

CHILD SAFETY COMMISSION OF INQUIRY

Level 5, Courtroom 23, Brisbane Magistrates Court,  
363 George Street, Brisbane

On Monday, 2 February 2026 at 10.06 am

Before: Mr Paul Anastassiou KC, Commissioner

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

1 COMMISSIONER: Welcome back, everybody. Before we  
2 commence, I just would like to give a short ruling in  
3 relation to a claim for public interest immunity that's  
4 been made by the State. By notices to produce 81, 195 and  
5 196 the Commission sought production of documents relating  
6 to the evaluation of the role of the Director of Child  
7 Protection Litigation, which may be conveniently described  
8 as the DCPL model. The department produced documents to  
9 the Commission on a confidential basis but has claimed that  
10 it has a reasonable excuse for non-production in accordance  
11 with section 5(2)(b) of the Commissions of Inquiry Act 1950  
12 on the grounds that the documents are subject to public  
13 interest immunity, sometimes also referred to as Crown  
14 privilege.

15  
16 The State of Queensland provided written submissions dated  
17 19 December 2025 in support of the claim for public  
18 interest immunity in respect of the documents produced  
19 confidentially in response to the notices. I have  
20 considered those submissions and the documents to which  
21 they relate. I have concluded that the claim for public  
22 interest immunity in relation to the documents should be  
23 upheld. I accept that the documents prima facie fall  
24 within the categories which attract public interest  
25 immunity. More significantly, I accept that the documents  
26 are not sufficiently critical to the discharge of  
27 the Commission's duty to investigate and report on the  
28 matters within the terms of reference as to outweigh the  
29 public interest in protecting the confidentiality of the  
30 documents.

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32 I agree with the State's submissions that I should adopt  
33 the principles applicable to the weighing of competing  
34 public interests as applies in the context of civil  
35 litigation, adapted as appropriate. I respectfully agree  
36 with what was said by Associate Justice Derham in  
37 *Matthews v SPI Electricity Pty Ltd (No. 11)* [2014] VSC 65  
38 at paragraph 25(k):

39  
40 *In order for the public interest in the*  
41 *administration of justice to arise in the*  
42 *balancing process, the documents must*  
43 *contain 'material evidence'. Relevance to*  
44 *the proