the  
47 senior team leader as to whether there's grounds for

1 seeking an emergent order?

2 A. Well, they come to OCFOS with the information they  
3 have, and we look at the information they have and we give  
4 advice on the merits of any application, including the  
5 strengths and the weaknesses of that application.

6

7 COMMISSIONER: In other words, do you give advice as to  
8 whether the evidence that they have gathered and their  
9 assessment is sufficient to warrant an application to the  
10 court?

11 A. Yes, whether or not there's reasonable grounds for  
12 that order.

13

14 COMMISSIONER: And do you provide a sort of proper basis  
15 advice to them; you know, there's a proper basis for this  
16 application?

17 A. That's correct, yes.

18

19 COMMISSIONER: And in making that assessment your  
20 officers, I assume, are dependent upon what they are told  
21 by the CSO and the team leader in their assessments of the  
22 position in relation to an individual child?

23 A. Yes, and if requested they are - they can also access  
24 the department's systems to have a look at all the  
25 information that's held by the department in relation to  
26 that child.

27

28 COMMISSIONER: What happens where the department considers  
29 that there is good reason to make an application for an  
30 emergent order but your officers don't agree that there is  
31 adequate evidence? What do you do then?

32 A. There's an escalation process.

33

34 COMMISSIONER: And what does that mean?

35 A. So there's several grounds on which a matter would  
36 escalate within OCFOS. So they include if there's no  
37 reasonable grounds for the order or the action, is one of  
38 them. The second one is if there's significant concerns  
39 for the safety of a child due to the action or inaction;  
40 and, thirdly, if there's a significant legal action -  
41 sorry, a significant legal issue as a result of the action  
42 or the order that they're proposing, and in those  
43 circumstances you're - the legal officer, if they had any  
44 of those concerns, they would escalate to a senior legal  
45 officer. So our legal officers sit in teams of six to  
46 eight legal officers. They report to a senior legal  
47 officer. So they would escalate it to the senior legal

1 officer.

2

3 We would never ask a legal officer to change their legal  
4 advice. So what we do is we have a really robust system  
5 whereby the senior legal officer then reviews the matter  
6 afresh. They will then give an advice, whether it be  
7 verbal or in writing. If they still don't think that  
8 there's reasonable grounds, for example, to make the order  
9 and we've still got a senior team leader or a manager who's  
10 saying, "No, I really want you to make the order," it will  
11 then escalate to a principal legal officer - senior legal  
12 officer reports to principal legal officer. They then  
13 review the matter afresh. And then it then goes to a  
14 director. So it then goes a level across to a regional  
15 director, and then there's a conversation between the  
16 regional director and the director and OCFOS as to the  
17 evidence essentially that's supporting whether or not it's  
18 a valid application, essentially, whether or not there's  
19 reasonable grounds to actually make that application. In  
20 my time as a director --

21

22 COMMISSIONER: Does it get to you eventually in this  
23 process?

24 A. I've been in the role now for 18 months substantively  
25 and in an acting capacity. I'm aware of matters, but, no,  
26 they haven't come to me for a decision on them. But  
27 certainly in my time as a director, which was approximately  
28 six years, there weren't many matters that actually  
29 escalated to me. I could probably - I was only responsible  
30 for half the state, and most of my regions that I covered  
31 were in the metropolitan area versus - I had Far North  
32 Queensland, but otherwise they were largely metropolitan  
33 offices, and I would probably have a matter escalate to me  
34 maybe once a - once every couple of months, maybe once a  
35 quarter.

36

37 COMMISSIONER: Coming back to your expression "an  
38 instructional model" --

39 A. M'hmm.

40

41 COMMISSIONER: -- that's a reference to the usual  
42 relationship between a client and a solicitor, isn't it?

43 A. Yes, it is.

44

45 COMMISSIONER: That is to say the solicitor acts on the  
46 instructions of the client?

47 A. M'hmm.

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COMMISSIONER: But that doesn't mean that the solicitor is required to take the action that the client may wish the solicitor to take?

A. M'hmm.

COMMISSIONER: There's a difference between acting on instructions in the sense of making applications that the client wishes to make and making those applications in circumstances where the lawyer considers there's not a proper basis for making the application?

A. M'hmm.

COMMISSIONER: Right? And it's commonplace in civil litigation for a lawyer to be required to give a certificate when issuing a proceeding to the effect that there's a proper basis for the claims advanced in the statement of claim; you're aware of that?

A. M'hmm.

COMMISSIONER: So, on your instructional model, where the OCFOS solicitor disagrees with the assessment of the department, what happens in the end if that disagreement cannot be resolved? Does the instructional model mean that the application goes ahead on the instructions of the department irrespective of the view expressed in this hypothetical by the OCFOS solicitor?

A. I have never been involved in a matter where by the time it got to me as a director I disagreed with the instructions of the regional director, because usually by the time it got to that point the service centre, the regional director, had said, "Yep, we need more evidence. Let's go get it," and then they would come back and say, "What do you think now," and I'd be like, "Yes. Now I think there's reasonable grounds."

So in my experience - it may be different for others, but certainly in my experience as a director - actually, there was one matter many, many years ago where my legal advice wasn't followed but I wasn't going to die on my sword on it. It wasn't - yes, it wasn't pertinent at the time.

COMMISSIONER: When we talk about legal advice here in this context what we're really talking about is an assessment of the evidence as to the risk to the child, aren't we?

A. It's an assessment of --

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COMMISSIONER: It's a forensic exercise, is it not?  
A. Yes.

COMMISSIONER: Why isn't the lawyer best placed to make that forensic judgment?

A. I think the lawyer's the best - the person who's best placed to test the strength of the evidence. I do not think that they're the person who's best placed to actually make that assessment. We do not have the relevant qualifications to be assessing safety or risk to children.

COMMISSIONER: But at the end of the day what you're doing is making an application to a court and asking the court to make the decision about the removal of the child. So what's in issue at the stage in which OCFOS is involved, and the department for that matter, is whether the material that has been assembled and assessed in relation to the essential question of whether there is a child in need of protection is, I would suggest to you, a forensic/legal analysis that needs to be made by somebody anterior to the application being made to the court, and then ultimately it's a matter for the court to be satisfied on that material that an order should be made; isn't that the position?

A. I hold a slightly different perspective to you on that, Commissioner.

COMMISSIONER: Well, tell me what it is.

A. I agree with you in that I think the court is the ultimate decision-maker. I believe that the court should have all the evidence before it to be able to make that decision.

COMMISSIONER: Yes?

A. I believe that the court, particularly in relation to, say, child protection order applications - you know, the court needs to determine whether or not a child is a child in need of protection and the order that's most appropriate and desirable in those circumstances, and for me that's not a prosecutorial set-up, it's not a - it's about the safety, wellbeing and best interests of the child. And I think that's a decision for the court, and I think our role is to assist the court in making that decision.

COMMISSIONER: Well, I don't know that anything you've just said is different to what I put to you; that is to

1 say, the role anterior to the court application is for  
2 somebody to make an assessment as to risk to the child --  
3 A. M'hmm.

4  
5 COMMISSIONER: -- or whether the child is in need of  
6 protection, to form a view that on the material there is  
7 warrant in making the application to the court for the  
8 court to decide on that material whether an order should be  
9 made; do you agree with that?

10 A. I agree with that, yes.

11  
12 COMMISSIONER: Isn't that essentially a legal and forensic  
13 exercise at that point? I don't suggest that it doesn't  
14 involve the input in terms of the investigation and  
15 assessment by the department through its relevant officers,  
16 the CSO, the team leaders, et cetera. But by the time the  
17 matter gets to a point at which a decision needs to be  
18 made, and this is the relevant decision I would suggest to  
19 you --

20 A. M'hmm

21  
22 COMMISSIONER: -- whether an application should be made to  
23 the court, whether the court's power should be invoked, it  
24 becomes an exercise of forensic analysis and legal  
25 analysis, does it not?

26 A. I think you then run the risk of --

27  
28 COMMISSIONER: Well, just address my question. Is it not  
29 that kind of exercise at that point? I mean, you're  
30 welcome to add whatever further remarks you wish, but  
31 I just want to understand whether you consider at that  
32 point that it is a legal and forensic issue?

33 A. I still have a difference of opinion.

34  
35 COMMISSIONER: All right. Tell me what the difference is,  
36 because I'm not understanding it.

37 A. Okay. I believe that if the lawyer is the  
38 decision-maker --

39  
40 COMMISSIONER: Yes?

41 A. -- as well as the legal adviser then there's a real  
42 blurring of boundaries, and I think --

43  
44 COMMISSIONER: But what's the difference between - what is  
45 the legal advice? The legal advice is essentially an  
46 assessment of the evidence, is it not? Implicit in the  
47 assessment of the evidence is legal advice to the effect

1 that, "On this material I, the lawyer, consider there's a  
2 proper basis for making the application"; that's the legal  
3 function, isn't it?

4 A. You're then the decision-maker, but.

5  
6 COMMISSIONER: Yes. But what I'm asking - that's the  
7 point I'm trying to tease out with you: why shouldn't the  
8 lawyer be the decision-maker at that point given that the  
9 exercise is essentially one of forensic and legal analysis,  
10 the forensic analysis being, "On the material in front of  
11 me as presented to me by the CSO as a result of their  
12 investigations, et cetera, I consider this material  
13 provides a proper basis for applying to the court for an  
14 emergent order because on that material the child is a  
15 child in need of protection"?

16 A. As I said, I think you're then being a legal adviser  
17 on your own application and the decision-maker on the same  
18 application, and I think there needs to be really clear  
19 boundaries between - in the department I think there needs  
20 to be - as an in-house government lawyer, I think there  
21 needs to be really clear boundaries between a practice  
22 assessment and valuing that and all the expertise that come  
23 with that and the role of a lawyer, without any crossover.  
24

25 COMMISSIONER: Well, we can tease that out because that's  
26 a question that in my mind is very much an open question.

27 A. M'hmm.

28

29 COMMISSIONER: The ultimate decision-maker is the court?

30 A. I agree.

31

32 COMMISSIONER: Right. And so it's important to keep in  
33 mind that the decision here in question relevant at this  
34 stage of the continuum is whether or not an application  
35 should be made to the court; that's the question?

36 A. Yes.

37

38 COMMISSIONER: And in that circumstance why do you see  
39 there being some sort of conflict, as I take you to be  
40 saying, between the role of the lawyer as a "legal adviser"  
41 and the role of the lawyer as a decision-maker, bearing in  
42 mind that the relevant decision in question is whether to  
43 make an application to the court, and that is essentially,  
44 I suggest, a forensic decision to be made having regard to  
45 the legal meaning of what - a child in need of protection?  
46

47

So, just to be clear, I'm not suggesting to you that all of

1 the expertise, interrogation, investigation, assessment and  
2 evaluation by the department officers should be ignored.  
3 Quite the contrary. Rather, I'm suggesting to you that it  
4 needs to be scrutinised through the forensic and legal  
5 lens, and with that in mind I suggest that the  
6 decision-maker as to whether an application for an order  
7 should be made would better be, at least on one view, a  
8 lawyer rather than a department officer. That's the  
9 proposition I'm putting to you. That's the contending  
10 position I'd like you to consider.

11 A. I don't agree with you.

12  
13 COMMISSIONER: Now, tell me why?

14 A. I believe in legal independence. I believe that as an  
15 in-house government lawyer it's fundamental that you should  
16 be able to provide legal advice to your client and your  
17 client then has the responsibility as to whether or not  
18 they accept your advice or not, and that if that legal  
19 advice compromises your primary duty to the court as a  
20 lawyer then I think that an internal escalation pathway is  
21 the most appropriate course of action.

22  
23 COMMISSIONER: Well, I don't think anything I've suggested  
24 to you or said to you suggests that there should be any  
25 intrusion upon legal independence or the ability of the  
26 lawyer to give advice to the department. On the contrary  
27 what I would suggest is that, if the lawyer is the  
28 decision-maker as to whether an application to a court  
29 should be made for an emergent order, that fortifies, does  
30 not diminish, the independence of the role of the lawyer,  
31 because at present the model, the instructional model,  
32 means that the lawyer is subordinate to the instructions of  
33 the department, doesn't it?

34 A. With the escalation process I think that that issue is  
35 mitigated.

36  
37 COMMISSIONER: All right. I don't think we can take this  
38 much further. Mr Hastie.

39  
40 MR HASTIE: Commissioner, maybe the other way of looking  
41 at it too is if the person who decides not to apply, who  
42 should be the person not to apply.

43  
44 COMMISSIONER: Well, it's both ways.

45  
46 MR HASTIE: But a lawyer might --  
47

1 COMMISSIONER: Implicit in the decision of whether you  
2 make an application is - it's a binary choice: you make the  
3 application or you don't make the application. And so if  
4 you decide not to apply then that also would be the  
5 decision of the lawyer.

6  
7 MR HASTIE: But the lawyer might decide not to apply  
8 because there's not enough evidence.

9  
10 COMMISSIONER: Yes.

11  
12 MR HASTIE: But the department might decide for strategic  
13 and other reasons - the interests of the family, for  
14 instance - that they shouldn't apply notwithstanding the  
15 test had been passed.

16  
17 COMMISSIONER: But that wouldn't be a proper basis under  
18 the Act, Mr Hastie.

19  
20 MR HASTIE: But, Commissioner, it's up to you to decide  
21 what might be a basis to apply, and, as I understood it,  
22 you were struggling - sorry, not you were struggling, but  
23 I meant the system is struggling with how many applications  
24 to make and on what basis, and there's submissions I think  
25 have already been made to the Commission about that. So  
26 that's another - just to make your life a bit more  
27 interesting in deciding, it's not only a question of  
28 whether to apply but whether - and who should decide not to  
29 apply and on what basis.

30  
31 COMMISSIONER: In my thinking about that question I regard  
32 the question of whether to apply as necessarily entailing,  
33 implicitly entailing, a decision not to if there is on an  
34 assessment of the material an inadequate foundation for -  
35 in the material before the lawyer, as I've put it, to  
36 support an affirmative decision to apply to the court.

37  
38 Now, if the decision is that there is not an adequate or  
39 proper basis to make the application it follows that no  
40 application is made. So it is a decision both ways. A  
41 decision to apply is an affirmative decision. If no such  
42 affirmative decision is made, then an application isn't  
43 made, and therefore there's a decision implicitly not to  
44 apply.

45  
46 So I don't think I can - one can sensibly separate the  
47 affirmative from the negative. If you don't make an

1 affirmative decision, then there's no application and  
2 therefore ergo you're not making an application, you've  
3 decided not to.

4  
5 MR HASTIE: I suppose I was thinking of the discretion to  
6 prosecute or not to prosecute, which involves different  
7 elements as to whether or not you have a reasonable basis  
8 to win or whether or not on discretionary grounds you  
9 shouldn't be prosecuting.

10  
11 COMMISSIONER: Mr Hastie, there are some parallels with  
12 the role of a prosecutor, but this is not entirely on all  
13 fours with the role of a prosecutor because the central  
14 question here is whether the child is in need of  
15 protection, and that's the question, not whether there's  
16 some discretion for some broader public interest reason not  
17 to bring prosecution, for example.

18  
19 MR HASTIE: I didn't mean to imply that. I was really  
20 thinking, Commissioner, there might be - as this witness  
21 I think hinted at, there might be different ways of dealing  
22 with the risk to a child than going to court, which might  
23 be in the province of a child safety officer.

24  
25 COMMISSIONER: I understand that. There are all sorts of  
26 lesser actions that might be available: working with the  
27 family, having an agreement for the care of the child with  
28 the family or, alternatively, a court-supervised order -  
29 I've forgotten the precise expression for that category of  
30 order. I understand there's a range of options short of  
31 making an application for an emergent custodial order.  
32 I do understand that. But, when it comes to making a  
33 decision to apply to the court to invoke the court's power  
34 to remove a child, that is the issue I've been trying to  
35 tease out with this witness, Mr Hastie.

36  
37 MR HASTIE: Yes, thank you. I didn't mean to enter the  
38 debate.

39  
40 COMMISSIONER: No, no, debate's useful. Thank you.

41  
42 MR HASTIE: One of the things you mentioned during that  
43 discourse with the Commissioner was magistrates not being  
44 available, and you mentioned I think in one instance a long  
45 delay between an application able to being heard or  
46 decided. What are we talking about in those sort of  
47 instances? Where are we talking about? Is there an issue,

1 say, at Southport, which is a very big Magistrates Court?  
2 A. No, it tends to be the more regional and remote courts  
3 that may only sit every two to three weeks.  
4  
5 Q. So, for instance, what places are we talking about?  
6 A. Geez, off the top of my head, places - I'm making it  
7 up now, quite frankly.  
8  
9 Q. All right.  
10 A. But places like Emerald, do you get what I mean, that  
11 kind of thing would be --  
12  
13 Q. All right.  
14 A. Courts that sit less frequently.  
15  
16 Q. So they will sit for one week and then they wouldn't  
17 sit in Emerald for --  
18 A. For another couple of weeks.  
19  
20 Q. All right. Well, that's probably, as it turns out, a  
21 good example. And that's a reasonably sized regional town,  
22 let alone the small country magistrates courts that exist  
23 elsewhere?  
24 A. M'hmm.  
25  
26 Q. Is that correct?  
27 A. Yeah, and that's why I was talking about - and  
28 obviously accommodations are made for that so that it's not  
29 unfair to parents by the time we actually get the matters  
30 into court.  
31  
32 Q. All right. And does that - in a place like - for  
33 instance, is - you obviously indicated Southport. Is that  
34 a busy court?  
35 A. Yes.  
36  
37 Q. Are you able to indicate - would you be able to  
38 indicate what's your experience at a court like that being  
39 able to determine a return date on an application?  
40 A. They would be listed within the week, I would expect,  
41 yes.  
42  
43 Q. A week?  
44 A. Yes. So the next court date. Whatever the next court  
45 date is, it would be listed for that day.  
46  
47 Q. If you found yourself or the office found itself

1 needing to seek an order of any of the times you're talking  
2 about, a TAO or a temporary custody order, what return  
3 date - what power or control might you have over the return  
4 of that kind of application?

5 A. So TAOs and TCOs, they tend to be heard the same day.  
6 So when you make those applications - so if you make it,  
7 like, during the day, usually they are heard that day.  
8 Sometimes they go after hours for those particular  
9 applications. It's more so the CAOs because they have to  
10 be listed and then - for mention.

11  
12 Q. We'll come to the CAOs in a moment --

13  
14 COMMISSIONER: So just on that point - and pardon me for  
15 interrupting you again, Mr Hastie --

16  
17 MR HASTIE: No.

18  
19 COMMISSIONER: -- but if you make the CAO or the TAO on  
20 the same day that practically means, doesn't it, that those  
21 orders are ex parte because there's no practical  
22 opportunity for the parents to be heard? I mean, if you  
23 make the application on the same day - sorry, if you file  
24 the application and it's heard on the same day, it's  
25 practically impossible, isn't it, for those applications to  
26 be contested?

27 A. No, that was the TAOs and TCOs. The CAOs aren't. So  
28 the TAOs - TAOs and TCOs are the matters that can be heard  
29 ex parte under the legislation. CAOs, but --

30  
31 COMMISSIONER: Sorry, I think you did say CAO, but that  
32 doesn't matter --

33 A. Sorry.

34  
35 COMMISSIONER: No, no, it doesn't matter. A TAO and a  
36 TCO --

37 A. TCO.

38  
39 COMMISSIONER: -- they are made on the same day, generally  
40 speaking?

41 A. Generally speaking, yes, and they're the ones the  
42 legislation provides may be heard ex parte, whereas CAOs  
43 are filed and there's a mention date listed for those.

44  
45 COMMISSIONER: I follow. So, just to focus on the TAOs  
46 and the CSOs that are applied for on the same day and the  
47 application is heard, don't you agree that in those

1 circumstances they are, practically speaking, ex parte,  
2 without notice to the - without practical notice at least  
3 to the parents? Isn't that the consequence?

4 A. But if the parents wish to be heard - so if the CSO  
5 has spoken to the parents and asked the parents whether  
6 they wish to be heard because there's no safety concerns  
7 then --

8

9 COMMISSIONER: Just speak up a little, please.

10 A. Sorry. Sorry. If the parents wish to be heard and we  
11 then tell the magistrate that the parents wish to be heard  
12 and we provide the magistrate with the parents' contact  
13 details, then the magistrate - it's at their discretion as  
14 to whether or not they then hear from the parents.

15

16 COMMISSIONER: But how do the parents get to be heard -  
17 let's say the magistrate says, "Yes, I'd like to hear from  
18 the parents," but there's now presumably only a matter of  
19 hours notice to the parents, how do these people get to be  
20 heard, to your knowledge? I mean, what, does the  
21 magistrate call them on the telephone?

22 A. Yes, the magistrate contacts them.

23

24 COMMISSIONER: Contacts them?

25 A. Yes.

26

27 COMMISSIONER: But they don't have an opportunity to  
28 appear in court represented arguing that this TAO or CSO  
29 should not be made?

30 A. And I think that's reflected in the short-term nature  
31 of the order.

32

33 COMMISSIONER: Yes. But it's something that does raise  
34 some questions because it is one thing to make an order ex  
35 parte on an urgent basis for a very short period of time.  
36 The considerations relevant to a court for a short-term  
37 order are very different to an order that would endure,  
38 let's say, for 28 days --

39 A. M'hmm.

40

41 COMMISSIONER: -- or even longer. But what tends to  
42 occur, I suggest, is the TAO is transmuted into some other  
43 longer form order, like a CAO, and then, whether the CAO is  
44 extended or not, is transmuted into a child protection  
45 order sought by the Director. So what starts off as a  
46 three-day order can become an order that endures for up to  
47 two years; isn't that the case?

1 A. It has ongoing court oversight throughout that  
2 process.

3

4 COMMISSIONER: Yes. But what I'm interested in knowing is  
5 at what point in that court process at a practical level is  
6 there an opportunity for the parents or others to contest  
7 the continuation of the order?

8 A. That's possible during the CAO space.

9

10 COMMISSIONER: During the?

11 A. The CAO space.

12

13 COMMISSIONER: The court assessment order?

14 A. Yes.

15

16 COMMISSIONER: If that's the kind of order that's sought?

17 A. Yeah. So the parents have the right obviously to  
18 obtain legal representation and to contest that CAO.

19

20 COMMISSIONER: I'll tell you what's troubling me. You set  
21 a ball rolling. You set and establish a new state of  
22 facts, and the new state of facts is that the child is no  
23 longer in the custody of the family, the child is now in  
24 the custody - if a TAO is made or a temporary custody order  
25 is made, is now in the custody of the department, in the  
26 custody of the State?

27 A. M'hmm.

28

29 COMMISSIONER: And if that custody endures for a month,  
30 maybe two months, maybe six months, as orders are made, one  
31 supplanting the other, with the helpful intervention and  
32 operation of section 99 of the Act, then you are  
33 establishing by default, I would suggest, a new state of  
34 affairs when it comes to an assessment of what is in the  
35 best interests of the child. So, to put it bluntly, you  
36 could establish a self-fulfilling, self-perpetuating  
37 sequence of events, making a court - putting the court in a  
38 position where it's to assess as time goes by a different  
39 state of affairs concerning the welfare of the child.

40

41 So, with that in mind, I'm interested to know how the  
42 department through its processes encourages the early  
43 interrogation and representation of parents who may wish to  
44 put a contending position to the court?

45 A. So with the CAO applications, once that matter has  
46 been filed in court and listed for mention, then OCFOS  
47 prepare letters to parents that then go to the child safety

1 officer to provide to the parents along with a copy of  
2 the order because they require personal service of CAO -  
3 sorry, of CAO applications. And so that sets out for the  
4 parents - it recommends that they receive legal  
5 representation in that.

6

7 COMMISSIONER: But it's not in every case that a CAO is  
8 sought, is it? That's a court assessment order. That only  
9 applies where the department - as I would understand it,  
10 where the department says, "Well, look, we're not sure. We  
11 need more time to assess the need for protection and what  
12 should be done, et cetera"; isn't that the case?

13 A. Yes.

14

15 COMMISSIONER: So they're not routinely sought, I imagine;  
16 only when needed?

17 A. That's correct, yes.

18

19 COMMISSIONER: Right.

20 A. Only when needed.

21

22 COMMISSIONER: So if a CAO isn't sought but you've got a  
23 TAO for three days - let's just put aside the CAO situation  
24 for present - what happens if the department considers that  
25 the TAO needs to be extended? Is it at that point that the  
26 matter is referred to the Director?

27 A. No. It depends on whether or not the investigation is  
28 completed. So if three days - if three business days that  
29 you've received on the TAO is not sufficient to complete  
30 the investigation, then usually you would seek a CAO.

31

32 COMMISSIONER: All right. Where --

33 A. After that. There's also other voluntary  
34 interventions, like assessment, care agreements as well.

35

36 COMMISSIONER: Of course, and I am aware that there are  
37 courses of action open to the department with  
38 the cooperation of the parents to try and do something less  
39 interventionist than --

40 A. Yes.

41

42 COMMISSIONER: -- applying for a child protection order.  
43 But there are many cases where child protection orders are  
44 made, and indeed they are increasing quite dramatically.  
45 I think the present figure is some 15,000 children  
46 presently in one form or another are in child protection.  
47 So they're not going down; they're going up.

1 A. Agreed.  
2  
3 COMMISSIONER: So what happens in the circumstance where  
4 the TAO order is made, an assessment is completed in the  
5 three days --  
6 A. M'hmm.  
7  
8 COMMISSIONER: -- and that assessment leads to a  
9 conclusion on the part of the department that custody  
10 should continue with the department? So what then happens?  
11 A. So that would be that the child was assessed then as  
12 being a child in need of protection?  
13  
14 COMMISSIONER: Yes.  
15 A. I'm assuming - and I'm not involved in practice, but  
16 I'm assuming that a practice panel would occur --  
17  
18 COMMISSIONER: Yes.  
19 A. -- to determine whether or not - to determine the best  
20 course of action.  
21  
22 COMMISSIONER: I'm asking you to assume --  
23 A. Yep.  
24  
25 COMMISSIONER: -- that the TAO has resulted in a  
26 conclusion that the child is in continuing need of  
27 protection --  
28 A. Yes.  
29  
30 COMMISSIONER: -- in terms of in the custody of the  
31 department --  
32 A. M'hmm.  
33  
34 COMMISSIONER: -- and three days - and that's been  
35 determined in the three days?  
36 A. Yes, that the child is in need of protection. So it  
37 will go to a practice panel. That assessment will be  
38 endorsed by the practice panel. If the senior - and they  
39 then come to OCFOS. OCFOS then do a legal consult based on  
40 the evidence that's provided to us, and looking at the  
41 evidentiary thresholds related to that. If we are  
42 satisfied that it meets those evidentiary thresholds and  
43 that a referral is required to DCPL, then we will seek  
44 those instructions from the senior team leader. The senior  
45 team leader, if they provide those instructions, will then  
46 ask the CSO to start drafting the initial affidavit. OCFOS  
47 will then prepare the referral that goes across to DCPL.

1 OCFOS will work alongside the CSO in gathering all of the  
2 relevant evidence to support that referral, so the brief of  
3 evidence to support that referral --

4  
5 COMMISSIONER: And then what does the DCPL seek? What  
6 kind of order?

7 A. So there's a little bit before that, but. So --

8  
9 COMMISSIONER: All right.

10 A. -- that initial affidavit then is sent through to the  
11 senior team leader, who then endorses that for casework.  
12 It then comes across to OCFOS. We quality assure that  
13 affidavit and we give feedback on that affidavit at that  
14 point, and we do any necessary redactions on that document.  
15 It then goes back to the CSO. They then affirm the  
16 affidavit, and then the referral is ready to go across to  
17 DCPL.

18  
19 COMMISSIONER: Wouldn't it be easier for all of that, that  
20 is to say the affidavit supporting the referral to the  
21 Director, to be an affidavit of and prepared by an OCFOS  
22 lawyer, because, you see, there's a lot of evidence that  
23 I've heard about the heavy burden on CSOs --

24 A. M'hmm.

25  
26 COMMISSIONER: -- and there's a good deal of consensus in  
27 the feedback that has been elicited from quite a number of  
28 CSOs that the burdens associated with preparing court  
29 documentation are highly distracting of their other  
30 activities, of which there are many, and it - yes, that  
31 it's a big burden on them. Why wouldn't the OCFOS lawyer  
32 on the present model be best placed to swear the affidavit?

33 A. It's a capacity issue. When you look at the OCFOS  
34 workforce under the current model, so since its inception  
35 in 2016 through until today, there's this significant  
36 trajectory on the increase of the number of emergent orders  
37 and the number of referrals to DCPL that are made with no  
38 additional FTEs in our workforce. So the last time that we  
39 were - that we received additional positions was in 2018.

40  
41 COMMISSIONER: So it's a resources issue --

42 A. Yes, it's a --

43  
44 COMMISSIONER: -- basically is your answer? It's not that  
45 it wouldn't otherwise be a function appropriate for the  
46 solicitors, subject to resources, performing it?

47 A. Yes, that's right. That's right. So, you know, for

1 example, if you look at - if you look at the increases from  
2 2016, when the model first came in, to 24/25, TAOs have  
3 gone up 81 - sorry, 71 per cent; CAOs have gone up  
4 86 per cent; TCOs, the temporary custody orders, there's an  
5 increase of 131 per cent; overall emergent orders in that  
6 same period of time have gone up 93 per cent; and referrals  
7 across to DCPL have gone up 67 per cent. All of that  
8 information in relation to the emergent orders is  
9 operational data, hasn't been cleaned. So there might be  
10 some slight variations on that. The figure in relation to  
11 DCPL comes from DCPL annual reports. So there is - there  
12 is a significant spike in work and a lot of workload  
13 pressure in that regard, and that's one of the reasons -  
14 the pressure on CSOs in preparing those affidavits, that's  
15 one of the reasons why the paralegals are in place.

16  
17 COMMISSIONER: Yes, I --

18 A. To alleviate some of that pressure standing in the  
19 shoes of a CSO.

20  
21 COMMISSIONER: Yes, I understand that. So do you have a  
22 view about why there's been such an increase in the number  
23 of emergent orders to the degree and in the proportions  
24 you've just explained?

25 A. No, I don't. I think that comes down to the social  
26 drivers --

27  
28 COMMISSIONER: Yes.

29 A. -- of that. We know that there's a lot - the  
30 complexity of matters is probably one of the - the most  
31 significant that I've ever seen in my years of being in  
32 child protection.

33  
34 COMMISSIONER: So just coming back to my hypothetical  
35 about the TAO that has been assessed to require ongoing  
36 protection within the three-day period --

37 A. M'hmm.

38  
39 COMMISSIONER: -- after there's a meeting - what sort of  
40 meeting --

41 A. So after the TAO the child's assessed as being a child  
42 in need of protection --

43  
44 COMMISSIONER: Yes.

45 A. -- and the assessment's finalised and the  
46 investigation's finalised, at that point in time they  
47 probably do a prac panel after that --

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COMMISSIONER: That's it, the prac panel?  
A. Yes, to endorse the assessment, and the decision will then be made as to whether or not - you know, the most appropriate intervention at that point, and it could be that you do a child protection care agreement, so a voluntary intervention with the family, or alternatively it could be that a child protection order is required.

COMMISSIONER: I'm just focusing on the circumstance of a child protection order. As I've said a number of times, I'm not ignoring and neither am I unaware of other alternatives which are less intrusive or impactful.  
A. M'hmm.

COMMISSIONER: Okay? But there are still many circumstances where the other less impactful options are not available for one reason or another; correct? So what happens if there's a disagreement at the practice panel level - well, firstly, I think you said to me that the OCFOS lawyer isn't represented at the practice panel; is that right?  
A. That's correct. That's correct. We don't attend practice panels.

COMMISSIONER: So the practice panel doesn't have to contend with it - a view by OCFOS as to whether or not there is a need to refer to the DCPL because that's a matter for the panel, is it?  
A. It's a practice decision. It's not a legal decision. So they then come after the practice panel to OCFOS, and a legal consult occurs at that time with the assessment that's been endorsed and the evidence that supports that assessment, and then --

COMMISSIONER: Well, I question the proposition that it's not a legal decision, but we don't need to go back over the debate we had about what the essential decision is, namely a forensic/legal decision. You have a different view about that, and I follow that. But, in any event, once a positive decision has been made to refer the matter to DCPL within the three-day period, what, in your understanding, does the DCPL then do?  
A. So if that TAO is about to expire, expire in three days, a decision may be made to apply for a temporary custody order. So a temporary custody order is essentially --

1  
2 COMMISSIONER: I thought that was an emergent order, a  
3 temporary --  
4 A. It is. It is.  
5  
6 MR HASTIE: One of them?  
7 A. It is. It's one of them.  
8  
9 COMMISSIONER: It's one of them?  
10 A. We might be getting - yes, there's also short-term  
11 custody orders, and they're child protection orders. It's  
12 a little bit confusing on the terminology.  
13  
14 COMMISSIONER: No, no, I'm starting to get my head around  
15 all these different orders.  
16 A. Yes.  
17  
18 COMMISSIONER: But once the Director becomes involved he  
19 doesn't seek a temporary custody order, does he? He might  
20 seek a short-term custody order?  
21 A. So in that period to actually do the referral  
22 sometimes OCFOS will receive instructions to seek a  
23 temporary custody order, and that --  
24  
25 COMMISSIONER: I see. So get a TAO followed by a  
26 temporary custody order?  
27 A. M'hmm.  
28  
29 COMMISSIONER: Then --  
30 A. And so a TAO, and then possibly - and in the instance  
31 you're telling me about, TAO, and then it could potentially  
32 be a TCO --  
33  
34 COMMISSIONER: Yes?  
35 A. -- which is a further three-day order to --  
36  
37 COMMISSIONER: Plus one?  
38 A. Plus one for the extension, yes, and that's if the  
39 child is at unacceptable risk of suffering harm and during  
40 the period of the TCO it will be time for both the Chief  
41 Executive to consider the most appropriate course of action  
42 to ensure the child's ongoing care and protection needs.  
43  
44 COMMISSIONER: Yes. But once the referral is made to the  
45 Director --  
46 A. M'hmm.  
47

1 COMMISSIONER: -- it is a matter for the Director what  
2 further order is sought; that's right, isn't it?  
3 A. The Director may actually ask for an extension of that  
4 TCO to allow time to consider all of the material and to  
5 determine the most appropriate order to be sought.

6  
7 COMMISSIONER: Yes. I thought that could only be extended  
8 for one day?  
9 A. It can.

10  
11 COMMISSIONER: So only one day?  
12 A. Yes.

13  
14 COMMISSIONER: So the Director's got four days in which to  
15 decide which further child protection order is sought.  
16 Could be a short-term custody order or something else?  
17 A. Something else. It may not be - just taking you back,  
18 it may not be four days that the Director has. It may take  
19 a couple of days to actually do the referral, for the CSO  
20 to draft the initial affidavit and for all of that to get  
21 uploaded onto the Unify portal to get across to DCPL.

22  
23 COMMISSIONER: And then the Director has how long to act  
24 usually?  
25 A. So the Director then coming off a TCO or a TCO  
26 extension would then need to determine the type of  
27 application that they were going to file, and they would  
28 have to file the application before the TCO or the TCO  
29 extension expired for section 99 to apply.

30  
31 COMMISSIONER: That's right. And the options then are a  
32 short-term custody order?  
33 A. Yeah, they could - so obviously get an interim order  
34 at the first mention, hopefully, an interim order for  
35 custody. And after that, further down the track, obviously  
36 a court needs to make a determination on the type of - the  
37 appropriate type of court protection order to ensure the  
38 safety of the child, and that could include a short-term  
39 custody order. A short-term guardianship order could  
40 include a directive order, a supervision order.

41  
42 COMMISSIONER: Look, what's the advantage of having these  
43 two different bodies involved as between emergent orders  
44 and child protection orders? What's the point of this  
45 bifurcation between the role of OCFOS and the Director, as  
46 far as you're concerned?  
47 A. Commissioner, I've worked in two jurisdictions now.

1 I've worked in New South Wales and in Queensland. In New  
2 South Wales they have an in-house child protection team  
3 that does it all, and when they're at capacity they  
4 outsource to external legal practitioners who specialise in  
5 child protection. And now I have worked in this system for  
6 the last seven years. I'll be completely honest, the New  
7 South Wales system is much better than this system.

8  
9 COMMISSIONER: But the New South Wales system involves the  
10 removal of the child at the decision of the department,  
11 does it not?

12 A. I'm not talking about that, sorry. All I'm talking  
13 about is having an in-house legal team that sees matters  
14 through from start to finish, having one layer of lawyers.

15  
16 COMMISSIONER: Just so I'm clear about the New South Wales  
17 system, there's no emergent orders in New South Wales?

18 A. There's an emergency care and protection order  
19 application that you can run in New South Wales which gives  
20 you a really short-term order, and that's when you're  
21 essentially assessing in the very early days as to whether  
22 or not an actual order is needed for the child, otherwise  
23 they're likely care applications, what they call care  
24 applications.

25  
26 COMMISSIONER: But you don't need in New South Wales to go  
27 to court to get an order for custody of the child for a few  
28 days?

29 A. No, it's an administrative decision.

30  
31 COMMISSIONER: Yes. And, following that, an application  
32 is made by - by whom for the equivalent of a child  
33 protection order here?

34 A. CSO or senior team leader.

35  
36 COMMISSIONER: And supported by who? External lawyers?

37 A. No. In-house.

38  
39 COMMISSIONER: So the whole system in New South Wales is  
40 in-house, is it?

41 A. Yes. Apart from a small panel of practitioners for -  
42 and only if the in-house legal team is at capacity that  
43 matters then get referred out, or in the interests of, you  
44 know, being fiscally responsible, if there's, you know,  
45 matters out in, I don't know, Walgett or somewhere, you  
46 know, out - very much out west, then it makes absolutely no  
47 sense at all to fly a lawyer from Sydney to Walgett for a

1 one-hour court matter. They will get someone who's based  
2 in Walgett to do that.

3

4 COMMISSIONER: All right. We'll come back to that. Thank  
5 you, Mr Hastie.

6

7 MR HASTIE: Can I ask you two questions that arose from  
8 that. You were asked by the Commissioner for the drivers  
9 for the increase in the emergent order, and you I think  
10 responded that it was to do with - that there were social  
11 drivers, and I thought you said complexity of the matters?

12

13

14 Q. What do you mean by social drivers?

15

16

17 Q. What social drivers are giving rise to the increase in  
18 emergent orders?

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1 and mum was nowhere to be seen, mum was on a bender  
2 somewhere for days and no-one knew where mum was, and, you  
3 know, the child was covered in filth, that kind of thing.

4  
5 COMMISSIONER: In those circumstances you've just  
6 described, and I imagine there is a myriad of --  
7 A. So many.

8  
9 COMMISSIONER: -- circumstances --  
10 A. M'hmm.

11  
12 COMMISSIONER: -- the department has the power to remove  
13 the child under section 18 for a short time. So if it's  
14 really urgent that action could then, one would expect  
15 would, be taken where necessary for urgent reasons; that's  
16 correct, isn't it?

17 A. Yes, yes, if there's immediacy, and those decisions  
18 are usually made at a point in time when a CSO is in the  
19 field.

20  
21 COMMISSIONER: Yes. But a temporary assessment order  
22 suggests that, whilst there are immediate concerns,  
23 something further needs to be investigated in order to  
24 reach a conclusion that the child is in need of protection;  
25 isn't that the sort of implicit assumption underlying the  
26 availability of that kind of order?

27 A. It's to do the investigation to assess whether or not  
28 the child is in need of protection.

29  
30 COMMISSIONER: Yes, all right.

31  
32 We might just take a 10-minute break, Mr Hastie.

33  
34 **SHORT ADJOURNMENT** **[11.36 am]**

35  
36 COMMISSIONER: Mr Hastie, before you start again, I just  
37 want to ask some further questions that go to the legal  
38 analysis, jurisprudential questions. Section 10. There  
39 are two elements to it: that the child has suffered or is  
40 at risk of suffering significant harm, that's the first  
41 limb; and, secondly, the child does not have a parent  
42 willing and able to protect the child from harm. That's  
43 the test. I assume you're very familiar with that section.

44  
45 Now, that section doesn't in terms require any assessment  
46 of the risks of harm to the child from removal of the child  
47 and the placement of the child, does it?

1 A. No, it doesn't.

2

3 COMMISSIONER: Right. So can I take it that when giving  
4 advice to the department your officers do not consider and  
5 do not give advice that the harm to the child that flows  
6 from the removal of the child - and again we're talking  
7 only about the circumstance where the child is removed, not  
8 where other less impactful orders are sought - doesn't give  
9 any consideration to the harm that flows from the removal  
10 of the child?

11 A. In giving advice it's about satisfying for us - it's  
12 about satisfying the evidentiary requirements of the  
13 particular section of the Act, of that provision that we're  
14 looking at at that particular time. I view placement as  
15 being a systems issue.

16

17 COMMISSIONER: Sorry, I didn't hear you properly?

18 A. Sorry. So placement is a systems issue, whereas when  
19 you're looking at giving advice in relation to a particular  
20 child and their circumstances at that particular time  
21 you're looking at the threshold requirements for that  
22 provision of the Act that applies in those circumstances  
23 for that child --

24

25 COMMISSIONER: So if the only placement option available  
26 to the child, or for the child, I should say, in a  
27 particular case is placement in non-family based  
28 residential care, that fact is not considered as part of  
29 the assessment when it comes to deciding whether an  
30 application to the court ought be made for an emergent  
31 order?

32 A. It's not something that we would provide legal advice  
33 on.

34

35 COMMISSIONER: Right. So there's no analysis of the  
36 balance of harm to the child in the circumstances  
37 pertaining to that particular child having regard to the  
38 availability in the particular case of placement for the  
39 child if removed into the custody of the State?

40 A. Yeah, it's not something that as a legal officer we  
41 would give advice on, no. That would be more of a practice  
42 consideration.

43

44 COMMISSIONER: Do you think it should be considered in the  
45 analysis of the risk of harm to the child; that is to say  
46 the counterfactual of where the child will end up in the  
47 circumstances where the child is made the subject of a

1 custody order in favour of the State?

2 A. I think you would then open yourself up to having  
3 inconsistencies across the state in the way that you  
4 applied the legal test because there might be placement  
5 options available in some areas that aren't available in  
6 other areas.

7

8 COMMISSIONER: Well, that would just be a variation on the  
9 facts, wouldn't it? That wouldn't be an inconsistency of  
10 principle, would it? That would just mean that in some  
11 places there were better opportunities for accommodating or  
12 placing the child than in other instances. That wouldn't  
13 be a legal inconsistency, would it?

14 A. We don't give - as I said, we don't give legal advice  
15 on it. It's not something that we would consider at the  
16 point of giving legal advice.

17

18 COMMISSIONER: And I'm not criticising you for that. The  
19 section of the Act doesn't seem to demand that there be any  
20 consideration of the harm to the child occasioned by  
21 removal, and so, just to be clear, you don't consider it  
22 and therefore - and that's mandated by the Act, you would  
23 say, I think?

24 A. As a legal officer we don't consider it. That doesn't  
25 mean that as a practitioner they don't.

26

27 COMMISSIONER: As a?

28 A. As a practitioner, I don't know. I don't know if the  
29 practitioners consider it. I don't know. But as a legal  
30 officer we do not.

31

32 COMMISSIONER: Yes. All right. Thank you, Mr Hastie.

33

34 MR HASTIE: If I could take you then onto the next topic  
35 or next task, which is if an application is made for one of  
36 these particular types of orders that your office is the  
37 solicitor for and there's a - you mentioned to the  
38 Commission there'd a practice panel and a decision made  
39 then about what was to happen at the end of the period  
40 allowed for in those orders. What's the role of the office  
41 after that?

42 A. So, yeah, so then the CSO would draft the initial  
43 affidavit, we would do the form A referral across to DCPL,  
44 gather all the relevant material that supports that  
45 referral and that assessment, and then we would complete  
46 all the necessary redactions or mark up the necessary  
47 redactions for that referral.

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Q. What do you mean by mark up all the necessary redactions?

A. Because we're not the applicant for child protection order applications; the DCPL is. They settle those documents. So we would mark up what we think should be redacted, so put boxes around it, and then we send it across, and they're the ones who then settle those affidavits. Ultimately it's a decision for the deponent of the affidavit as to whether or not they accept those redactions.

Q. On the advice of the DCPL?

A. Yes, and initially OCFOS.

COMMISSIONER: So the lawyer is the applicant when it gets to the DCPL stage?

A. Yes.

COMMISSIONER: Here's the conflict. You were identifying a conflict you perceive if the applicant at the emergent order stage was the lawyer as opposed to the departmental officer, yet that is precisely the case, is it not?

A. So DCPL don't give legal advice to the department because the department is not their client.

COMMISSIONER: Yes, I understand that. That's the distinction?

A. That's the distinction.

COMMISSIONER: I see. Okay.

A. The department has no further - sorry, OCFOS have no further involvement in a matter once the referral is done, the initial affidavit is filed, the application is filed and the affidavit of service is filed. After that point in time OCFOS have no further ongoing involvement in the matter, and DCPL are then responsible for that application and they then communicate directly with the department for any further information. If during the course of the proceedings child safety service centres require legal advice they can re-engage OCFOS for specific matters.

COMMISSIONER: So once DCPL is involved the departmental officers are effectively witnesses in the proceeding rather than the moving party?

A. That's exactly right, yes. Yeah, we become - or we as in the CSO or the senior team leader becomes, yes, the

1 witness on the CPL application.

2

3 COMMISSIONER: Yes. Thank you.

4

5 MR HASTIE: Does OCFOS have any role after sending the  
6 brief, as it were, to the Director?

7 A. Yes. So once a referral, including - so once a brief,  
8 including the referral, is sent across to DCPL, DCPL will  
9 then have a look at the matter and determine whether or not  
10 they're going to file an application or whether or not  
11 they're going to refer the matter back to the department.

12

13 Q. All right. And when you said there's a referral as  
14 well what's the standard that has to be met before there's  
15 a referral?

16 A. That's under section 15 of the DCPL Act. It talks  
17 about an assessment that a child is in need of protection  
18 and the order's appropriate and desirable, I think is the  
19 test.

20

21 Q. All right. And so what sort of material - you  
22 mentioned an affidavit before?

23 A. M'hmm.

24

25 Q. What sort of material does an affidavit contain?

26 A. So, yeah, it will be an affidavit and then it will be  
27 essentially a bundle of documents that includes all  
28 relevant evidence, and that's a discussion that occurs  
29 between the CSO and the legal officer to determine what's  
30 relevant on the file, and that's then endorsed by the  
31 senior team leader before that then goes across to DCPL.

32

33 Q. All right.

34 A. Once the matter goes across to DCPL there's a  
35 significant amount of toing and froing between DCPL and  
36 OCFOS and Child Safety about that initial affidavit and  
37 about the redactions and about any relevant evidence. So  
38 DCPL will file the application usually pretty quickly if  
39 they determine that an order's required. But the affidavit  
40 may take some time to finalise between the agencies and for  
41 that affidavit to then be filed and served on the parents.

42

43 Q. I'll come to the affidavit. Just going back to the  
44 temporary orders that are made, the emergent orders, what  
45 kind of material is provided for - to the court in support  
46 of those orders?

47 A. They're template applications that were endorsed in

1 2024 by the Chief Magistrate of the Childrens Court. So  
2 we've got the same template applications used across the  
3 state. They usually don't have any exhibits to them. It's  
4 a standalone template document.

5  
6 Q. And is it a relatively simple application?

7 A. Yeah, usually they're about 10 or 11 pages long.

8  
9 Q. This is for a - one of the emergent orders?

10 A. Yes.

11  
12 Q. All right. And what about - is there an affidavit  
13 required for those?

14 A. Not usually, no, not unless there's, like, a contested  
15 CAO. But typically no.

16  
17 Q. When you said it might be 10 or 12 pages, is there a  
18 brief statement of facts contained in the application, is  
19 there?

20 A. Yes, usually an outline that the notification has been  
21 received. It includes, you know, the steps that - whether  
22 or not, you know, the parents have consented to the  
23 intervention - usually no, which is why the order's  
24 required - and all they talk about, the - all the things  
25 that the department seeks to do during the period of the  
26 order.

27  
28 Q. All right.

29 A. So during the period of that investigation.

30  
31 Q. Now, how does the material required for that compare  
32 with the material that you're required to give the DCPL?

33 A. So, yes, so for material for the DCPL is initial  
34 affidavit and exhibits. They can be very voluminous.  
35 We've heard from parents that they receive affidavits that  
36 can be three and four hundred pages long, and how  
37 overwhelming that feels.

38  
39 Q. And is that at the initial stage or towards the end of  
40 the proceedings?

41 A. That's at the initial stage.

42  
43 Q. All right.

44  
45 COMMISSIONER: Sorry, just to be clear, at the emergent  
46 order stage?

1 MR HASTIE: No, the initial - sorry, will let the witness  
2 answer.

3  
4 COMMISSIONER: No, I thought not. It's a template  
5 application at the initial --

6 A. So that's in relation to the emergent orders.

7  
8 COMMISSIONER: Yes, I follow that.

9 A. Yep. And then when DCPL are applying for a child  
10 protection order they'll do the application and then there  
11 will be an affidavit in support of that application, and  
12 that initial affidavit can be three or four hundred pages  
13 long.

14  
15 COMMISSIONER: And that initial affidavit is prepared by a  
16 CSO?

17 A. By the CSO, yes.

18  
19 COMMISSIONER: And --

20 A. And - sorry.

21  
22 COMMISSIONER: With input from?

23 A. OCFOS.

24  
25 COMMISSIONER: OCFOS.

26 A. So prepared by the CSO, endorsed by the senior team  
27 leader for casework and to make sure that everything that's  
28 relevant is on the file, the good and the bad, so it's  
29 really balanced, and then it comes across to OCFOS. OCFOS  
30 then have a look at it for legal issues. They give  
31 feedback to the CSO and the senior team leader on that  
32 document, and then when it's ready to go then it will -  
33 then OCFOS will upload that document and all the relevant  
34 exhibits through the Unify portal, will then go across to  
35 DCPL, and DCPL then do the same thing again. So DCPL then  
36 review that initial affidavit, review all of the exhibits.  
37 They then give feedback through OCFOS to the CSO about the  
38 affidavit, and sometimes that affidavit might need to be  
39 re-worked based on what their feedback --

40  
41 COMMISSIONER: And redacted, you said?

42 A. Yes. So if --

43  
44 COMMISSIONER: What sort of things are redacted?  
45 Identifying matters?

46 A. Yeah, particularly if there's family and domestic  
47 violence, usually addresses for parents might be redacted

1 in that. If there's other people involved - like, who are  
2 mentioned who are not actually part of the application, we  
3 would usually redact that. If there's any identifying  
4 information that would identify the location of someone -  
5 so that could even be like, you know, medical centres or  
6 schools nearby or something - we might redact that kind of  
7 information.

8

9 COMMISSIONER: Is it redacted from the court or just for  
10 the purposes of other parties?

11 A. No, for the purpose of other parties being served with  
12 those documents.

13

14 COMMISSIONER: So the court gets an unredacted version?

15 A. No, the court gets the redacted version too.

16

17 MR HASTIE: So it sounds more like you give a draft to the  
18 Director?

19 A. Yes.

20

21 Q. And he sends it back?

22 A. M'hmm.

23

24 Q. To OCFOS and then to the child safety officer?

25 A. Yes, and then the toing and froing begins.

26

27 Q. So it's not like what we would describe as a redaction  
28 to a discovered document where you, you know, give a page  
29 and you redact a paragraph out; is that right?

30 A. No.

31

32 Q. The court gets the full document?

33 A. No, no, the court gets --

34

35 Q. The final signed copy?

36 A. The court gets the redacted version like everybody  
37 else.

38

39 Q. Well, they get - but when you say redacted, they just  
40 get a final copy; they can't see that a paragraph's been  
41 deleted, can they?

42 A. Yeah, it's blacked out.

43

44 Q. It is blacked out?

45 A. Or whited out. Yeah, it's whited out.

46

47 COMMISSIONER: What's the reason for depriving the court

1 of the details? There might be good reason to redact for  
2 the purposes of maintaining the privacy or confidentiality  
3 as between other persons who might have been involved?  
4 A. Because we're not the applicant, I haven't had - we're  
5 not involved in those matters to know.  
6  
7 COMMISSIONER: It's not a question for you?  
8 A. Yes, that's right.  
9  
10 COMMISSIONER: This toing and froing --  
11 A. M'hmm.  
12  
13 COMMISSIONER: -- that you - as you characterise it,  
14 between OCFOS and the DCPL, so you've got a situation where  
15 the draft is provided by the CSO?  
16 A. Yes.  
17  
18 COMMISSIONER: It's looked at by the team leader.  
19 Feedback is given by OCFOS. It's then provided to the  
20 Director?  
21 A. Yes, it's uploaded into a portal. It then goes  
22 across, yes.  
23  
24 COMMISSIONER: By means of uploading it into the portal?  
25 A. Yes.  
26  
27 COMMISSIONER: The Director gives feedback to OCFOS?  
28 A. Yeah, to - it's to the CSO but it's through OCFOS.  
29  
30 COMMISSIONER: Through OCFOS. So OCFOS considers the  
31 material again based on the comments or feedback from the  
32 Director's staff?  
33 A. Alongside the CSO, yes.  
34  
35 COMMISSIONER: Alongside the CSO. And then it goes back  
36 via the portal to the Director?  
37 A. Yes.  
38  
39 COMMISSIONER: And that's a cumbersome process as far as  
40 you're concerned, is it?  
41 A. Yes, it's a double handling. I call it a duplication  
42 of efforts. You've got two lawyers who are looking over  
43 the same documents and providing feedback.  
44  
45 COMMISSIONER: All right. Thank you.  
46  
47 MR HASTIE: You mentioned before that there's a template.

1 Can you have a look at this document, please. Is that the  
2 template?

3 A. That's a template affidavit, yes. This was - this  
4 template affidavit was initially prepared between Child  
5 Safety, OCFOS and DCPL in about 2017. It was last reviewed  
6 in 2022, and there's currently a working group that's  
7 reviewing the template document again.

8

9 MR HASTIE: I tender that, Commissioner.

10

11 COMMISSIONER: Yes, that template will be CL-66.

12

13 **EXHIBIT #CL-66 - TEMPLATE AFFIDAVIT**

14

15 MR HASTIE: And was there another one done for Aboriginal  
16 and Torres Strait Islander families?

17 A. Yes. Yes.

18

19 Q. Could you have a look at this document, please?

20

21 COMMISSIONER: This is a template for the Director's  
22 application, though.

23

24 MR HASTIE: Yes, Commissioner.

25

26 COMMISSIONER: Yes. I thought that there was some  
27 template associated with the applications for emergent  
28 orders. Is that wrong?

29

30 MR HASTIE: No, Commissioner, it's just simply an  
31 application. This is a template for the affidavit.

32

33 COMMISSIONER: Yes. Is there any kind of template for -  
34 yes, template for the emergent orders?

35 A. Yes, there is.

36

37 COMMISSIONER: I thought the witness had said that,  
38 Mr Hastie. Do you have that?

39

40 MR HASTIE: I do not - as far as I'm aware, not on my  
41 desk. But we can provide a copy of that because it is  
42 instructive.

43

44 COMMISSIONER: Yes, yes.

45

46 MR HASTIE: So I can tender this and I'll take the witness  
47 to it.

1  
2 COMMISSIONER: All right. Well, the template applicable  
3 to Aboriginal and Torres Strait Islander families will be  
4 CL-67.

5  
6 **EXHIBIT #CL-67 - TEMPLATE APPLICABLE TO ABORIGINAL AND**  
7 **TORRES STRAIT ISLANDER FAMILIES**  
8

9 MR HASTIE: Can I just ask you in the body of  
10 the affidavit apart from there's some tips that are in  
11 green and in the body there's also some black print that  
12 would appear to have names in it and a description of  
13 events, is that just to - that's not a real description of  
14 events, that's meant to assist the person who's making the  
15 affidavit --

16 A. Yes, that's just to - yeah, just to - it's just a  
17 guide, yeah.

18  
19 Q. All right.

20 A. Just a support, particularly new legal officers and  
21 new CSOs when they're first starting out. People are  
22 always really keen for template documents to support them  
23 in drafting.

24  
25 Q. All right.

26  
27 Commissioner, I meant to bring a copy but I didn't.

28  
29 The Childrens Court Rules set out the sorts of things that  
30 an application for a protection order should include; is  
31 that correct?

32 A. M'hmm.

33  
34 Q. And some of the headings to this document reflect the  
35 requirements of the Childrens Court?

36 A. And they - the requirements under the Act.

37  
38 Q. Thank you. And also the Director's guidelines  
39 reinforce that?

40 A. Yes.

41  
42 Q. And the template without exhibits is about 20 pages?

43 A. Yes.

44  
45 Q. And in your experience is that kind of the length  
46 you'd ordinarily expect to be provided for an application  
47 for a protection order?

1 A. Usually they're significantly larger than that, and  
2 then you've got obviously your exhibits. OCFOS, in  
3 supporting the CSOs to draft these initial affidavits, I am  
4 told and I frequently hear from our lawyers that they're  
5 working towards securing essentially an interim order at  
6 first mention. I think that once the matter gets across to  
7 DCPL the feedback that I receive from our legal officers is  
8 that they're working towards the matter going to a  
9 contested hearing, and that's why the affidavits become so  
10 voluminous. And so --

11  
12 COMMISSIONER: But surely it doesn't turn only on a  
13 question of whether there will be a contest? The criteria  
14 in the Act needs to be satisfied?

15 A. That's correct.

16  
17 COMMISSIONER: And you're invoking the court's power. It  
18 needs to be explained, doesn't it, the basis for the  
19 application?

20 A. The basis for the application, yes, it does.

21  
22 COMMISSIONER: Yes.

23 A. It does.

24  
25 COMMISSIONER: So irrespective of whether it's contested  
26 or not?

27 A. I put to you, though, Commissioner, that - I'm not  
28 aware of the current data on that, but DCPL would be able  
29 to inform you of that - but in my last - the last time  
30 I was informed of how many matters actually went to  
31 contested hearing it was roughly around 20 per cent, which  
32 means that 80 per cent of matters won't go to contested  
33 hearing and yet you're preparing the affidavit as though  
34 you are.

35  
36 COMMISSIONER: But why do you draw a distinction in the  
37 preparation of the affidavits? That's the point I'm  
38 raising with you, depending on whether the application is  
39 contested or not? I mean, isn't the court entitled to know  
40 the basis upon which it's asked to make these highly  
41 consequential orders in any circumstance?

42 A. Yes. I agree that all information should be put to  
43 the court that is relevant in relation to making that  
44 order. I don't dispute that.

45  
46 COMMISSIONER: And then there's public confidence in the  
47 system. I mean, if orders are made removing children

1 without the basis for the orders in fact and insofar as  
2 they're supported by evaluation or opinion being exposed,  
3 then wouldn't the absence of such material undermine public  
4 confidence in the system?

5 A. I think that needs to be counterbalanced with parents  
6 knowing the case against them and parents --

7  
8 COMMISSIONER: But that's a different point. Parents need  
9 to know if they wish to contest the application.

10 A. Well, yeah, sorry.

11  
12 COMMISSIONER: And they probably need to know anyway. But  
13 the point I'm asking you about is your implicit criticism  
14 that affidavits in this fulsome form are prepared on the  
15 assumption that the application may be contested, and you  
16 add that only 20 per cent are contested so there's  
17 80 per cent uncontested, roughly; correct? And my question  
18 to you is why should there be any difference between the  
19 material provided in the contested as opposed to  
20 uncontested application?

21 A. I think that the purpose of any proceedings should be  
22 for a child to return home to family.

23  
24 COMMISSIONER: That's a different question. Let's just  
25 focus on my question, please, which is your observation  
26 that the affidavits in this template form are prepared on  
27 the hypothesis that the application may be contested and  
28 hence it's as fulsome, as I think you're saying, it is?

29 A. What I'm saying is it's overwhelming for parents, and  
30 we hear that repeatedly is the parents don't understand it.  
31 And I believe that a far better approach would be to have a  
32 really simple affidavit - if you were to do it that way - a  
33 simple affidavit which attaches the assessment and has the  
34 relevant evidence attached to that so the parents do know  
35 the case against them and so that parents can get  
36 appropriate legal representation at the time, and then as  
37 the matter unfolds if it does become a contested hearing  
38 and a more forensic approach is required then you could  
39 consider it then.

40  
41 COMMISSIONER: But implicit in your answer is that the  
42 only party who has an interest in having the matter  
43 explained is the parents who may or may not wish to contest  
44 the application.

45 A. M'hmm.

46  
47 COMMISSIONER: What about the court? The court's being

1 asked to invoke - exercise a very significant and  
2 consequential power. Why shouldn't the court have as much  
3 information as possible before it to decide whether or not  
4 it should accede to the application?

5 A. The court's being asked to make a decision in relation  
6 to the interim matter, in relation to an interim order.

7  
8 COMMISSIONER: No, here we're talking about a stage in the  
9 proceedings where the Director is involved. So it's not  
10 interim at all. It might be a short-term custody order,  
11 but it's a short-term custody order in support of an  
12 eventual long-term guardianship order subject to  
13 reunification being achieved.

14 A. No, I don't agree. So at that first court event it's  
15 an interim order. It's an interim order that could be  
16 protracted for up to 270, 280 days before a final order is  
17 made, and that's in relation to a short-term custody or  
18 short-term guardianship order.

19  
20 COMMISSIONER: Well, we need to get this clear. These are  
21 pro formas or templates applicable to the work of the  
22 Director?

23 A. Yes.

24  
25 COMMISSIONER: So we're not talking about emergent orders?  
26 A. No.

27  
28 COMMISSIONER: We're talking about longer term orders?  
29 A. M'hmm.

30  
31 COMMISSIONER: And they would be either a temporary  
32 custody order?  
33 A. No.

34  
35 COMMISSIONER: Short-term custody order. I just used the  
36 wrong nomenclature.

37 A. That's all right.

38  
39 COMMISSIONER: Okay? Short-term custody order?  
40 A. Yes.

41  
42 COMMISSIONER: What else?  
43 A. A short-term guardianship order would be your two most  
44 common.

45  
46 COMMISSIONER: A short-term guardianship order. And they  
47 could go for two hundred and something days?

1 A. They could be in court for that long, yes, yes, and  
2 the Director of DCPL, he would have the relevant  
3 information around that as to how long matters take to get  
4 through court.

5

6 COMMISSIONER: But at this stage in the process we've  
7 moved beyond the emergent order --

8 A. That's correct.

9

10 COMMISSIONER: -- stage where only three-day orders are  
11 made --

12 A. M'hmm.

13

14 COMMISSIONER: -- subject to the operation of section 99.

15 A. M'hmm.

16

17 COMMISSIONER: And we're now in the realm of longer term  
18 orders and orders of significant duration, wouldn't you  
19 agree?

20 A. Yes.

21

22 COMMISSIONER: Right. And eventually they may lead to an  
23 application for long-term guardianship?

24 A. Yes, or they could be - you could get a long-term  
25 guardianship order off the bat, but it would - they're  
26 usually - they're not very common. It would be something  
27 like a really significant physical abuse or a sexual  
28 assault that you would not have a short-term order first  
29 because the purpose of those short-term orders is to  
30 continuously work towards reunification for the family.

31

32 COMMISSIONER: I follow that. The orders at this stage  
33 are child protection orders falling under the jurisdiction  
34 of the Director; right?

35 A. Yes.

36

37 COMMISSIONER: And they are contemplated to be, subject to  
38 reunification being achieved, of can I call it medium term  
39 length or duration up to two years?

40 A. Possibly.

41

42 COMMISSIONER: Yes. So that's a significant period of  
43 time?

44 A. M'hmm.

45

46 COMMISSIONER: Right. Now, with that context in mind, why  
47 is it you say that this template is too elaborate or too

1 detailed or however you wish to express it given that it's  
2 designed to meet a circumstance where there's a contest but  
3 many applications aren't contested, so 80 per cent are not  
4 contested, and I'm trying to understand why it is you think  
5 there's a distinction of substance between the kind of  
6 affidavit required in an uncontested as opposed to  
7 contested context, having regard to the fact that the  
8 court's jurisdiction is sought to be invoked for an order  
9 the duration of which might be up to two years?

10 A. Because the court only needs to be satisfied at that  
11 first court event to be able to make the interim order.

12  
13 COMMISSIONER: Say that again?

14 A. The court only needs to be satisfied at that first  
15 court event to be able to make the interim order.

16  
17 COMMISSIONER: You mean --

18 A. And then you can - further affidavits can be provided  
19 as a matter unfolds. And then you can go through to  
20 actually providing a trial affidavit if the matter's  
21 contested.

22  
23 COMMISSIONER: All right. Well, there's sense in that  
24 provided, I suggest to you, that the court has before it  
25 sufficient information on which to evaluate whether a  
26 short-term custody order, for example, should be made. Do  
27 you agree the court ought to be able to evaluate whether  
28 the material warrants the making of a short-term custody  
29 order?

30 A. Yes, but you're not going to get a short-term custody  
31 order at that first mention.

32  
33 COMMISSIONER: So what are you going to get at the first  
34 mention?

35 A. An interim order for custody.

36  
37 COMMISSIONER: For how long?

38 A. Until the next court event.

39  
40 COMMISSIONER: Which would be how long, in your  
41 experience?

42 A. It depends on what the matter's adjourned for.

43  
44 MR HASTIE: About a month or two weeks or --

45 A. I don't know because we're not in that space.

46  
47 COMMISSIONER: All right. Thank you.

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MR HASTIE: So, as I understand your evidence, is it the case that you think the large affidavit filed with the originating proceeding is not conducive to reunification of the child with the parents?

COMMISSIONER: I don't think the witness said that, but you can put it to her.

A. Yeah, I don't know if I said that. If I did, I didn't mean it. Like, I didn't mean that.

MR HASTIE: You said that parents were overwhelmed by the large affidavits sometimes.

A. Yes, they are. Yes.

Q. So is that as far as it goes, as far as your evidence goes?

A. My evidence, I guess, is that the affidavit should be sufficient to secure custody, if that's what you're seeking, at that first mention.

Q. All right. And what's the downside of putting a big affidavit down in?

A. Is the impact on families of receiving that and being able to understand that.

Q. All right. Perhaps one way of looking at it, Commissioner, is it may be not unlike an injunction; sufficient material for an injunction but not enough for a mandatory injunction until you've had a full trial of those contested matters.

COMMISSIONER: Well, the parallels with interlocutory injunctions, I think you would understand from the questions about balancing harm, is very much a matter that exercises my mind here. The question of whether the parents are overwhelmed, mightn't that be addressed by better opportunities for the parents to have legal advice and be assisted in digesting material?

A. Yes. In my view there should be a process. Each court event should be a process where Child Safety is able to have really open communication with parents and with their lawyers in an effort to resolve matters, and in the current framework that is not possible.

COMMISSIONER: Why is it not possible in the current framework?

1 A. Child Safety doesn't have a seat at the table.

2

3 COMMISSIONER: Well, this is perhaps a matter for the  
4 Director, but are you suggesting that in the course of the  
5 court process once the matter leaves the hands of the  
6 department and OCFOS that the Director doesn't initiate  
7 such - let me put a label on it - mediation with the family  
8 as might be conducive to reunification or to the  
9 cooperation and collaboration with the family concerned?

10 A. I couldn't comment categorically on that because I'm  
11 not involved in that space, but I'm not aware - I'm not  
12 aware.

13

14 COMMISSIONER: But do you criticise the process impliedly  
15 once the Director becomes involved, but I'm not entirely  
16 sure what your criticism is.

17 A. My criticism, if you call it that --

18

19 COMMISSIONER: Well, comment if you like.

20 A. Yeah, my comment.

21

22 COMMISSIONER: It doesn't matter what label you put on it.

23 A. My comment is around the amount of evidence that is  
24 provided to families or that's presented to families for  
25 the case against them, when I do not believe that that is  
26 necessary to secure an order at first mention, an interim  
27 order at first mention. It is counterproductive to  
28 continuing to have good relationships with families in an  
29 effort to reunify children.

30

31 COMMISSIONER: Well, wouldn't it also be counterproductive  
32 not only to the families but to the public confidence in  
33 the process if the department was not able to provide  
34 cogent material supporting the application for the removal  
35 of the child and the continued removal of the child?  
36 Wouldn't that lead potentially to allegations of  
37 resurrecting the Stolen Generation?

38 A. Absolutely.

39

40 COMMISSIONER: I mean, there's a need, isn't there, for  
41 this sort of decision-making to be undertaken scrupulously?

42 A. I agree in robust processes. I agree in relevant  
43 evidence being provided to the court and to families.

44

45 COMMISSIONER: And would you agree that the public  
46 confidence in the system is enhanced by the fact that the  
47 power is exercised judicially; that is, the removal of

1 the child is made as a consequence of a decision made by a  
2 court based on evidence put before it?  
3 A. Yes.

4  
5 COMMISSIONER: Right. So if that's the key element to  
6 public confidence in the system, including the confidence  
7 of the families concerned, isn't it necessary for the court  
8 to have before it the facts and opinion, hopefully  
9 separated, that forms the basis of the application that it  
10 exercise its power?

11 A. That forms the basis of the threshold test that needs  
12 to be satisfied.

13  
14 COMMISSIONER: Well, as I understand your point, the  
15 detail of the affidavits could be sort of serially updated  
16 and more detail given as and when required as the process  
17 continues?

18 A. Yes.

19  
20 COMMISSIONER: Is that a fair summary?

21 A. Yes.

22  
23 COMMISSIONER: All right. Thank you.

24  
25 MR HASTIE: Now, you mentioned to I think the Commissioner  
26 the participation that OCFOS or officers in OCFOS might  
27 have in relation to plans for the child independent of  
28 the court process. So one of the things that we've heard  
29 evidence about is the existence of case plans and family  
30 meetings.

31 A. M'hmm.

32  
33 Q. Does OCFOS participate in either of those?

34 A. No, no. The FGMs typically occur once the referral  
35 has been made to DCPL.

36  
37 Q. Right. And is that something that - is the occurrence  
38 of a case plan for the child and the existence of a  
39 meeting, is that something that OCFOS would ensure would  
40 happen?

41 A. No, because we're no longer involved in that space at  
42 that time.

43  
44 Q. And you don't represent --

45 A. No.

46  
47 Q. -- the Chief Executive at either of those meetings?

1 A. No.  
2  
3 Q. All right. And the other matter that can sometimes  
4 occur, we've heard evidence about, is a conference, a court  
5 ordered conference.  
6 A. M'hmm.  
7  
8 Q. Does OCFOS participate in those?  
9 A. No. No, we don't.  
10  
11 Q. And are you aware of how they operate?  
12 A. No, not the details of them, no, because we're not  
13 involved.  
14  
15 Q. The Director --  
16 A. The Director is, yes.  
17  
18 Q. The Director, if invited, attends --  
19 A. Yes.  
20  
21 Q. -- is that how it works?  
22 A. That's correct, usually along with the senior team  
23 leader and the CSO, is my understanding.  
24  
25 Q. I beg your pardon?  
26 A. Usually along with the senior team leader and CSO, is  
27 my understanding.  
28  
29 Q. All right. Now, you mentioned that you'd - just in  
30 relation to the discussion that you had with  
31 the Commissioner that there might be different ways of - or  
32 a shortened affidavit rather than a lengthy affidavit, and  
33 you'd practised in New South Wales. Can you have a look at  
34 this document, please?  
35 A. Thank you.  
36  
37 Q. So is that a practice note number 2 from the Childrens  
38 Court of New South Wales?  
39 A. Yes.  
40  
41 Q. I tender that.  
42  
43 COMMISSIONER: Yes. It will be CL-68  
44  
45 **EXHIBIT #CL-68 - PRACTICE NOTE NUMBER 2 FROM THE CHILDRENS**  
46 **COURT OF NEW SOUTH WALES**  
47

1 MR HASTIE: Given the date, you were still - or  
2 the initial date anyway, you were still working down there?  
3 A. M'hmm.

4  
5 Q. And, as you understand it, what does this guideline or  
6 practice note, I should say, indicate and how does it work  
7 in relation to applications for protection orders or the  
8 like?

9 A. Commissioner, it's a very different way of doing  
10 things.

11  
12 COMMISSIONER: Just to be clear, are we talking about -  
13 does this apply from what in Queensland would be called an  
14 emergent order or is there no distinction?

15 A. There's no distinction as such in New South Wales  
16 apart from those emergency care protection orders. But  
17 this would typically be used for their equivalent of a care  
18 application. So a child protection order application.

19  
20 COMMISSIONER: So, just so I'm clear about this, how long  
21 does the administrative decision to remove a child in New  
22 South Wales endure for before the matter comes before the  
23 court?

24 A. Three days.

25  
26 COMMISSIONER: Three days. All right. So after three  
27 days it's a court process?

28 A. Yes.

29  
30 COMMISSIONER: Right.

31 A. So this practice note sits alongside I think it's a  
32 three-page report document, and that report provides a  
33 really succinct summary of why the child is a child in need  
34 of protection and the most appropriate order to ensure the  
35 child's ongoing care and protection needs. No affidavit is  
36 filed in the matter. This practice directions sets out  
37 specified documents that must be provided to all the  
38 parties and the court. So the application to the court is  
39 a succinct document with essentially a bundle of documents  
40 that sits behind it.

41  
42 MR HASTIE: Can I give the witness - would you mind having  
43 a look at this document as well?

44 A. Thank you.

45  
46 Q. Is that the application you're referring to?

47 A. Yes, thank you.

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Q. That would be the application - the equivalent of an application for a protection order?

A. Yes.

Q. I tender that, Commissioner.

COMMISSIONER: This again is the New South Wales application initiating care proceedings. It will be CL-69

**EXHIBIT #CL-69 - NEW SOUTH WALES APPLICATION INITIATING CARE PROCEEDINGS**

MR HASTIE: Thank you. I interrupted you. The practice note refers at the bottom that it serves the documents, the application and the report, and that's the - this is the application to which you're referring?

A. Yes.

Q. And there is a report in form 1 which I haven't tendered. But, anyway, the report - who writes the report?

A. In New South Wales it's written by the CSO.

Q. All right. And how long would that report be, for instance?

A. It doesn't extend much longer than the actual template document. It's a very quick report that can be written, you know, in a couple of hours.

Q. All right.

COMMISSIONER: And is that all that is needed for an order that might endure for several years?

A. No. So what would happen then if the matter goes to hearing or if the magistrate specifically orders that you could then file an affidavit at that time if further information is required. But what it essentially does is provide the court and all the parties with a really wholesome picture of the records that are held by the department.

COMMISSIONER: Let me tell you what I think the problem is, the rolling up of opinion and fact. Somebody expresses an opinion, "I have concerns about this, that or the other thing about the child," but is not able or does not clearly articulate the factual basis upon which the opinion is founded. Then it's inscrutable to anybody, including the

1 court and including any interested party like the parents  
2 who may wish to contest it, because no opinion rises higher  
3 than the facts upon which it's based. Any opinion that  
4 doesn't clarify and distinguish between the facts upon  
5 which the opinion, evaluation or assessment that is made  
6 and the conclusions drawn from those facts remains opaque  
7 in terms of scrutiny by any other person, including the  
8 court. Now, do you agree with that as a proposition?

9 A. Yes.

10  
11 COMMISSIONER: Right. So isn't it important that the  
12 court is given the facts upon which the opinion or  
13 evaluation as expressed are based, and where the evaluation  
14 is based upon an opinion which may also be the case in this  
15 context because somebody with professed expertise says,  
16 "I assess a risk because of a prevalence of certain  
17 factors," then that too needs to be articulated so that any  
18 person, and especially the court, looking at the material  
19 is able to understand the evaluative reasoning upon which  
20 the conclusion that the child was in need of protection has  
21 been founded.

22 A. M'hmm.

23  
24 COMMISSIONER: So you agree with me?

25 A. Yes.

26  
27 COMMISSIONER: Do you consider that the material prepared  
28 by OCFOS in relation to emergent orders satisfies that  
29 basic need for the distinguishing of fact from conclusion?  
30 A. I think that the material that's provided by OCFOS is  
31 fact in relation to emergent orders. It's what is on the  
32 departmental system that is relevant to the application.

33  
34 COMMISSIONER: That depends on what the material on the  
35 department's records in terms of its assessment contains,  
36 whether the department does distinguish between factual  
37 matters as investigated and identified and conclusions  
38 drawn from those factual matters; do you understand the  
39 distinction I'm making?

40 A. I don't know if I do.

41  
42 COMMISSIONER: Right. You can have an opinion that the  
43 child is in need of protection. That's the ultimate  
44 opinion. Why? Well, the following facts, hypothetically,  
45 occurred. "The child was subject to physical abuse, was  
46 hit over the head with a broomstick, witnessed regular  
47 episodes of domestic violence between the parents or on the

1 part of the father et cetera. Based on those facts, it is  
2 my opinion that the child is in need of protection." So  
3 you need to break down the facts from the opinion, don't  
4 you?

5 A. M'hmm.

6

7 COMMISSIONER: Right. And the affidavit should do that.  
8 What I'm not understanding in your evidence is what it is  
9 you think that could be dispensed with in terms of the  
10 material that ought to be put before a court and prepared  
11 in the context of either an emergent order or a more - or  
12 an order sought once the Director becomes involved?

13 A. I think that this is merely just an alternative option  
14 that may assist the Commissioner. That was all. If the  
15 Commissioner's looking at streamlining services and making  
16 things, I guess, looking at the workload for CSOs, the  
17 current pressures on the system which are extremely  
18 significant then --

19

20 COMMISSIONER: Well, streamlining is a good thing. I'm  
21 sure everybody agrees that streamlining would be good.

22 A. Yes.

23

24 COMMISSIONER: But that's why I asked what can we cut out,  
25 what should be cut out, because it's not immediately  
26 obvious to me that cutting out the evidentiary foundation  
27 for the opinion that the child needs protection is  
28 something that could be cut out of the process --

29 A. I agree with you. It shouldn't be cut out. The way  
30 they do it in that jurisdiction is the assessment by the  
31 CSO becomes - is part of the bundle of documents.

32

33 COMMISSIONER: But in that jurisdiction what you cut out  
34 at the equivalent of the emergent order stage in Queensland  
35 is the involvement of the lawyers in the process, is that  
36 essentially it, because it's a department decision?

37 A. Sorry, yes, in New South Wales, yes, it's an  
38 administrative decision.

39

40 COMMISSIONER: And so there's no need to go off to court  
41 at all for the three-day period in New South Wales?

42 A. Once again, I'm not sure if I'm understanding your  
43 question, sorry.

44

45 COMMISSIONER: In Queensland if you want to remove the  
46 child you need to go and get an emergent order?

47 A. Yes.

1  
2 COMMISSIONER: Subject to section 18?  
3 A. No, not necessarily. Section 18 is where you've  
4 already removed the child.  
5  
6 COMMISSIONER: I see. That's what I meant.  
7 A. Yes.  
8  
9 COMMISSIONER: Except in the case of section 18, you need  
10 a court order?  
11 A. M'hmm.  
12  
13 COMMISSIONER: In New South Wales you don't need a court  
14 order for that initial stage?  
15 A. M'hmm.  
16  
17 COMMISSIONER: And you think that's a preferable process?  
18 A. No, I'm not suggesting that at all.  
19  
20 COMMISSIONER: It's all right if you do. So you don't  
21 think that's a preferable process?  
22 A. No, I don't.  
23  
24 COMMISSIONER: You think the system in Queensland where  
25 there's a court application for an emergent order is  
26 preferable?  
27 A. Yes. But once again I think it can all be  
28 streamlined.  
29  
30 COMMISSIONER: All right. Help me with how one might  
31 streamline it?  
32 A. I think that - and this is why Mr Hastie I think has  
33 provided you with these documents, because we got talking  
34 about how you could do things differently. And this is an  
35 alternate way of doing things whereby you don't have -  
36 you've got CSOs back out in the field working with  
37 families, and that's at the crux of it; right? It's a  
38 major pressure on the system. So anything at all that can  
39 alleviate the pressure that they can provide all of the  
40 relevant information to the court in making that decision  
41 I think would be of great benefit.  
42  
43 COMMISSIONER: But, just to be clear, in New South Wales  
44 you don't have to provide anything to the court in the  
45 emergent order stage or what is the emergent order stage in  
46 Queensland because you don't need to go to court to get an  
47 order, isn't that the difference, or have I misunderstood

1 it?  
2 A. This is - if you were to do a model like this, then  
3 this would be - if you were to refer something, say, to  
4 DCPL or even if you didn't refer it to DCPL, if you applied  
5 for a child protection order, you could do something along  
6 the same lines as what they do in New South Wales where  
7 they just do a really simple report and then they have a  
8 bundle of documents that supports that. And then if an  
9 affidavit is required that can then be filed down the  
10 track. So this means that the parents at the very outset  
11 get all the documents that are relevant to the proceedings  
12 in the one go. They're not waiting for weeks on end to  
13 know the case against them. There's not any  
14 toing-and-froing between lawyers. It's all a very simple  
15 process. It's very streamlined. It means that everyone  
16 knows what the department has. It's time limited. It goes  
17 back, like, 12 months of matters that the department  
18 currently holds. It's a very transparent process.

19  
20 COMMISSIONER: That only occurs, in terms of the  
21 involvement of a court, after via administrative decision a  
22 child might have been removed for three days; that's right,  
23 isn't it?

24 A. Yes.

25  
26 COMMISSIONER: Okay.

27  
28 MR HASTIE: Or indeed if a child wasn't removed; is that  
29 right? This application and the form of the direction with  
30 respect to the practice note, that deals with the first  
31 initiating proceeding in court regardless of what order or  
32 anything that happened beforehand?

33 A. That's right. It could be a directive order. It  
34 could be a supervision order. It could be anything. Any  
35 type of child protection order is dealt with that way.

36  
37 COMMISSIONER: All right. Applicable to effectively the  
38 equivalent jurisdiction to that presently under the  
39 Director in the Queensland model?

40  
41 MR HASTIE: Yes.

42  
43 COMMISSIONER: Right.

44  
45 MR HASTIE: You've mentioned before we went down that path  
46 that a brief of evidence would be provided to the Director,  
47 and then there would be a case where the Director might

1 refer a matter back or might proceed with it.

2 A. M'hmm.

3

4 Q. Now, what sort of matters or when does it come to pass  
5 that matters might be referred back? What does that -  
6 referring something back, what does that mean?

7 A. Referring a matter back means that the Director may  
8 not agree that an order's required in the matter. They may  
9 say that further assessment is required; they don't think  
10 the assessment has been completed. So, for example, they  
11 may think that we haven't assessed a father fully.

12

13 COMMISSIONER: Sorry, I didn't hear what you said.

14 A. They may think that we haven't assessed the matter  
15 properly. So they may think, for example, that we haven't  
16 assessed a father properly.

17

18 MR HASTIE: A what? A father?

19 A. A father. Say a father properly.

20

21 Q. All right.

22 A. Yeah, so no order required; haven't assessed a father  
23 properly.

24

25 Q. Is that a case where the whole thing comes back or is  
26 it just the case where the Director says, "Oh, can you help  
27 us here; we want a bit more information," or is it --

28 A. It could be either or. It could be either or. The  
29 other instance that I can think of is if you refer across  
30 an order for, say, long-term guardianship to the Chief  
31 Executive and you want to vary that order to like a  
32 long-term guardianship to other or something like that they  
33 may refer that back and say they don't agree with it for  
34 whatever reason; yeah.

35

36 Q. What might be the reason for it?

37 A. I haven't seen one in a while.

38

39 Q. All right. Okay. Well, all right. And so do you get  
40 many of those referrals back?

41 A. No. So if you have a look I think at the DCPL data  
42 over the last three years there's been approximately 11,000  
43 matters referred for CPOs, for child protection orders, and  
44 over those three years I think it's 260 matters have been  
45 referred back, so about 2.3 per cent.

46

47 Q. And, as you understand it, those numbers, do they go

1 back to the - or could they go back to the Director or does  
2 that mean they're finalised?

3 A. No, they can go back. You can re-refer. You can  
4 re-refer the matters back. Sometimes if matters are  
5 referred back families may agree due to the change in  
6 circumstances to engage a voluntary intervention. Some  
7 matters may also be referred back because the department  
8 has changed their assessment and they've actually asked for  
9 the matter to be referred back. Families are continually  
10 evolving and changing. They're certainly not static and  
11 things always change. And so it wouldn't be unusual then  
12 for the department to ask for a matter to be referred back  
13 if the assessment changes, and that would be factored into  
14 that 2.3 per cent.

15  
16 Q. All right. Sorry, it's not unusual for the department  
17 to ask for it back?

18 A. No, well, it wouldn't be unusual for the department to  
19 change their assessment if circumstances change for a  
20 family.

21  
22 Q. All right. And if there's an existing order of the  
23 court in relation to something what does that involve? In  
24 other words, there's an existing - some sort of short-term  
25 order or even a supervision order, and the department's  
26 changed their assessment of the requirements for an order.  
27 How is that dealt with?

28 A. Sorry, so if it's an expiring order - I'm just trying  
29 to - yeah. If it's an expiring order, so, for example,  
30 it's a short-term custody, short-term guardianship order,  
31 and it's referred across to DCPL and they may not agree  
32 with, like, the order that we're requesting, and they may  
33 then come back and ask for further information about that  
34 to support that. But that's not necessarily a refer back,  
35 but.

36  
37 COMMISSIONER: Tell me about that. When you refer the  
38 matter to the DCPL do you express a view, do you, as to  
39 what order DCPL should seek?

40 A. Yes, and that's in the form A referral that we send  
41 across.

42  
43 COMMISSIONER: Why do you do that, given that it's within  
44 his jurisdiction to determine what longer term or long-term  
45 order is made?

46 A. Because --  
47

1 COMMISSIONER: Why would you do that?  
2 A. Because we've already given legal advice on it, and  
3 we've already assessed it, already assessed all of the  
4 evidence in that. I see it as being collaborative in  
5 working with the Director to provide that information.  
6

7 COMMISSIONER: Well, what Mr Miller says in a statement  
8 that - and I'll be hearing from him - in relation to that  
9 question, paragraph 34 of his statement, which is a long  
10 statement and dated 7 November, he says this:

11  
12 *In 2024/25 within the 3,988 child*  
13 *protection applications made the DCPL made*  
14 *a different decision than initially*  
15 *assessed by Child Safety in respect to 671*  
16 *applications, 16.4 per cent of the total*  
17 *child protection applications made, for*  
18 *child protection orders of a different type*  
19 *or orders that were otherwise different to*  
20 *Child Safety's initial assessment on*  
21 *matters.*

22  
23 A. That's different to a refer back, but.

24  
25 COMMISSIONER: Yes, I understand that.

26 A. Yeah.

27  
28 COMMISSIONER: Refer back he mentions in paragraph 33  
29 that:

30  
31 *In 2024/25 of the 3,988 child protection*  
32 *applications 96 matters were referred back*  
33 *or 2.4 per cent of the total matters dealt*  
34 *with.*

35  
36 So I think that's the figure that you gave?

37 A. I think I said 2.3 but, yep, 2.3, 2.4.

38  
39 COMMISSIONER: Yes. But he makes a different assessment  
40 as to the kind of or type of child protection order to be  
41 sought in 16.4 per cent of the cases in 24/25. That's  
42 quite a significant proportion, wasn't it?

43 A. No, I haven't seen the report, his annual report.

44  
45 COMMISSIONER: I'm just quoting the figures that he gives.  
46 This is an internal communication between OCFOS and DCPL as  
47 to what the department sees as the appropriate child

1 protection order.  
2 A. Yes.  
3  
4 COMMISSIONER: But it's a matter for him, that is per his  
5 position as the Director, to decide what application to  
6 make?  
7 A. That's correct.  
8  
9 COMMISSIONER: All right. Thank you.  
10  
11 MR HASTIE: Thank you, Commissioner.  
12  
13 COMMISSIONER: So when it's referred back - I'm sorry -  
14 does that essentially mean that the Director has rejected  
15 the department's view that a child protection order should  
16 be made?  
17 A. Not necessarily. It just means that they may want  
18 further information or further evidence. They're not  
19 satisfied that we've given enough. Sometimes - I mean, it  
20 can be referred back with agreement or without agreement.  
21  
22 COMMISSIONER: So that again?  
23 A. It can be referred back with agreement or without  
24 agreement.  
25  
26 COMMISSIONER: What does that mean?  
27 A. Well, if it's without agreement they need to provide  
28 written reasons as to why they've referred the matter back.  
29  
30 COMMISSIONER: Written reasons to whom?  
31 A. To the senior team leader.  
32  
33 COMMISSIONER: And that's required under the DCPL Act, is  
34 it?  
35 A. I think so, yes.  
36  
37 COMMISSIONER: Those reasons are reviewable somehow, are  
38 they?  
39 A. That I'm not sure of. I'm not involved in that  
40 process.  
41  
42 COMMISSIONER: If the Director forms the view that the  
43 matter shan't proceed to an application for any kind of  
44 child protection order that's the end of the matter, isn't  
45 it?  
46 A. Yes. So if the matter is referred back, as I was  
47 saying before, then the department may engage in voluntary

1 intervention with the family. It doesn't mean that the  
2 child is still not at risk of harm. So it may engage in  
3 voluntary intervention with the family. They may --  
4

5 COMMISSIONER: It means, doesn't it, that the Director has  
6 come to the view, if he refers it back on the basis that no  
7 further action will be taken, that his office is of  
8 the view that the child is not in need of protection within  
9 the meaning of the Act, doesn't it?

10 A. Yes.

11  
12 COMMISSIONER: I mean, otherwise he has a duty, does he  
13 not, to make the application?

14 A. Yes.

15  
16 COMMISSIONER: Well, you say but it doesn't mean that the  
17 child is not in need of protection. That's just a way of  
18 you saying you don't agree with his decision, isn't it?

19 A. Well, the department's already assessed that the child  
20 is a child in need of protection. That's why the referral  
21 was made in the first instance.  
22

23 COMMISSIONER: Right.

24 A. So obviously there's a difference of opinion as to  
25 whether or not the child is a child, yeah, in need of  
26 protection.  
27

28 COMMISSIONER: And it is at the end of the day an opinion,  
29 isn't it?

30 A. Yes, it is.  
31

32 COMMISSIONER: Yes.

33 A. It is, but can I put a caveat on that?  
34

35 COMMISSIONER: Yes.

36 A. Child protection practitioners, whether they be CSOs,  
37 senior team leaders or managers, I view them - I may be a  
38 lawyer, but I view them as being the absolute experts in  
39 their field in assessing --  
40

41 COMMISSIONER: But they're not the decision-maker, are  
42 they?

43 A. But they're the experts in assessing risk.  
44

45 COMMISSIONER: Well --

46 A. And who am I as a lawyer to say that I don't believe  
47 that their assessment is accurate and valid?

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COMMISSIONER: Well, "accurate and valid" might not be quite the right words, but I understand what you're saying.  
A. Because I'm not qualified. I don't hold the qualifications that CSOs or senior team leaders do in making that assessment. I give advice on the evidence that supports that.

COMMISSIONER: At the end of the day the decision is made not by any anterior expert within the department but by the court.  
A. M'hmm.

COMMISSIONER: And that's the process that is established by the legislation. The Director's job, it seems to me, is to make a legal and forensic assessment as to whether the matter should be put before the court. And if that office considers that it shouldn't that's an end to the matter, isn't it?  
A. Yes.

COMMISSIONER: Subject to new facts emerging?  
A. Yes, also the evidence --

COMMISSIONER: Because new evidence might come forward, circumstances might change. There's no limit on the number of applications that could be made to protect the child as circumstances manifest, is there?  
A. Or referrals that could be made back to DCPL.

COMMISSIONER: Yes. So do you not consider it a good thing that the department's assessment is scrutinised by somebody independent of the department for the purposes of deciding whether an application should be put to the court for such consequential orders?  
A. I think that the assessment stands on its own.

COMMISSIONER: The assessment --  
A. Supported by evidence, but I think the assessment itself stands alone.

COMMISSIONER: Which is somebody's opinion based on the facts, isn't it?  
A. It's an expert assessment.

COMMISSIONER: And why do you say it's an expert assessment?

1 A. Because they're appropriately qualified to be making  
2 that assessment.

3

4 COMMISSIONER: Well, if that were the answer, why do we  
5 need the court's involvement? Isn't the answer to my  
6 question because for public confidence the courts are asked  
7 to examine the question of whether the State should remove  
8 a child from that child's family?

9 A. M'hmm.

10

11 COMMISSIONER: Isn't that the answer, however expert the  
12 department might be at assessing risk?

13 A. The court must be satisfied, yes, that the child is in  
14 need of protection.

15

16 COMMISSIONER: So if it were simply a matter of letting  
17 the experts decide then on the Director's figures there  
18 would be 16 per cent of cases where an independent  
19 assessment by the Director, if he wasn't there, would have  
20 led to applications that the Director, if he had looked at  
21 them, would not have supported?

22 A. Is that 16 per cent - I don't have the data in front  
23 of me. Is that 16 per cent of matters about where he has  
24 applied for something that was different to what was  
25 referred?

26

27 COMMISSIONER: Yes, that's what he said. I'll --

28 A. I guess you would have to then scrutinise the data in  
29 relation to what court orders were ultimately made as to  
30 whether or not that was - the order that was sought was  
31 ultimately the order that was made by the court.

32

33 COMMISSIONER: I don't want to - perhaps over lunch you  
34 can have a look at this paragraph or this statement by  
35 Mr Miller and consider any comments you wish to make about  
36 it, because I'm going to ask Mr Miller some questions  
37 arising from what you say as well. But it's paragraph 34,  
38 Mr Hastie, of Mr Miller's statement.

39

40 MR HASTIE: Thank you, Commissioner.

41

42 COMMISSIONER: I suppose the basic point is this. One  
43 can't have it both ways. One can't have the scrutiny of  
44 the court, the protection and confidence that comes from a  
45 court making a decision, while at the same time asserting  
46 that the better experts are somebody - in somebody or some  
47 body, some office, outside the court. You either invoke

1 the court's processes or you don't. And, if you're going  
2 to, the basis upon which the court is asked to make an  
3 order has to be clear; do you not accept that?

4 A. I accept that the assessment and the evidence that is  
5 given to the court assists the court in making that  
6 decision. That's what I accept.

7  
8 COMMISSIONER: Yes. And if the material that's put before  
9 the court conflates opinion with fact then the court is in  
10 a hopeless position when it comes to making an assessment  
11 of the veracity of the opinion as expressed because, if  
12 it's all conflated, then it becomes impossible to  
13 interrogate it, which is why the rules of evidence don't  
14 allow that when it comes to opinion evidence generally.  
15 There's very good reason for disaggregating opinion from  
16 fact, and you understand that as a lawyer?

17 A. Yes, I understand that.

18  
19 COMMISSIONER: Right.

20 A. Yes.

21  
22 COMMISSIONER: So one would hope that the material put  
23 before a court strives to disaggregate fact from opinion  
24 wherever possible or, if it is a conclusion based on  
25 opinion, the clear identification of the opinion because  
26 some matters might be supported by the expert opinion as  
27 well as by fact.

28 A. It becomes a question of weight then, doesn't it, the  
29 weight that you give to some evidence versus other  
30 evidence?

31  
32 COMMISSIONER: Yes, if you're capable of scrutinising it.  
33 If it's too rolled up then you can't; that's the problem,  
34 you see?

35 A. M'hmm.

36  
37 MR HASTIE: On which case, Commissioner, then an  
38 experienced magistrate would be in a position to say that  
39 they won't accept what they're told.

40  
41 COMMISSIONER: In theory, of course. In practice, whether  
42 that's a practical course available to a magistrate  
43 confronted with an opinion expressed in some rolled up way  
44 by a responsible officer who asserts some, you know,  
45 egregious risk that is about to occur unless some step is  
46 taken, puts the magistrate in a difficult position. So  
47 I am concerned about the quality of the material before the

1 courts, Mr Hastie, for the reasons I've just discussed with  
2 this witness.

3  
4 MR HASTIE: I don't think this witness was suggesting that  
5 a decision shouldn't be made by the court.

6  
7 COMMISSIONER: No, no. But if that's the starting point  
8 then a number of conclusions follow from that, Mr Hastie,  
9 is what I was trying to tease out. That might be a  
10 convenient time, Mr Hastie. 2.15.

11  
12 **LUNCHEON ADJOURNMENT**

[12.59 pm]

13  
14 COMMISSIONER: Mr Hastie.

15  
16 MR HASTIE: Commissioner. Prior to the luncheon  
17 adjournment you'll recall the discussion between yourself  
18 and the Commissioner in relation to once an application has  
19 been filed - this is for a protection order or even for  
20 some kind of interim order which becomes a protection order  
21 - then the process continues on, as it were, sometimes with  
22 little intervention until there's a final order being made  
23 and might go on for some time. Is there, in your mind,  
24 some way around the necessity for a referral to the  
25 Director once the Chief Executive is of the view that the  
26 child is assessed in need of protection, short of actually  
27 applying for a protection order?

28 A. I think what you're referring to is - is it the  
29 lead-in time, is that what you're talking about, before a  
30 referral's necessary, just to clarify?

31  
32 Q. Yes, yes.

33 A. Yeah. So with the current model there's - there's a  
34 relatively short period of time, you know, during the  
35 investigation stage from when the department first seeks,  
36 say, a temporary assessment order through to, say, a CAO  
37 and then a TCO. And then once an assessment is made that a  
38 child's in need of protection and that an order's required  
39 for that child you then have to refer the matter across to  
40 DCPL. So that lead-in time is relatively short in the  
41 whole scheme of things.

42  
43 You could essentially go from a TAO application, so  
44 three days, and then a CAO application, say 28 days, across  
45 - even if you had a TCO in there for another three days, it  
46 could be a month and a half, two months between when you  
47 first intervene and have any involvement with the family to

1 when you then actually need to make that referral.  
2 I guess, in my mind, that leaves very limited opportunity  
3 for a significant engagement and participation by the  
4 family, and prior alternative action and that collaboration  
5 and early intervention with the family. And I think that  
6 that would be something that I think would be of great  
7 benefit to the system, if children and young people and  
8 families were engaged a lot more in that process prior to  
9 referral being necessary.

10  
11 Q. And in what form could that type of engagement take?

12 A. I think if - there's a simple answer to that, quite  
13 frankly. I think if Child Safety were the applicant and  
14 you didn't need to do the referral as soon as that  
15 determination was - as soon as that assessment was made,  
16 then it would allow Child Safety to work relationally with  
17 families to really provide those wraparound supports to  
18 them to keep children with families.

19  
20 Q. But presumably you're talking about that happening  
21 before a lengthy affidavit being filed in the court?

22 A. Yes, yes. I mean, the goal would be, wouldn't it, to  
23 keep children out of the care system.

24  
25 Q. All right.

26 A. We want to keep children with families.

27  
28 COMMISSIONER: So in the case of a TAO - which is what  
29 you're talking about, I take it - that's a situation where  
30 the department hasn't formed a final view as to whether the  
31 child is a child in need of protection?

32 A. That's correct. It's an investigation stage, yeah.

33  
34 COMMISSIONER: Yes. That isn't to say that prior to the  
35 application being made for a TAO there hasn't been some  
36 earlier investigations, but those investigations are still  
37 under way?

38 A. Yeah, there would have been some minimal  
39 investigations. It might have been, you know, there would  
40 have been a notification possibly received; you might have  
41 done an interview with parents; you might have done what's  
42 called like a SODA request to QPS to get information. But  
43 the bulk of it --

44  
45 COMMISSIONER: But that depends entirely on the  
46 circumstances. It might be that there were months of  
47 investigation but, nevertheless for whatever reason, at the

1 time the application for a TAO is made, as a matter of  
2 hypothesis, the department hasn't yet reached a view and  
3 therefore needs a TAO; isn't that right? Because if the  
4 department had already made an assessment that the child  
5 was in need of protection it wouldn't be seeking a TAO,  
6 would it?

7 A. That's correct. You wouldn't, no. You seek the TAO  
8 for that purpose.

9

10 COMMISSIONER: So if the department had already reached a  
11 view it would seek instead potentially as an emergent order  
12 a temporary custody order, would it not?

13 A. That's correct.

14

15 COMMISSIONER: Right. And then it might - then it will  
16 get handed over to the DCPL in due course?

17 A. That's correct, yes.

18

19 COMMISSIONER: Right.

20 A. I don't know about "in due course", because there's a  
21 tight timeframe. But, yes.

22

23 COMMISSIONER: Okay. Three days plus one, potentially?

24 A. Plus one; you're right, yes.

25

26 COMMISSIONER: All right. So the problem that you  
27 identify is three days is not long enough to conduct the  
28 investigation in circumstances where the department hasn't  
29 prior to making the application for the order concluded its  
30 investigations; it may be three days is not sufficient?

31 A. I think, no, my point is that the department needs  
32 time to be able to engage in meaningfully with families in  
33 processes that put children at the centre of those  
34 considerations.

35

36 COMMISSIONER: Yes, I understood why.

37 A. Yes.

38

39 COMMISSIONER: That's the reason for the time, in order to  
40 engage in a consultative process with the children or child  
41 concerned and the family.

42 A. Yes.

43

44 COMMISSIONER: And that's what I understood you to be  
45 saying.

46 A. Yeah.

47

1 COMMISSIONER: But the constraint with a TAO, which is the  
2 circumstance of the - well, arises where the department  
3 hasn't concluded a view about the risk to the child is the  
4 three day time constraint on that?

5 A. I think my point is more about the systems issue in  
6 relation to that, not just the TAO. It's about that whole  
7 front end of the system and what that looks like, and then  
8 the need to then do that referral; and, the short timeframe  
9 that's in that front end before you actually need to refer  
10 a matter across, that's my point.

11  
12 COMMISSIONER: But if you had more time, if that timeframe  
13 were expanded, then it would give the department a better  
14 opportunity to do the engagement with the family and the  
15 children that you say, reasonably, is desirable?

16 A. Yes.

17  
18 COMMISSIONER: Right. So if one were to extend the three  
19 days to some further number of days, in your experience  
20 what would be a reasonable timeframe? Are we talking a  
21 month or, you know --

22 A. I would be worried if you were to extend the timeframe  
23 on an ex parte application, and I think in my mind that is  
24 why those ex parte applications - they're only three days.

25  
26 COMMISSIONER: Yes.

27 A. Because of protecting the interests of parents.

28  
29 COMMISSIONER: But if the extension from three days to  
30 something longer to allow for the engagement that you  
31 describe was inter partes then what would you suggest is a  
32 reasonable timeframe?

33 A. I don't know if it's just about the TAO because you've  
34 then got a CAO provision afterwards still. So it's about -  
35 it's about the accumulation of that and about the total  
36 time period.

37  
38 COMMISSIONER: But the CAO is for a court assessment  
39 order, isn't it?

40 A. That's right. But it's still an investigation to  
41 allow time to complete the assessment.

42  
43 COMMISSIONER: Right. So why doesn't the CAO solve the  
44 problem of the TAO being limited to three days?

45 A. It can if you don't finalise the assessment in three  
46 days and you need a further period to finalise the  
47 assessment. So, for a CAO, the investigation will take

1 longer than three days.

2

3 COMMISSIONER: And the CAO will allow you 28 days plus the  
4 prospect of a further 28 days, won't it?

5 A. Yes.

6

7 COMMISSIONER: So in that period of potentially 56 days  
8 the department could be both investigating and completing  
9 its investigations and also working on such consultations  
10 as might lead to early reunification, for example,  
11 consulting with the children, the child, consulting with  
12 the family, with kin.

13 A. Yes.

14

15 COMMISSIONER: So under this framework if the TAO combined  
16 with the CAO were - if that time and the availability of  
17 that suite of orders was taken advantage of by the  
18 department could it not do the things that you say are  
19 desirable in that period; that is, to do the early  
20 intervention and consultation et cetera?

21 A. I think there's significant time pressures even with  
22 those periods of the orders to get everything done because  
23 you're up against it in relation to then finalising your  
24 assessment.

25

26 COMMISSIONER: Well, that's always going to be the  
27 pressure, isn't it, because if the question is, "Shouldn't  
28 application be made to remove the child," then that  
29 assessment has to be made with some expedition, doesn't it?

30 A. Yes.

31

32 COMMISSIONER. Yes. So would it help if the TAO were  
33 extended to 10 days or something of that order?

34 A. Commissioner, my point is not around the period of the  
35 investigation. My point is around the entirety of that  
36 front end and the need to then make the referral to DCPL.  
37 You don't actually have time at the end of that. If you  
38 determine that a child's a child in need of protection,  
39 you've got - after that you've got a child protection care  
40 agreement available to you. They may not always be the  
41 most appropriate option for you because, under a child  
42 protection care agreement, if the parents were to withdraw  
43 their consent and the child would be at immediate risk of  
44 harm then it's not an appropriate option that's available  
45 to the Chief Executive. But if you had further time, even  
46 if you - at the end to actually work - or at any course,  
47 any time during the course to actually work really

1 meaningfully with families and put those wraparound  
2 services in place with families, then --

3

4 COMMISSIONER: But none of that substantive work is  
5 precluded by the sequence of a TAO followed by a CAO times  
6 two even; that is a CAO one and extended for another month,  
7 so three days for the TAO, 56 days for the CAO, and perhaps  
8 those timeframes should be expanded. That timeframe should  
9 allow for the department to do the work that you consider  
10 to be desirable. What I take to be your objection is the  
11 referral on to the DCPL.

12 A. In the really short timeframe, yes.

13

14 COMMISSIONER: Okay. So if it's the timeframe and not the  
15 referral to the DCPL what is the timeframe you suggest  
16 should be allowed for the department to do all the good  
17 work that you've described to try and reunify and work with  
18 the family and work with the child? See, I'm not  
19 understanding whether your objection is just to the  
20 referral or as to the time in which the referral was to  
21 take place?

22 A. Okay. So I think that - just to clarify then, I think  
23 that if the department was the applicant then even if a  
24 child protection order was required they could continue to  
25 work relationally with the family to keep the child safe.

26

27 COMMISSIONER: So your objection is really to the referral  
28 to the Director?

29 A. At the - yes.

30

31 COMMISSIONER: Because the Director becomes the applicant  
32 and that jettisons the department, on your analysis; well,  
33 it does in terms of the court process.

34 A. What it does is it moves from a human services  
35 framework to a litigation framework as soon as that  
36 happens.

37

38 COMMISSIONER: Yes.

39 A. And as soon as you do that then there's a disconnect  
40 between - you've got this dichotomy, haven't you, with  
41 CSOs. So, on one hand, you've got CSOs who are trying  
42 really hard to build relationships with families and to  
43 support families and, on the other hand, they're constantly  
44 being asked for more and more evidence to support the  
45 application before the court, and then you have this issue  
46 then with how do you build trust between the CSO and  
47 between families.

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COMMISSIONER: But isn't that more so the case if the applicant is the department? And on your model the department is the applicant for the TAO, and you accept you need to get a TAO because you haven't done the assessment. So let's assume the TAO is in place. And let's assume there's not a three-day time limit but let's just pick a figure for the sake of the discussion, a 30-day time limit, that the department could be working with the family in that period. It is the applicant for the TAO. And on your desired model it would be the applicant for the long-term child protection order as well, wouldn't it?

A. That's correct.

COMMISSIONER: So how does that enhance the ability of the department to form a trusting relationship with the family that you suggest is something that is somehow impeded by the present model?

A. I think at the moment the department is not - we're not involved in that litigation process. We're merely a witness in that providing information to the applicant on that.

COMMISSIONER: But you're not suggesting that, once the Director takes over so far as the litigation is concerned, that the department is precluded in its efforts for engagement with the family, reunification et cetera, are you, because it's my understanding that from the outset and on an ongoing basis, irrespective of what's happening in court, the department is engaged with the family, is engaged in the exercise of trying to find reunification options, and continues to engage with the family and the child throughout the litigation process?

A. That's correct. The department does continue to engage with families. I think what tends to happen, but, is because it's so heavily focused on litigation that court work ends up driving case management.

COMMISSIONER: Well, that may be so. But that starts with the TAO or other emergent order, doesn't it? And that itself is a consequence of the court being given the responsibility of making the decision to remove a child or make some other variant on an emergent or long-term child protection order. Isn't that all the consequence of the court system being invoked in this area? I mean, once you've got the court involved, the court's involved. That doesn't preclude the involvement or participation by the

1 department in doing the things that you've described, does  
2 it? You just say it distracts from that; is that your  
3 point?

4 A. No, that's not my point.

5  
6 COMMISSIONER: Tell me what your point is then?

7 A. My point is that in removing the department from the  
8 picture, essentially, and having us as a witness rather  
9 than as an applicant, then those ongoing negotiations that  
10 will typically occur for each court event to attempt to  
11 resolve matters and to negotiate matters when you have  
12 parents and when you have legal reps there, when you have  
13 the department there, aren't able to occur.

14  
15 COMMISSIONER: Well, I don't understand that because my  
16 understanding based on other evidence I've heard and my  
17 understanding of the continuum as described to me by the  
18 department through various witnesses, senior witnesses, is  
19 that the department carries on with its good work in  
20 relation to reunification from the moment that it makes the  
21 assessment or - well, throughout the process with a view to  
22 achieving reunification as early as possible. So you might  
23 have --

24 A. I agree with that. I do agree with that.

25  
26 COMMISSIONER: Well, then the fact that the department is  
27 not the applicant, I suggest to you, is a factor which  
28 might enhance the ability of the department to engage in  
29 those more mediated processes as it is not, by the time the  
30 Director becomes involved, the moving party concerning  
31 whether removal of the child.

32 A. I have a very different perspective to that,  
33 Commissioner.

34  
35 COMMISSIONER: And just explain to me what is different  
36 about your perspective in that regard?

37 A. I think that, as I said before, it's about the  
38 department continuing to be able to work in a human  
39 services framework with families throughout that and being  
40 able to narrow the issues with families, being able to be  
41 involved in that whole dispute resolution with families,  
42 even if there's a child protection order that's being  
43 sought. At the moment that doesn't occur until very late  
44 in the piece. The department doesn't become engaged again  
45 until you've got like a dispute resolution or like a court  
46 order conference when the matter is about to go to a  
47 contested hearing. That could be 200, 250 days later.

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COMMISSIONER: Well, maybe those alternative dispute like procedures need to be accelerated so that the department is involved in the human services dimension earlier than what you say is the case. But, if you accept that the department's evidence is that it remains committed and involved in engagement with the family throughout the process aiming at reunification if possible, then it's not mutually exclusive; there are two things happening in tandem, aren't there?

A. So you've got casework happening on one hand but then you've got the litigation process happening on another hand. But, once again, because we're not actually involved in trying to resolve that dispute - so you might be doing the casework, but in relation to actually the court order and what's required that's - they're very - there's a real disconnect.

COMMISSIONER: But I just don't understand how the department's not involved in trying to resolve the litigation by means of the effective engagement with the family concerned towards the reunification of the child wherever possible. What you're saying to me is that the ability of the department to be involved is somehow impeded because this court process is occurring in tandem.

A. Yes.

COMMISSIONER: That is a function of the court having the jurisdiction, isn't it, to decide the question of what kind of order should be made? And so if you accept that that's desirable then the question becomes more a question as to how the department might more effectively be facilitated or assisted or there be better and earlier opportunities for the department to do what you say it should. I think there would be general agreement that the more involvement there is at the earliest possible time towards reunification the better. I'm just not understanding why these two streams of activity are thought by you to be somehow mutually exclusive.

A. I think that's because we're not involved in the litigation. So there's no consultation. Once the matter has been initially referred across to DCPL there's consultation at that point, and I don't think there's many other points of consultation - I'm just trying to think off the top of my head - during that process then.

COMMISSIONER: Well, your criticism in this regard is a

1 new one to me, and I'll take it up with the Director to see  
2 what he has to say about his involvement with the  
3 department once the matter is referred to him and what the  
4 department's ongoing role is in the process in relation to  
5 reunification, for example.

6 A. Thank you, Commissioner.

7

8 COMMISSIONER: Thank you.

9

10 MR HASTIE: Continuing the line that the Commissioner  
11 asked you about, that is bringing some form of dispute  
12 resolution forward, would that or could that entail in your  
13 eyes or are you suggesting that should precede an  
14 application for a protection order?

15 A. It could. If you could - if people could gather  
16 around the table, yes, in some form of mediation, for want  
17 of a better word, yeah, to discuss the issues, I think that  
18 that would be really beneficial.

19

20 COMMISSIONER: Just to be clear, Mr Hastie, are you  
21 talking - was the assumption in your question relating to  
22 an emergent order or to an order once the matter is  
23 referred to the Director?

24

25 MR HASTIE: An order that the Director can seek. In other  
26 words, before --

27

28 COMMISSIONER: So not at the emergent stage?

29

30 MR HASTIE: No, not at the emergent stage, no.

31

32 COMMISSIONER: All right. I just wanted to be clear about  
33 that.

34

35 MR HASTIE: Well, I'll come back to the emergent stage.  
36 But just dealing with the question of a child protection  
37 order, in your mind is it - just dealing, making it clear  
38 what I'm asking you, is it in your mind before an  
39 application for that kind of order is made and not an  
40 emergent order is that there should be some kind of  
41 resolution meeting or dispute resolution format conducted  
42 between the department and the parents and the child?

43 A. If it hasn't already occurred, yes.

44

45 Q. All right. Now, and is one of the problems with that  
46 the requirement that as soon as the Chief Executive is  
47 satisfied that the child is in need of protection and a

1 child protection order is appropriate and desirable that  
2 the Chief Executive has to refer that to the Director?

3 A. It's a must, yeah.  
4

5 Q. And, Commissioner, I wasn't originally sure about  
6 this, but if the Director thinks that the - it seems maybe  
7 only has two choices, one of which is to either send it  
8 back or to file an application?

9 A. Yes.  
10

11 Q. So, in your mind, it's that combination of  
12 circumstances that might be an issue; that you might be  
13 able to circumvent that by having a resolution prior to a  
14 child protection order being made?

15 A. Prior to seeking a child protection order, yes.  
16

17 Q. All right.

18 A. When there's - yeah, I mean, obviously there's  
19 voluntary intervention that's available in that space too.  
20 But then there's issues with that as well, which I was  
21 talking about before in relation to child protection care  
22 agreements and, if the parents withdraw their consent, that  
23 the child might be in immediate risk of harm.  
24

25 COMMISSIONER: But there's nothing to stop such meetings,  
26 mediation, engagement, however you want to describe it  
27 occurring concurrently, is there, with the referral to the  
28 Director?

29 A. Once again, it's about timeframes, Commissioner.  
30

31 COMMISSIONER: All right.  
32

33 MR HASTIE: Well, I suppose, Commissioner, there's nothing  
34 to stop a conference being held earlier, but we know as a  
35 matter of practice they take - it would seem on the  
36 Director's evidence - some months after an application has  
37 been made.

38 A. You're talking about family group meetings?  
39

40 Q. Or a consultation ordered in the Magistrates - in the  
41 Childrens Court.

42 A. A court ordered conference which tends to happen,  
43 yeah, towards the end.  
44

45 Q. Towards the end?

46 A. M'hmm.  
47

1 Q. So if the legislation mandated some kind of dispute  
2 resolution before a child protection order is made would  
3 that in your mind assist?

4 A. Yes.

5  
6 Q. All right. Now, to go back to the Commissioner's  
7 implicit question, that is emergent orders, and I think one  
8 of the submissions made by I'm not sure who is that there  
9 should be some kind of dispute resolution procedure  
10 required before any of the emergent orders; is that a  
11 practical way of dealing with what seems to occur?

12 A. That's probably a question that's very operational  
13 that I'm, yeah, probably - I'm not the best person to  
14 answer that.

15

16 COMMISSIONER: Well, I understood the practice of  
17 the department to be that it attempts to find alternative  
18 solutions to an emergent order --

19 A. Yes.

20

21 COMMISSIONER: -- involving a custodial element, and that  
22 applications for emergent orders to remove the child are  
23 considered to be a last resort and, in the process of  
24 considering that question, attempts are made to engage with  
25 the family --

26 A. Yes.

27

28 COMMISSIONER: -- to see whether the family plan can be  
29 implemented that would be satisfactory.

30 A. Yes. Yes, that's correct.

31

32 COMMISSIONER: So all of those things that one could  
33 describe as alternatives to - alternative dispute  
34 resolution would be how they'd be described in a litigation  
35 context, but let's call them early intervention options,  
36 are indeed explored, as I understand it.

37 A. Including assessment care agreements, yes.

38

39 COMMISSIONER: Including?

40 A. Assessment care agreements, which allows placement,  
41 other child; it's a voluntary intervention.

42

43 COMMISSIONER: Quite. Quite. So that opportunity does  
44 exist and is taken, but unfortunately isn't available in  
45 all cases, or deemed not to be, or assessed not to be  
46 suitable in all cases. So we're talking about the hard  
47 cases here, aren't we, where those options aren't

1 available?

2

3 MR HASTIE: One other question I wanted to ask you about  
4 is does your office have any relationship or dealings with  
5 or obligations to where there are delegated authorities for  
6 First Nations organisations?

7 A. Yes. So OCFOS are able to provide legal advice to the  
8 chief executive officers of Aboriginal community controlled  
9 organisations in matters where they hold the relevant  
10 delegation that they're seeking legal advice on, and my  
11 team has a mailbox set up for the ACCOs to contact directly  
12 seeking that legal advice.

13

14 Q. As far as you're aware, do the organisations which  
15 have delegated authority with respect to children - and  
16 there are some in South East Queensland?

17 A. Yes, in pockets all over the state now.

18

19 Q. All right. And how do they operate in relation to the  
20 legal system that you're talking about?

21 A. When you say "legal system" that I'm --

22

23 Q. Well, aren't the cases for child protection orders?

24 A. Yeah, I think that the overrepresentation of  
25 Aboriginal and Torres Strait Islander children needs to be  
26 a real focus for government; you know, Child Safety and  
27 DCPL as a whole. I think that that should definitely  
28 include consideration to First Nations families having a  
29 really active voice in self-determination when it comes to  
30 child protection matters, and in relation to participation  
31 and engagement.

32

33 I have concerns that any child protection litigation model  
34 that includes a statutory agency that's making decisions  
35 about child protection applications for First Nations  
36 families and children, I think that there's definitely some  
37 incongruence there. I'm a really firm believer in the need  
38 for a child protection Murri Court in Queensland.

39

40 I think that there's other jurisdictions that have  
41 explored, you know, similar options. We know that in  
42 Victoria they've had something similar set up since about  
43 2016 that was evaluated in 2020 with good outcomes. It's a  
44 different court process for First Nations children.

45 They've now started something in New South Wales in Dubbo  
46 court, only fairly recently, I think it's 2022/2023, to  
47 explore avenues for Elders and community members to be part

1 of that process for First Nations families who are involved  
2 in the child protection system. And I think that kind of  
3 approach is congruent with self-determination, and I think  
4 that that aligns well with the department's work on  
5 delegated authority.

6  
7 I think it's a missed opportunity, can I say, to date that  
8 we haven't taken that up. I know that certainly in my  
9 engagement with the consultations that occurred with now  
10 some of the child protection litigation project team when  
11 that was in operation people were suggesting that. I know  
12 that it was certainly a really strong proposal, I thought,  
13 but obviously it hasn't been taken up yet. But I think  
14 there's some real strength in that.

15  
16 I think there's some real strength in having First Nations  
17 families supported by First Nations, whether that be, you  
18 know, court officers or coordinators or case managers pre,  
19 during and post court. I think it's more of a therapeutic  
20 kind of case management model. I think if First Nations  
21 families can reach out to those officers or those  
22 coordinators, you know, if they're having difficulties as a  
23 first point of call. I know that the evaluation in  
24 Victoria indicated that these are families who are less  
25 likely to come back into the system if they're reunified  
26 and, if they do come back into the system, that it's at  
27 lower levels of intervention. And I think it's an option  
28 that Queensland really needs to explore.

29  
30 COMMISSIONER: I don't think you answered the question,  
31 but you certainly said a lot about the matter that you're  
32 concerned about. Let's see if we can break it down a bit;  
33 okay?

34 A. Sure.

35  
36 COMMISSIONER: Section 10 of the Child Protection Act is  
37 invoked where the child is defined to be in need of  
38 protection; all right? That's the starting point to all of  
39 this. So, as you'd agreed, the court ultimately is the  
40 decision-maker in relation to that question.

41 A. Yes.

42  
43 COMMISSIONER: Now, do you say in relation to Aboriginal  
44 and Torres Strait Islander children that the decision-maker  
45 should be somebody else?

46 A. No, I say that there needs to be an alternate pathway  
47 for First Nations families to explore. So I'm not saying

1 that you need to amend section 10 of the Act. I'm just  
2 saying that when families become involved in the system  
3 then there needs to be something, there needs to be a model  
4 or an approach that is appropriate, that is culturally  
5 responsive to the needs of First Nations families.

6  
7 COMMISSIONER: And to facility their participation in the  
8 court process?

9 A. Yes.

10  
11 COMMISSIONER: So by way of representation, for example,  
12 in the hearing where an Aboriginal or Torres Strait  
13 Islander child may be the subject of either an emergent  
14 order or a longer term order?

15 A. Yes.

16  
17 COMMISSIONER: Yes. All right. And you said something  
18 about a statutory body by which I took you to mean the  
19 Director somehow impeding that process. Tell me what  
20 you --

21 A. No, I didn't mean to impede. What I meant was where  
22 you've got a government - like, a statutory authority that  
23 is making those decisions in the absence of that  
24 participation by First Nations peoples, then I think that  
25 there's some - we're not doing it right, quite frankly. We  
26 need to do better.

27  
28 COMMISSIONER: Right. Well --

29 A. Because otherwise you're just --

30  
31 COMMISSIONER: -- help me in understanding how we might do  
32 better in that regard?

33 A. Well, I think we can learn from other jurisdictions.  
34 If Victoria's been doing it now for five years - sorry, in  
35 excess of five years; they've been doing it since 2016 with  
36 really good outcomes.

37  
38 COMMISSIONER: So what have they been doing?

39 A. So they've set up a system down there which is an  
40 alternate pathway. I mean, I don't know the Victorian  
41 system at all, but all I know is that children are referred  
42 through to the equivalent. It's called a Koori Court down  
43 there. But for them it's First Nations designed, it's  
44 First Nations led, and it's an appropriate culturally  
45 responsive model for First Nations families.

46  
47 COMMISSIONER: So you would say potentially at least a

1 decision under section 10, whether in relation to an  
2 emergent order or a longer term order, could potentially be  
3 made in the case of Aboriginal and Torres Strait Islander  
4 children by a different court, a Koori Court to adopt the  
5 Victorian model, as you understand it?

6 A. I think there would be some real learnings from that  
7 that we could adopt, yes.

8  
9 COMMISSIONER: All right. Thank you. Thanks, Mr Hastie.

10  
11 MR HASTIE: Thank you, Commissioner. One of the things  
12 you referred to in your affidavit is the issue of service  
13 of material. Can you tell the court, please, what role  
14 OCFOS plays in relation to service of material?

15 A. In the emergent order space CAO applications require  
16 personal service. And child protection order applications,  
17 both original and amended, also require personal service.  
18 There was a 2023 Childrens Court of Queensland decision,  
19 SKJ v HR I think it was, decision that interpreted section  
20 56 of the Act. And part of the wording of section 56 of  
21 the Act is "it is not practicable to serve the copy  
22 personally". And that particular Childrens Court of  
23 Queensland decision said that - interpreted that to mean  
24 that it was practically impossible to effect personal  
25 service. That has been a game-changer, that decision. As  
26 a result of that we had to develop, along with DCPL,  
27 flowcharts, fact sheets and process maps around what that  
28 looks like.

29  
30 Q. In other words, how to --

31 A. How do you do personal service when - under the test  
32 of practically impossible. And so as a result of that  
33 there has been obviously some implications on the  
34 timeframes that actually takes to effect person service,  
35 because the bar's obviously much higher. OCFOS assist in  
36 that space of not only understanding that legal test and  
37 legislative compliance with that now; we're also  
38 responsible certainly in the CAO space of supporting CSOs  
39 in providing letters and everything to parents at the time  
40 of service, doing all of those sorts of things of course,  
41 and in actually helping the CSOs to prepare the affidavits  
42 of service. And we're responsible for doing that as well  
43 once we refer matters across to DCPL when a child  
44 protection order is sought. So obviously you're following  
45 the initial affidavit, the application the affidavit of  
46 service, and then obviously we withdraw after that period  
47 of time. So we simply support CSOs in drafting that

1 affidavit of service.

2

3 COMMISSIONER: See, the Act provides in section 56(2)  
4 that, if it is not practicable to serve the copy  
5 personally, a copy of the application may be served on a  
6 parent by leaving it at or by sending it by post to the  
7 parents' residential address last known to the Chief  
8 Executive.

9 A. Yes, and that was the interpretation. It was that  
10 wording, "not practicable to serve the copy personally",  
11 that that particular matter, that particular court matter,  
12 deemed it to be must be a practical impossibility to serve  
13 the applicant personally.

14

15 COMMISSIONER: And is that still the position under the -  
16 and that's a Childrens Court decision?

17 A. A Childrens Court of Queensland decision. So it's an  
18 appellant court.

19

20 MR HASTIE: That's a District Court judge?

21 A. Yes. Yes. So that has had significant implications  
22 on our ability to serve parents in a timely way,  
23 particularly in regional and remote areas where sometimes -  
24 and CSO are responsible for that or child safety support  
25 officers are responsible for that. So, even though the  
26 department is not the applicant for child protection  
27 orders, the Act requires that the Chief Executive serve the  
28 documents. So, even though we're the witness, we're  
29 responsible for service.

30

31 COMMISSIONER: Right. To your understanding, is there no  
32 provision in the Childrens Court rules that allows for an  
33 application to dispense with personal service?

34 A. No, otherwise you would have to do substituted  
35 service.

36

37 COMMISSIONER: Yes, some form of substituted service.

38 A. Substituted service would be your next application,  
39 yes.

40

41 COMMISSIONER: So --

42 A. But you can't do that on every application.

43

44 COMMISSIONER: Yes, but substituted service could take a  
45 range of forms. I mean, if you know, for example, that the  
46 parents are regularly posting on Facebook or some social  
47 media, courts often make orders for substituted service via

1 means of notifying the parents - or in this case the  
2 parents - by way of social media post. And it's quite  
3 commonplace in the court system to find practical ways of  
4 bringing the fact of the application to the attention of  
5 the person who needs to know.

6 A. The department has a policy around social media.

7  
8 COMMISSIONER: Well, it might, but this may or may not  
9 intrude on that policy. I'm talking about substituted  
10 service. I mean, one of the things that might be said in  
11 relation to the difficulties that you've noted is that  
12 there should be other ways to effect service if it is not  
13 practical as opposed to impossible to serve personally, and  
14 one way would be to empower the court to make an order for  
15 appropriate substituted service, and what's appropriate  
16 would depend on the circumstances.

17 A. That would be an application by DCPL then, who sits in  
18 that space.

19  
20 COMMISSIONER: Yes. But you're noting it as an issue. Is  
21 it an issue for the emergent - no, you don't have to serve  
22 the emergent order so it doesn't arise.

23 A. You have to serve the CAOs personally. But I think  
24 the bigger pressure is probably in the CPO space.

25  
26 COMMISSIONER: But in relation to CAOs then that emergent  
27 order that you do have to serve you have to comply with  
28 section 56?

29 A. No, for CAOs you have to comply with section 41.

30  
31 COMMISSIONER: 41. And is that easier to comply with?

32 A. So if there's no long-term guardian the application  
33 must be personally served on each of the child's parents.  
34 But, if there is a long-term guardian, the guardian must be  
35 personally served and reasonable attempts must be made to  
36 personally serve the parents.

37  
38 COMMISSIONER: Why would there be a long-term guardian in  
39 the context of a court assessment order?

40 A. Why would there be a long-term guardian?

41  
42 COMMISSIONER: Yes, in what circumstances, because  
43 normally it would be the parent who's both the custodian  
44 and guardian?

45 A. Yeah, you could have - I guess you could have a Family  
46 Court order in that space with parental responsibility  
47 given to somebody else, or you could have a long-term

1 guardianship order and then need a - for whatever reason  
2 need a CAO in that space.

3

4 COMMISSIONER: Anyway, the section contemplates the  
5 possibility that the child might have a guardian other than  
6 the parents.

7 A. Yes.

8

9 COMMISSIONER: And where that's the case the application  
10 has to be served on the guardian.

11 A. Mmm.

12

13 COMMISSIONER: And the parents.

14 A. Yep.

15

16 COMMISSIONER: And personally served. But subsection (2)  
17 provides that, if the applicant makes reasonable attempt to  
18 personally serve but does not personally serve, the  
19 applicant must document full details about actions taken.

20 A. The Childrens Court of Queensland decision was in  
21 relation to section 51.

22

23 COMMISSIONER: Yes, no, I'm just trying to understand  
24 whether the service issues are a problem for your  
25 activities.

26 A. It's a - I think you will see probably in the DCPL  
27 annual report that it's a significant contributor to  
28 adjournments.

29

30 COMMISSIONER: Well, we can ask the Director about this  
31 matter, but the idea of some form of - some power to grant  
32 substituted service in lieu of personal service might be  
33 desirable?

34 A. Yes.

35

36 COMMISSIONER: Thank you.

37

38 MR HASTIE: It also might be a question of who's to do the  
39 personal service. At the moment I think you said the child  
40 safety officer, presumably the one responsible for the  
41 child, as it were, is required to serve the parents?

42 A. That's correct. So not the applicant. So the witness  
43 in those proceedings is required to effect personal  
44 service.

45

46 Q. What's the alternative to that method?

47 A. Would be the applicant effecting personal service.

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Q. But by what means?

A. They could engage a process servicer.

Q. And is there any --

A. Or our own set of legal reps.

Q. I beg your pardon?

A. No, no, yeah, probably process servers, sorry.

Q. Unless the personal rep - the lawyers acknowledge service?

A. Mmm.

Q. All right. So the process server. Is there any reason that you know of why that might have been adopted even by the Chief Executive as a way around --

A. It's costly. Process servers are costly. And there's no specific funds for court matters as much; do you know what I mean? There's no bucket of money that pays for court expenses in the department that I'm aware of. So it would have to come out of - and I don't know anything, like, the finances of the department. I don't need to know that. But I expect it would come out of some other bucket of money for children's expenses.

Q. All right. And you mentioned the Family Court just then. Does the Queensland Act have any or does the Queensland Chief Executive or your office have anything to do or any role with respect to applications in the Family Court?

A. I have a senior legal officer in my team that represents the department in Federal Circuit and Family Court matters. That senior legal officer works alongside court services, which is a different business unit in the department. So court services have court services advisers, and they have officers who I guess are an interface between Child Safety and the Federal Circuit and Family Court to provide information to the court as and when needed.

At the moment the way that the Child Protection Act is set up it makes it very difficult for families who are involved in both jurisdictions, so families who are involved in Federal Circuit and Family Court and in the child protection - and in the child protection arena, I guess. So you could have families who are in both jurisdictions at

1 the same time, and courts adjourning matters off until  
2 other courts determine the matters for them.

3

4 I know other jurisdictions have provisions in their Act  
5 which enable the Family Court to be able to make orders  
6 that relate to child protection, and I think that that  
7 would be something that may be considered or the  
8 Commissioner may want to have a look into.

9

10 COMMISSIONER: What I would like to understand in a  
11 practical sense how there might be a conflict in terms of  
12 the jurisdictions being exercised. So one can imagine  
13 let's say a child is subject to a long-term guardianship  
14 order in favour of the Chief Executive, and let's say one  
15 of the reasons for that was because of domestic and family  
16 violence. And let's suppose that the couple concerned have  
17 separated, and let's suppose that the mother wants the  
18 child returned to her custody, she having left the abusive  
19 husband. Now, in that situation what does the mother do?  
20 Let's suppose there's - I should add to the scenario that  
21 there's an application before the Family Court for  
22 parenting orders, I think they're now called, rather than  
23 custody orders; but that's the issue, who has custody.  
24 What would the department do in that situation?

25 A. The department would have to consent to jurisdiction  
26 in the first instance for the Family Court to even be able  
27 to consider that matter.

28

29 COMMISSIONER: Consent to the jurisdiction of the Family  
30 Court?

31 A. Yes.

32

33 COMMISSIONER: So that the department could just simply  
34 say, "Well, we have guardianship of this child and custody  
35 by means of some placement, and we're not going to  
36 participate in your process"?

37 A. That's correct. Yeah, "And we don't consent to you  
38 making orders in your process."

39

40 COMMISSIONER: No. And, alternatively, the department  
41 could work with the mother, in my hypothetical example, to  
42 see whether reunification to the mother in the changed  
43 circumstances I've posed is a reasonable thing to do?

44 A. Yes.

45

46 COMMISSIONER: Yes. Do you wish to say something?

47

1 MR SCHMIDT: Yes, Commissioner, I was just about to, if  
2 I could assist. Under the Family Law Act 1975, section  
3 69ZK deals with the Family Law Act essentially being  
4 subservient to child welfare laws except in circumstances  
5 where the department consents to the jurisdiction of the  
6 Family Law Court.

7  
8 COMMISSIONER: Thank you. That's very helpful.

9  
10 THE WITNESS: Thank you.

11  
12 COMMISSIONER: So contrary to section 109 of  
13 the Constitution.

14  
15 MR SCHMIDT: It appears so, Commissioner.

16  
17 MR HASTIE: And did you have a different experience in New  
18 South Wales?

19 A. Yes. So New South Wales actually has a provision in  
20 their Act which allows essentially the department to apply  
21 in either jurisdiction and for the family - or the Federal  
22 Circuit and Family Court to make orders, essentially child  
23 protection orders. And so - and there's an MOU between the  
24 department down there and the Family Court around that.  
25 I guess I raise that merely as an option for families, as  
26 another option to reduce stress on the child protection  
27 system. And it may be more appropriate for some families  
28 to be in the Family Court rather than to be in the  
29 Childrens Court in some matters.

30  
31 COMMISSIONER: Sure. But it's within the power of  
32 the department, it would seem, to consent to the  
33 jurisdiction of the Family Court --

34 A. Yes, but --

35  
36 COMMISSIONER: -- and to allow the Family Court to make an  
37 order that might result in the child in question being  
38 reunified with one or other parent on whatever terms the  
39 parenting order sets out, and that might include - and  
40 I expect would normally include - shared access, provided  
41 that access was safe of course. I just would like to know  
42 what you think could be improved because the department can  
43 consent to the jurisdiction. You might be the wrong person  
44 to ask, but do you know if the department has a policy  
45 about that?

46 A. That I'm not sure on. That I'm not sure. I know  
47 there's a delegation for it, but it's not with me. But

1 this is also in relation, but, to the Federal Circuit and  
2 Family Court being able to make essentially child  
3 protection orders.  
4

5 COMMISSIONER: In what sense?

6 A. In other jurisdictions the Federal Circuit and Family  
7 Court can make orders. And obviously that would need to be  
8 in collaboration and the department would need to be a  
9 party to those proceedings. I mean, it's a whole - it's  
10 not simple. But in other jurisdictions --  
11

12 COMMISSIONER: Tell me something I haven't picked up on.

13 A. But obviously they could make orders in relation to -  
14 like, you know, in other jurisdictions they might have  
15 parental responsibility which aligns with the Family Law  
16 Act to be able to actually - for a child protection agency  
17 essentially to have parental responsibility for a child,  
18 and that order is actually made by the Federal Circuit or  
19 Family Court.  
20

21 COMMISSIONER: If the department hasn't intervened and  
22 exercised powers under the Child Protection Act --

23 A. M'hmm.  
24

25 COMMISSIONER: -- there might be circumstances in the  
26 context of a parenting application before the Family Court  
27 or the circuit court, depending on which division of the  
28 court is handling the matter, where the court is persuaded  
29 that for the protection of the child some particular  
30 constraints need to be imposed in relation to the parenting  
31 order. So is it in that sense that you say that the Family  
32 Court exercises the child protection power or is it  
33 something broader than that?

34 A. I think it's something broader than that. I just say  
35 it as a way of another option, another pathway that could  
36 be explored, and it may be more appropriate. And I know  
37 when we've looked at it in the past, which was a few years  
38 back, we thought that there might be some benefit for  
39 Aboriginal and Torres Strait Islander children and what  
40 that looks like for them, and that pathways including  
41 family law orders might be more appropriate in some  
42 situations.  
43

44 COMMISSIONER: Sure. Are you aware of the Family Court  
45 making orders for the removal of a child from a family into  
46 the care of the Attorney-General or --

47 A. Not in Queensland.

1  
2 COMMISSIONER: I mean, I don't know how that would work.  
3 A. Not in Queensland. None that I'm aware of.  
4  
5 COMMISSIONER: I think not anywhere in Australia would the  
6 Family Court actually make an order for the removal of  
7 the child from the parents into State care; in this case it  
8 would be the care of the Commonwealth. But I'll stand  
9 corrected if that's not the case. I don't know if anybody  
10 at the else at the Bar table knows what the position is in  
11 that regard. Yes?  
12  
13 MS McMILLAN: Child Safety can be a party to Family Court  
14 litigation anywhere in Australia.  
15  
16 COMMISSIONER: Yes.  
17  
18 MS McMILLAN: They can be a party to it. The other thing  
19 is the fundamental difference that the Lighthouse Project  
20 has made in terms of triaging families where there's child  
21 safety, but this witness probably can answer that. But  
22 just as a matter of law those things have come about - the  
23 Lighthouse Project, that's changed the landscape.  
24  
25 COMMISSIONER: We can come to the Lighthouse Project; I'd  
26 like to know what that is. But do you understand the  
27 Family Court exercises some power to remove children  
28 outside the context of --  
29  
30 MS McMILLAN: Look, that's probably really a matter for my  
31 learned friend to take up more for the department.  
32  
33 COMMISSIONER: Yes.  
34  
35 MS McMILLAN: But there are matters and authorities which  
36 you will find that the department has been a party to  
37 litigation.  
38  
39 COMMISSIONER: Yes, presumably on the basis that it is  
40 consented to jurisdiction.  
41  
42 MS McMILLAN: Yes.  
43  
44 COMMISSIONER: Or sought to intervene maybe as a friend of  
45 the court.  
46  
47 THE WITNESS: Yes, under 9(1)(b) --

1  
2 MS McMILLAN: That's more commonly. And then also as  
3 amicus at times.  
4  
5 COMMISSIONER: As amicus, yes.  
6  
7 MS McMILLAN: Occasionally.  
8  
9 COMMISSIONER: Yes. All right.  
10  
11 MS McMILLAN: I don't know if that helps.  
12  
13 COMMISSIONER: Thank you, it does. Could I understand  
14 what the Lighthouse Project is? I think I've heard it  
15 mentioned, but --  
16  
17 MR HASTIE: We can provide some further information about  
18 this and other matters.  
19  
20 COMMISSIONER: Yes. If it's not for this witness, that's  
21 fine, Mr Hastie.  
22  
23 MR HASTIE: I think I might leave it there with this  
24 witness.  
25  
26 COMMISSIONER: Yes.  
27  
28 MR HASTIE: I thought the Commission should hear about  
29 these matters, particularly given her experience in New  
30 South Wales.  
31  
32 COMMISSIONER: Yes.  
33  
34 MR HASTIE: Commissioner, we have copies of templates of  
35 the applications that this witness spoke about for the  
36 temporary assessment order, the court assessment order, and  
37 the temporary custody order. I've got one copy. It  
38 probably ought be one exhibit, but it's a matter for you,  
39 Commissioner.  
40  
41 COMMISSIONER: I'll mark them as one exhibit. The  
42 templates for applications for emergent orders will be  
43 exhibit CL-70.  
44  
45 **EXHIBIT #CL-70 - TEMPLATES FOR APPLICATIONS FOR EMERGENT**  
46 **ORDERS**  
47

1 MR HASTIE: One final issue is you're aware of the  
2 requirements in the Act in relation to guardianship and the  
3 preference in relation to who might be appointed guardian;  
4 it might be a parent or a suitable person or the Chief  
5 Executive?

6 A. Yes.

7

8 Q. And do you have or does your office have any role in  
9 relation to those principles?

10 A. Are you talking about permanency?

11

12 Q. Yes, for a permanent guardianship order.

13 A. Yeah. So --

14

15 Q. Long-term guardianship order.

16 A. Long-term guardianship order to other or a permanent  
17 care order, is that what you're talking about; a PCR or an  
18 LTGO?

19

20 Q. Or the --

21 A. Yes?

22

23 COMMISSIONER: Yes, the permanency principle.

24 A. Permanency principle. Okay. I'm with you. I know  
25 where you're going with this now. So obviously there's a  
26 hierarchy under section 5BA(4) in relation to children and,  
27 you know, working through that from the top is in relation  
28 to, you know, children being with families and then orders  
29 for long-term guardianship to other; then adoption where  
30 it's not an Aboriginal and Torres Strait Islander child;  
31 and then long-term guardianship to the Chief Executive; and  
32 then at the very bottom is adoption for Aboriginal and  
33 Torres Strait Islander children. I know that the  
34 Commissioner had some earlier concerns in previous hearings  
35 around that hierarchy and jumping straight to LTGCE, and  
36 I'm assuming that's what you're alluding to; is that right,  
37 Mr Hastie?

38

39 MR HASTIE: Yes.

40 A. Yes. My team has - in that initial affidavit template  
41 document, in the latest version you'll find prompts in  
42 relation to that, too, so that consideration is given to  
43 other appropriate - appropriate guardians before an order  
44 for LTGCE is sought. And when they're actually assisting  
45 child safety officers in actually preparing those  
46 affidavits that is a consideration that is taken into  
47 account at that time, and that should be addressed in the

1 initial affidavit. It is then provided to DCPL as part of  
2 the referral for an order.

3

4 COMMISSIONER: Where do I find that? Is that in the  
5 templates for the --

6

7

8 COMMISSIONER: -- longer term orders?

9

10 A. Yeah, that should be in the initial affidavit  
11 template. There should be a section in there.

11

12 COMMISSIONER: It's exhibit 66 for non-Indigenous children  
13 and 67 for Indigenous children. So show me where in that  
14 template that matter is addressed, say, starting with the  
15 non-Indigenous children?

16

17 A. I think you'll find that for non-Indigenous children  
18 on page 9 under "Long-term orders", paragraph 17.

18

19 COMMISSIONER: Yes.

20

21 A. So it's a prompt for CSOs, and then obviously of  
22 course for the legal officers to make sure that that is  
23 covered off.

23

24 COMMISSIONER: Yes, thank you. And so you would expect an  
25 affidavit to address that issue?

26

27 A. Absolutely. Commissioner, out of the OCFOS  
28 establishment of 77 staff, in the last - over 12 months now  
29 we have allocated two legal officers from that specifically  
30 just to work on permanency matters. And their role is to  
31 work with - one of them works specifically with the kinship  
32 and permanency team around progressing children off  
33 long-term guardianship to the Chief Executive orders across  
34 to orders for long-term guardianship to other or permanent  
35 care orders. And then I have another legal officer who  
36 covers those matters across the state and works with the  
37 adoption and permanent care services team in relation to  
38 doing the same thing. And my approach towards that is to  
39 make that a priority because I think if you don't make it a  
40 priority then what tends to happen is with the busyness of  
41 emergent orders then those matters have the potential to be  
42 overlooked. So --

42

43 COMMISSIONER: This is an issue that really falls within  
44 the jurisdiction of the Director, does it not, because  
45 we're talking about long-term orders here?

46

47 A. That's correct. But I see it as a role for my team in  
doing - in progressing variations across to - variations of

1 long-term guardianship to the Chief Executive. I see our  
2 role - our team as having a really significant role in  
3 ensuring that that occurs for children and that those  
4 referrals are made.

5

6 COMMISSIONER: Who gets to initiate an application for a  
7 variation to a long-term guardianship order?

8 A. That once again is the DCPL.

9

10 COMMISSIONER: Only the DCPL?

11 A. Long term - it's open - so PCOs - if there's a  
12 variation of a permanent care order, that can only be made  
13 by the Director. But if there's a variation in, say, an  
14 LTGCE to another type of order that can be made by a parent  
15 or by a young person.

16

17 COMMISSIONER: Nobody else?

18 A. It could be any other person who's interested. I'm  
19 not quite sure of the provision under the Act.

20

21 COMMISSIONER: All right.

22 A. Someone with a sufficient interest, I expect. Not  
23 entirely sure on that; I would have to check the  
24 legislation.

25

26 COMMISSIONER: That's all right. In any event, you say  
27 that your office is acutely aware of the hierarchy in  
28 relation to the permanency principle?

29 A. And is actively pursuing to get children off LTGCE  
30 orders onto other orders; yes.

31

32 COMMISSIONER: All right. Thank you. There's some data  
33 given by the Director - I just can't pick it up at the  
34 moment - as to the incidence of long-term guardianship  
35 orders made in favour of the Director as opposed to others.  
36 I just can't pick it up. But, from memory, it was I think  
37 approximately 80 per cent of long-term guardianship orders  
38 are made in favour of the Chief Executive. But don't hold  
39 me to that figure; somebody can tell me what it is in a  
40 minute, hopefully. We can take it up with the Director  
41 because it really falls within his direct responsibility,  
42 doesn't it?

43 A. Mmm.

44

45 COMMISSIONER: Yes.

46

47 MR HASTIE: Thank you, Commissioner. In relation to that

1 we have an additional schedule which shows the different  
2 kinds of orders that have been made, and including  
3 long-term guardianship Director and to others. But it's  
4 from the last five years. It's as at 30 June 2020, and the  
5 last year is 31 March 2025. I think I tendered the one for  
6 March 2025, but we've managed to get the five years before  
7 that. I tender that.

8  
9 COMMISSIONER: That's useful. Thank you.

10  
11 MR HASTIE: It shows something of that order,  
12 Commissioner.

13  
14 COMMISSIONER: I'm right in thinking that the Director has  
15 indicated what the figures are. But, in any event, this is  
16 data up to date as at the --

17  
18 MR HASTIE: Well, the last date is still 31 March because  
19 for reasons that I've already explained, Commissioner.

20  
21 COMMISSIONER: Yes, I understand.

22  
23 MR HASTIE: But it starts - the earliest date is as at  
24 30 June 2020.

25  
26 COMMISSIONER: Thank you. Well, that bundle of tables  
27 relating to the nature of the child protection orders  
28 sought or obtained will be CL-71.

29  
30 **EXHIBIT #CL-71 - BUNDLE OF TABLES**

31  
32 MR HASTIE: Thank you, Commissioner. That's the  
33 evidence-in-chief.

34  
35 COMMISSIONER: Thank you very much, Mr Hastie. Yes,  
36 Ms Sweet.

37  
38 MS SWEET: Yes, thank you, Your Honour.

39  
40 **<EXAMINATION BY MS SWEET** **[3.24 pm]**

41  
42 MS SWEET: Ms Schifilliti, I'm just going to hand you up a  
43 copy of the recommendations from the Carmody Inquiry,  
44 because I want to take you to some of them.

45 A. Thank you.

46  
47 Q. But, before that, do you also - so you don't need to

1 look at them immediately, and I'll direct you to the ones  
2 I want you to look at. So if you just close that for the  
3 moment. And if you have your witness statement there? It  
4 should be in court book volume 2, part 2.

5 A. I have it, thank you.

6

7 Q. And you have the statement. Your Honour, it's volume  
8 2, part 2, tab 31.

9

10 COMMISSIONER: Yes, I have that. It's CL-64.

11

12 MS SWEET: Yes, it is. Thank you.

13

14 COMMISSIONER: As well.

15

16 MS SWEET: Yes, indeed. Now, this statement was made in  
17 response to some sections of a notice that was provided  
18 initially to the department, and I want to take you to  
19 page 4 of 13, paragraph 11. There's a heading, "Emergent  
20 orders"; do you have that?

21 A. Yes.

22

23 Q. Yes. Paragraph 11:

24

25 *OCFOS is involved in the emergent order*  
26 *phase, TAOs, CAOs TCOs, insofar as*  
27 *providing independent legal advice to*  
28 *the department, preparing the applications,*  
29 *and representing the department on the*  
30 *applications.*

31

32 And you've given evidence to that effect today?

33 A. M'hmm.

34

35 Q. Can I take you to recommendation 13.17, please, which  
36 should be on page XL111. Your Honour, would you like a  
37 copy of these?

38

39 COMMISSIONER: No, I have it.

40

41 MS SWEET: You have it? Excellent. Do you see at the top  
42 of the page there's 13.17?

43 A. Yes, I do.

44

45 Q. Do you see the second paragraph starts:

46

47 *The Director of Child Protection will bring*

1           *application for child protection orders*  
2           *before the Childrens Court and higher*  
3           *courts, except in respect of certain*  
4           *interim or emergent orders where it's not*  
5           *practical to do so. In a latter case some*  
6           *officers within the department will retain*  
7           *authority to make applications.*

8  
9           Now, it's fair to say that that aspect of that  
10          recommendation isn't how emergent operators are dealt with  
11          today; correct?

12         A.    I think this is in the context - it's in a much bigger  
13          context and I would need to read the document further,  
14          because it's not my understanding that that was ever the  
15          intention. So --

16  
17         Q.    No, you don't need to read further. Well, I'll just  
18          take you to that to say that it's the fact that it's not  
19          the Director who is making emergent orders except in  
20          circumstances where it's not practical to do so; it's only  
21          - it's the department on the - well, it's OCFOS acting on  
22          the instructions of the department; that's correct, isn't  
23          it?

24         A.    Yes, yes.

25  
26         Q.    And do you know why it has evolved in that way such  
27          that it is the department and not the Director, except in  
28          these sort of particular circumstances where it's not  
29          practical to do so? Can you give any insight on that?

30         A.    Let me have a look. Sorry, I'm going to re-read it,  
31          if that's okay.

32  
33         Q.    Re-read the paragraph, certainly.

34         A.    Yes. Yes. Now, sorry, what was your question again?

35  
36         Q.    So the question is do you have - I think you've  
37          accepted that it's not - it is OCFOS on the instructions of  
38          the department who seeks all emergent orders?

39         A.    Yes.

40  
41         Q.    And if you had any insight into why that is the case  
42          in circumstances where the recommendation was that it would  
43          be the Director, save where it was not practical to do so?

44  
45         MR HASTIE:   It might just depend on how - I'd hate to  
46          engage in a bit of construction of a document --

47

1 MS SWEET: I would like to see if the witness could answer  
2 the question first, unless there's an objection to the  
3 question.  
4

5 COMMISSIONER: Well, I think what needs to be made clear  
6 to the witness is this. This paragraph, on one reading at  
7 least, recommends that all applications for child  
8 protection orders before the Childrens Court or other  
9 courts be made by the Director with the exception - with an  
10 exception in respect of certain interim or emergent orders  
11 where it is not practical to do so; in other words, there's  
12 a limited exception on the face of it for someone other  
13 than the Director to make an application for an emergent  
14 order in circumstances where it's not practical for the  
15 Director to do so. That is the construction that's being  
16 put to you. Now, on that construction, it's suggested that  
17 in fact that's not what occurs because it is the department  
18 that makes the application for the emergent orders - as  
19 you've said, the department's the applicant - with the  
20 assistance of OCFOS. And can you comment on the difference  
21 between what was recommended and what the present state of  
22 practice is?

23 A. No, I can't. I don't know the context around that.  
24

25 COMMISSIONER: Well, it does raise the question that  
26 I asked you this morning which is, as I understand it,  
27 I thought prior to 2018 but you I think say prior to 2020  
28 the decision-maker in relation to the making of an  
29 application for an emergent order was the OCFOS lawyer and  
30 post whenever the change occurred, let's say 2020, the  
31 department has moved to an instructional model where OCFOS  
32 acts on the instructions of the department rather than  
33 being the decision-maker in relation to the making of  
34 emergent order applications.

35 A. That's correct.  
36

37 COMMISSIONER: Now, were you involved in that change?

38 A. I was involved in that change as a director. I was  
39 not the decision-maker in relation to that; no.  
40

41 COMMISSIONER: Tell me what your involvement in that was?

42 A. I'm thinking. I'm trying to think back. I think it  
43 became - as I said this morning, there was inconsistencies  
44 across the state as to whether or not the legal officer was  
45 the applicant in matters or whether or not --  
46

47 COMMISSIONER: See if you can address yourself to my

1 question, which is what was your involvement; okay? Did  
2 you attend meetings? Did you have discussions about it?  
3 How did it come about?

4 A. Yeah, we would have had discussions as part of the  
5 Brisbane leadership team, the OCFOS Brisbane leadership  
6 team, around that and I guess the pros and cons of that and  
7 what that looked like.

8  
9 COMMISSIONER: Who wanted to change the situation?

10 A. Who wanted to change the situation?

11  
12 COMMISSIONER: Yes. Did OCFOS want things to change or  
13 was it the department or both?

14 A. I think at the time it was a decision that was made in  
15 consultation. It wasn't a decision - I don't recall it  
16 being a decision that was made solely by the Official  
17 Solicitor at the time. I think it was made in consultation  
18 with others.

19  
20 COMMISSIONER: Were you a party to discussions about it  
21 within the --

22 A. I remember discussions occurring at the time; yes.

23  
24 COMMISSIONER: And, as far as you can recall, where was  
25 the source of the impetus for the change in practice?

26 A. I think there was confusion as to who was the  
27 decision-maker, given the inconsistencies across the state  
28 with who was the applicant in matters. So it became, "Are  
29 you the legal adviser or are you the decision-maker?" And  
30 so it was a matter of, "If you're giving legal advice on  
31 the application, should you also be the decision-maker?"  
32 It's what we were talking about this morning. And so to  
33 ensure a really clear path between legal advice and  
34 practice decisions and to maintain that legal independence  
35 a decision was made at that time, from my memory, around an  
36 instructional model.

37  
38 COMMISSIONER: Who made that decision?

39 A. The Official Solicitor at the time, in consultation  
40 with other people. I'm sure it wouldn't have been made in  
41 isolation. And I was part of some of those discussions,  
42 not that I was the decision-maker, as I said.

43  
44 COMMISSIONER: Anything else you can tell me about that  
45 change of process or practice?

46 A. Not that I can recall, no.

47

1 COMMISSIONER: See, as I discussed with you this morning,  
2 the Director, once it gets to his hands, that is once his  
3 jurisdiction is invoked, he's the applicant and he might  
4 also need legal advice, mightn't he?

5 A. But the department's not his client.

6  
7 COMMISSIONER: No, you make that point. It may be a  
8 distinction without a difference, if I may suggest, because  
9 you could easily set up a process internally at OCFOS where  
10 advisers are not also decision-makers on the same matter in  
11 the way that so-called Chinese walls are set up to avoid  
12 conflicts in law firms. There are many solutions to the  
13 problem that you pose, are there not?

14 A. I don't know if that solution, but, is going to be a  
15 viable one in a really complex child protection system  
16 where you have - where you try to set up Chinese walls in  
17 matters, particularly given legal officers being based in  
18 service centres to support that particular service centre.  
19 And sometimes they provide support, you know, across  
20 service centres.

21  
22 COMMISSIONER: Well, I shall ask the Director because he's  
23 obviously resolved the problem. He's the applicant, and  
24 there might be times when he needs legal advice. He as in  
25 his statutory office, I mean. And the fact that the  
26 Director is the applicant doesn't seem to present a problem  
27 for that process to work.

28  
29 So I'm really wondering what the perceived problems with  
30 the model as it was originally established were; that is to  
31 say, what is the problem with the OCFOS lawyer concerned  
32 making the decision as to whether an application should be  
33 made for an emergent order. And you've identified one  
34 difficulty, which is the perceived conflict between being a  
35 legal adviser to the department and the applicant on an  
36 application. That's one problem, isn't it?

37  
38 And the other problem you've identified is inconsistency.  
39 Well, once the position as to who should be the  
40 decision-maker was clarified, presumably that inconsistency  
41 would evaporate, would it not? It's just a question of how  
42 you resolve a decision as to who is the decision-maker; do  
43 you agree? Do you see what I'm saying? Do you understand  
44 what I'm saying?

45 A. I understand what you're saying.

46  
47 COMMISSIONER: So somebody has made a choice that the

1 decision-maker should be the department rather than OCFOS.  
2 And you think that person was the --  
3 A. The decision-maker is the authorised officer. OCFOS  
4 aren't authorised officers.

5  
6 COMMISSIONER: Well, are they not - well, who was  
7 authorised to make a decision to - and we're talking about  
8 a decision to make an application, aren't we? You have to  
9 be authorised to make that application?

10 A. So there was statutory delegations - and I think that  
11 they probably still exist; I don't think they were amended  
12 afterwards - that still give OCFOS the ability to make that  
13 application if they choose so do.

14  
15 COMMISSIONER: So there's still an existing statutory  
16 delegation in favour of OCFOS that allows OCFOS to make an  
17 application for an emergent order?

18 A. As well as senior team leaders and managers and  
19 everyone else.

20  
21 COMMISSIONER: And those later - the delegations to senior  
22 team leaders and the like, presumably they didn't exist  
23 before the change in practice occurred?

24 A. No, they did exist.

25  
26 COMMISSIONER: They did?

27 A. They existed, yes.

28  
29 COMMISSIONER: So that might have been the source of the  
30 confusion; that there were two delegated decision-makers in  
31 relation to the question of who can make an application for  
32 an emergent order?

33 A. Possibly.

34  
35 COMMISSIONER: As you sit there today you still hold that  
36 delegation? Your office does?

37 A. I believe so, but I haven't - I haven't needed to  
38 check the statutory delegations for quite a while.

39  
40 COMMISSIONER: Well, I'll ask for those delegations in due  
41 course.

42 A. Okay.

43  
44 COMMISSIONER: And so two points just so I'm clear about  
45 what your evidence is, one, the perceived legal conflict of  
46 interest, being an adviser on the one hand and an applicant  
47 on the other, and the other is the inconsistency as to who

1 the applicant was in various applications around the state?  
2 A. Led to the decision; yes, I believe so.  
3  
4 COMMISSIONER: And are you telling me that prior to the  
5 change in practice there was some applications that were  
6 made by, let's say, the team leader and in the name of the  
7 team leader, and other applications were made in the name  
8 of the Official Solicitor? Is that what you mean by the  
9 inconsistency?  
10 A. Yes. I think they would have been made by the legal  
11 officer. But as I said --  
12  
13 COMMISSIONER: Pardon me?  
14 A. I think they would have been made by the legal  
15 officer. But, Commissioner, as I said this morning,  
16 I haven't been a legal officer in the department to know  
17 for sure.  
18  
19 COMMISSIONER: No.  
20 A. I haven't made one of those applications before.  
21  
22 COMMISSIONER: No, but in the period before there was a  
23 change of practice the OCFOS lawyer, however the delegation  
24 worked in terms of a cascade of delegations, was the  
25 applicant for the order; correct?  
26 A. Could have been the applicant for the order. Could  
27 have been.  
28  
29 COMMISSIONER: Could have been. But there were concurrent  
30 delegations, according to your understanding, at that time  
31 to team leaders?  
32 A. I believe so. I believe so. I'm not 100 per cent  
33 sure on that. I think so, but.  
34  
35 COMMISSIONER: And you think that even today there are  
36 delegations in place which will allow you or your office to  
37 be the applicant?  
38 A. I would need to check that.  
39  
40 COMMISSIONER: All right. Well, we can check that. All  
41 right. Thank you.  
42 A. Because delegations can be changed and I may not be  
43 aware of them; yes.  
44  
45 COMMISSIONER: Yes, of course. Ms Sweet.  
46  
47 MS SWEET: Thank you, Your Honour. All right. We were

1 talking about paragraph 11 of your statement, and I want to  
2 take you to the issue of the TAOs, the temporary assessment  
3 orders. If you have the Act there, Ms Schifilliti, you'll  
4 know that it's section 25 which deals with the making of an  
5 order. And I'm asking you to look at this in the context  
6 of your evidence that OCFOS provides independent legal  
7 advice to the department and that's part of how it's  
8 involved in the emergent order phase. So an authorised  
9 officer may apply to a magistrate for a temporary  
10 assessment order. I think you've just said to His Honour  
11 that OCFOS legal officers are not authorised officers; is  
12 that correct?

13  
14 COMMISSIONER: Well, I think she said she needs to check.

15  
16 MS SWEET: I didn't hear that.

17  
18 COMMISSIONER: The delegation may still be in place.

19  
20 MS SWEET: Yes, thank you. Do you have that section?

21 A. Let me just check "authorised officer".

22  
23 Q. Yes, the definition is:

24  
25 *An "authorised officer" means a person*  
26 *holding office as an authorised officer*  
27 *under an appointment under this Act.*

28  
29 Does that assist you at all?

30 A. I'm not sure.

31  
32 Q. Yes.

33 A. I'm not sure. I know we have delegations - I know we  
34 have delegations on the statutory delegations that are  
35 delegated when the Chief Executive can delegate to OCFOS,  
36 can delegate it to people within the department. But I'm  
37 not entirely sure about the authorised officer. I'd have  
38 to take that question on notice.

39  
40 Q. Yes, thank you. And you'll see subparagraph (2) talks  
41 about the application and it must state the grounds on  
42 which it is being made, the nature of the orders sought,  
43 and, if the proposal in the TAO is to take the child or  
44 keep the child in custody, the proposed arrangements for  
45 the child's care. I want to ask you to what level of  
46 specificity when making a TAO is the department able to say  
47 what the proposed orders were made in terms of the type of

1 care, who will be looking after the child? Can you speak  
2 to that at all?

3 A. No. As I said before, I've never made one of these  
4 applications before. So to comment on that would be -  
5 I would be making it up, quite frankly. I couldn't tell  
6 you definitively.

7  
8 COMMISSIONER: But your staff make these orders routinely,  
9 don't they?

10 A. Yes, but I don't get to see these orders unless a  
11 matter is complicated or contentious, and at that point  
12 I may review the orders. That doesn't happen very often.  
13 I'm not involved in the day-to-day making of applications.  
14

15 MS SWEET: And you'll see at subparagraph (4) it talks  
16 about - well it says:

17  
18 *The magistrate may refuse to consider the*  
19 *application until the applicant gives the*  
20 *magistrate all the information the*  
21 *magistrate requires about the application*  
22 *in the way the magistrate requires.*

23 A. Yes.

24  
25 Q. Do you know from your officers what types of  
26 information might be - are required by the magistrate  
27 before making --

28 A. No.

29  
30 Q. Under this type of subsection?

31 A. No.

32  
33 Q. No?

34 A. I couldn't answer that with confidence.

35  
36 Q. And section 26:

37  
38 *The magistrate may decide an application*  
39 *for a temporary assessment order without*  
40 *notifying the child's parents of the*  
41 *application or hearing them on the*  
42 *application.*

43  
44 And I'll take you back to some evidence I think you gave  
45 this morning where you said - when you were asked about the  
46 ex parte nature of the applications and you mentioned that  
47 it is in the discretion of the magistrate.

1 A. M'hmm.  
2  
3 Q. But of course it's the department's application. And  
4 you said, "We always ask whether parents want to be heard."  
5 You said you don't have visibility on these other things  
6 I've taken you to. Is it the case that you don't actually  
7 know whether or not parents are asked?  
8 A. Have an expectation. Have an expectation that parents  
9 would be asked.  
10  
11 Q. Whose expectation? Is that your expectation?  
12 A. That's my expectation that our legal officers would  
13 ask CSOs or senior team leaders whether or not the parents  
14 want to be heard. I cannot say 100 per cent that each and  
15 every one of the legal officers in my team would ask that  
16 question each and every time on a TAO.  
17  
18 Q. And in terms of advising your legal officers of your  
19 expectation how is that done? Do you have a guideline or a  
20 directive to that effect?  
21 A. I'd have to check the operating guidelines. We've  
22 recently finalised our operating guidelines. They've been  
23 in draft for a little while, and we only finalised them  
24 very, very recently, and I would need to check those to see  
25 whether or not that's in those operating guidelines. It's  
26 like a 67-page document.  
27  
28 Q. Yes. And would that tell you when - if it is in there  
29 would it tell you when it was placed in those guidelines,  
30 that type of expectation?  
31 A. I'm actually just thinking, Counsel, that it might  
32 even be in our process maps. So we have process maps in  
33 relation to emergent orders. I have a copy here. Let me  
34 just quickly check, sorry.  
35  
36 Q. I think just given the time --  
37 A. Yeah.  
38  
39 Q. -- I'm happy for you to - and I'm sorry to say that  
40 you will be back tomorrow to give further evidence.  
41 A. I gathered that.  
42  
43 Q. So you'll have overnight. So I don't want to put you  
44 on the spot any more than I'm already doing.  
45 A. There's actually a box. Sorry, I've found it. I've  
46 got - this one is the original one. There's an amended  
47 version of it, too.

1  
2 Q. I'm not sure where in the material you're at. If you  
3 could tell us that?  
4 A. Yeah, so it's in the process maps that were provided  
5 in response to a notice to produce --  
6  
7 Q. I see.  
8 A. -- around CSOs to inform parents that a TAO would be  
9 sought and confirm whether they have legal representation  
10 around that --  
11  
12 COMMISSIONER: Is that an annexure to your statement?  
13 A. No, it's not.  
14  
15 COMMISSIONER: No.  
16 A. It was in a previous, I think, notice to produce where  
17 we provided some of the process maps. It's in the emergent  
18 order process map. We provided the original, and then  
19 we've provided one that was currently under review.  
20  
21 MS SWEET: My learned friends are telling me try tab 34,  
22 which is --  
23 A. In the latest one it says, "OCFOS lawyer to advise any  
24 legal representatives that TAO is to be sought and  
25 determined if they wish to be heard" --  
26  
27 Q. Just give me a moment, please, Ms Schifilliti.  
28 A. Sorry.  
29  
30 Q. That's all right. You're anxious to help. So when  
31 I look at tab 34 of volume 2, part 2, "Emergent order  
32 process map between CSSC and OCFOS as at 4 December 2020";  
33 is that what you are looking at?  
34 A. No, I'm looking at a draft one that's as at July 2025.  
35  
36 Q. Okay. As I say, I think it would be most useful if we  
37 just pause on this --  
38 A. Would you like a copy? I can give you mine.  
39  
40 Q. -- and we'll come back to in a moment. No, thank you.  
41 We are going to pause, please, and we'll come back to this.  
42 And just in terms of your evidence to His Honour this  
43 morning about there being the circumstances in which you  
44 might not seek that advice from the parents about whether  
45 or not they want to be heard being circumstances where  
46 there's a flight risk, again, is that - do you remember  
47 giving that evidence?

1 A. Yes, I do.  
2  
3 Q. Yes. In terms of what constitutes a flight risk such  
4 that you would not advise parents or seek to find out if  
5 parents want to be heard on an application, an emergent  
6 application, is that also something that's contained in  
7 your guidelines as to what constitutes a flight risk?  
8 A. The process map says, "Unless an ex parte application  
9 is warranted due to safety risks, the CSO to ask parents  
10 and child, young person, if they wish to be heard on the  
11 application."  
12  
13 Q. Okay. If it's put in terms of safety risk, not flight  
14 risk per se, what are we to understand is meant by safety  
15 risk?  
16 A. Well, a flight risk would be a safety risk.  
17  
18 Q. Yes. Are there safety risks other than flight risks?  
19 A. If we thought that the child would be harmed in the  
20 interim --  
21  
22 Q. Yes.  
23 A. -- between advising the parents and the application  
24 coming before a magistrate.  
25  
26 Q. Yes. And when you said that the process is to ask the  
27 parents if they want to be heard can you just confirm what  
28 is it that - through your maps what is the query that the  
29 CSOs are to ask the parents? How is it phrased?  
30 A. It would be something I imagine along the lines of,  
31 "We're going to make an application to a magistrate for a  
32 short-term order for this reason. Do you wish to be heard  
33 on the matter? Would you like to speak to the magistrate?"  
34 It would be in more user-friendly terms than what I have  
35 just used, sorry. It would be, "Would you like to speak to  
36 the magistrate about that? Would you like the magistrate  
37 to contact you about that?"  
38  
39 Q. Yes. All right. And then when - and so based on what  
40 your evidence to me just now, that is done in advance of  
41 the filing of the application; is that correct?  
42 A. Of the making of the application, yes.  
43  
44 Q. So we make; we don't file?  
45 A. Yeah, so we make TAOs and TCOs and we file CAOs.  
46  
47 Q. Yes, thank you. And then just going back to the Act

1 at section 27 it talks at subsection (1) about the  
2 magistrate may make a temporary assessment order for the  
3 child only if satisfied that the investigation is necessary  
4 to assess whether the child is a child in need of  
5 protection and the investigation cannot be properly carried  
6 out unless the order is made.

7 A. M'hmm.

8  
9 Q. However, in deciding the application the magistrate  
10 must also be satisfied reasonable steps have been taken to  
11 obtain appropriate parental consent to the doing of the  
12 things sought to be authorised under the order or it is not  
13 practicable to take steps to obtain the consent. So am  
14 I to understand from that that that is information that is  
15 contained within the application?

16 A. Yes. And that would be in those template documents,  
17 the emergent order template documents that we just handed  
18 up.

19  
20 Q. Yes. Now, just in a general sense, then, when you  
21 talk about giving independent legal advice in respect of  
22 these applications what are the types of topics upon which  
23 you are giving legal advice in respect of the applications  
24 for a temporary assessment order?

25 A. Are you talking about the types of issues; sorry, just  
26 so I can clarify?

27  
28 Q. The types of issues that you are asked to advise upon?

29 A. That could be any array of matters. That could be,  
30 you know, notifications that a child has been sexually  
31 assaulted; it could be notifications that a child has been  
32 physically abused --

33  
34 Q. What is the advice you're being asked to give about  
35 these notifications?

36 A. So a CSO might come to you with the notification,  
37 which is essentially an allegation that's been made by  
38 someone to the department. So they might come with you --

39  
40 Q. Yes, I understand what a notification is.

41 A. Yes, sorry.

42  
43 Q. No, no, that's fine.

44 A. Yep. So they might come to you with that information.  
45 They may have done some preliminary enquiries. They may  
46 have spoken to parents. In some instances they may have  
47 actually gone out to a school and actually spoken to the

1 child already under a separate provision in the Act. They  
2 may have already made some requests to other government  
3 agencies for information, essentially to do like an early  
4 preliminary test of the notification that's been received.  
5 And so they might seek a legal consult and provide us with  
6 that information.

7  
8 Q. All right. So you're given the information. What is  
9 the advice that comes back to the department? Are they  
10 asking you questions or are you being given that? What is  
11 the advice you're being asked to give?

12 A. So the advice is on the merits of that application,  
13 and we advise them whether or not there would be reasonable  
14 grounds for making that application satisfying that test.

15  
16 Q. Okay.

17  
18 COMMISSIONER: On the evidence that's provided to you?

19 A. Yes, and sometimes that may be brief. Other times it  
20 may not be, but sometimes it may be as brief as that  
21 because the purpose of these orders is the investigation.

22  
23 MS SWEET: Yes. Okay. So you seek - just going back to  
24 your statement, and you see how you're asked - further down  
25 between paragraphs 12 and 13 you're asked about - this is  
26 one of the questions from the notice; that you're asked  
27 about the engagement of OCFOS to provide legal advice at  
28 each stage of the investigations and assessment process,  
29 including timeframes. And you say:

30  
31 *CSOs may seek legal advice from OCFOS*  
32 *throughout the investigation and assessment*  
33 *phase, specifically in relation to their*  
34 *legal obligations and when an order is*  
35 *required.*

36  
37 A. Yes.

38  
39 Q. So you say they may seek advice. What do you say  
40 about whether or not OCFOS is routinely engaged by CSOs to  
41 seek legal advice during that investigation and assessment  
42 phase as opposed to, I suppose, coming to you when their  
43 assessment is done and asking for prospects of success on  
44 an application to the court?

45 A. I don't know if I can actually answer that question.  
46 It's very - it's operational and, as I said, I'm not  
47 involved in the day-to-day operations.

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47

Q. Yes.

COMMISSIONER: Does OCFOS give legal advice to the department on matters other than matters associated with the making of emergent orders?

A. Yes.

COMMISSIONER: What kind of matters?

A. We give advice on adoptions matters and we represent the department in relation to applications for adoptions, mainly stepparent adoptions or dispensation ones.

COMMISSIONER: Come back to that.

A. We also give legal advice on federal and circuit - Federal Circuit and Family Court matters. So, even though they're dealt with by court services, if legal advice is required on those matters then we have, as I said this morning, the senior legal officer who provides legal advice on those matters.

COMMISSIONER: Sorry, do you mind just speaking up a bit?

A. Sorry.

COMMISSIONER: That's all right.

A. Sorry.

COMMISSIONER: There's a lot of people wanting to hear your answer.

A. So, yes. So in relation to --

COMMISSIONER: So this is where the department has either consented to jurisdiction in relation to a Family Court parenting matter --

A. Or there's been a section 91B request from the department to intervene and the department is considering intervening, that might be another situation.

COMMISSIONER: Yes. Any others?

A. Or if it's a particularly contentious Family Court matter and the court services team are seeking legal advice on that particular matter.

COMMISSIONER: Contentious in the context of the child in question being in some form of care by the department?

A. Could be. Could be across both jurisdictions; yes.

1 COMMISSIONER: But I'm assuming, but please correct me if  
2 I'm wrong, that the department doesn't get involved in  
3 Family Court matters to do with parenting unless it has  
4 some anterior involvement with the child concerned.

5 A. That's correct.

6  
7 COMMISSIONER: Yes, in the child protection context.

8 A. That's correct. More often than not it's by way of  
9 co-located offices, front of court services, who sit in the  
10 Federal Circuit and Family Court and provide information to  
11 the court to assist the court. But that's not part of the  
12 work that our OCFOS lawyers do.

13  
14 COMMISSIONER: Would an example of that be if the  
15 department knew of something to do with the behaviour of  
16 one of the parents that would pose a risk to the child, had  
17 posed a risk, and the department might be asked whether it  
18 would provide some affidavit or something else of relevance  
19 to the decision being considered in the Family Court  
20 bearing upon the welfare of the child?

21 A. Usually it would be information that was on the file  
22 that we would provide if the information was sought from  
23 the court.

24  
25 COMMISSIONER: And do you receive subpoenas to produce the  
26 file issued by the court, presumably on the application of  
27 one of the parties?

28 A. Not so much anymore because of those co-located  
29 officials. One of the purposes was for that free  
30 information exchange. So less so than in recent years than  
31 in years gone by.

32  
33 COMMISSIONER: Yes, okay. Any other matters that you give  
34 advice to the department about?

35 A. Supreme Court matters. So sometimes we're involved in  
36 the *parens patriae* jurisdiction if a parent has filed an  
37 application in the Supreme Court. It's not very often.  
38 Sometimes --

39  
40 COMMISSIONER: To revoke the child protection order?

41 A. Yeah, if - so rather than going through the Childrens  
42 Court we've had a couple of instances where parents have  
43 actually filed applications by way of essentially an  
44 appeal, really, in the Supreme Court. And so we've needed  
45 to appear on those matters.

46  
47 COMMISSIONER: Doesn't that become a matter for the

1 Director to deal with, generally?  
2 A. No, because that will be off the emergent order.  
3  
4 COMMISSIONER: It might be in relation to the emergent  
5 order?  
6 A. Yes.  
7  
8 COMMISSIONER: So if the parent wants to review the  
9 decision they might seek a prerogative writ to obtain  
10 effectively an appeal from the decision by the magistrate  
11 to grant an order?  
12 A. I mean, the appropriate - the most appropriate avenue  
13 would be to file in the Childrens Court of Queensland. But  
14 in the past only a very small amount of parents have chosen  
15 to go down the Supreme Court path.  
16  
17 COMMISSIONER: What do they seek, some injunction or --  
18 A. Yeah, essentially.  
19  
20 COMMISSIONER: -- letter of certiorari, something like  
21 that?  
22 A. Yeah, for the children to be returned to their care,  
23 yeah, because we've got custody of their children under a  
24 TAO or a CAO application.  
25  
26 COMMISSIONER: Yes. Any other matters you give advice  
27 about; subject areas, I mean, I'm not asking about the  
28 content of the advice?  
29 A. Yeah, in the past we've been asked to give advice on  
30 QCAT matters that require - that are particularly  
31 contentious. There's been on many of those occasions, but  
32 we haven't been able to because we just don't have capacity  
33 to be able to do that. Our team is really stretched. We  
34 are really stretched. I think I mentioned this morning  
35 that we haven't had any additional resources since 2018.  
36 And in that time obviously the emergent orders have  
37 increased significantly; referrals to DCPL have increased  
38 significantly. So sometimes we just are unable to do it  
39 and they have to be outsourced.  
40  
41 COMMISSIONER: So in relation to QCAT's jurisdiction the  
42 terms of an order - well, it's not really the terms of an  
43 order, but the terms of the care plan in relation to the  
44 child that relate to access by one of the parents, that's a  
45 matter reviewable in QCAT, isn't it?  
46 A. That's not something I could comment on. It is  
47 certainly not in my wheelhouse. I have no responsibility

1 for QCAT matters, and I have never given advice on a QCAT  
2 matter.

3

4 COMMISSIONER: So you mentioned QCAT. In what context  
5 does your office become involved in QCAT?

6 A. Sorry, no, that's what I meant. It would be - it  
7 would make sense for us to give advice on QCAT matters but  
8 we just haven't had the capacity. I think there might have  
9 been one or two matters over the years where we've done  
10 that. But certainly, no, it's not something that we would  
11 usually do.

12

13 COMMISSIONER: So who advises the department in relation  
14 to QCAT matters?

15 A. I'm not sure who court services briefs in relation to  
16 those matters. I know there have been a couple of matters  
17 in the past where DCPL have actually agreed to take on  
18 those matters.

19

20 COMMISSIONER: I was going to ask whether any review of  
21 orders sought by the Director would fall within his  
22 jurisdiction in terms of dealing with any QCAT application  
23 for a review of the order or aspects of the order.

24 A. M'hmm.

25

26 COMMISSIONER: You don't --

27 A. I don't know. That would be a question for the  
28 Director.

29

30 COMMISSIONER: All right. We might leave it there for  
31 today. 10.15?

32

33 MS SWEET: Yes, I'm conscious it's been a very long day  
34 for the witness.

35

36 COMMISSIONER: Sorry, Ms Sweet?

37

38 MS SWEET: You said you wanted to leave it there? Did you  
39 want to --

40

41 COMMISSIONER: Yes, I notice the time.

42

43 MS SWEET: Yes.

44

45 COMMISSIONER: Is that a convenient time? All right.  
46 10.15. Thank you.

47

1 MS SWEET: As the court pleases.

2

3 THE HEARING WAS ADJOURNED AT 4.04PM UNTIL TUESDAY,  
4 9 DECEMBER 2025

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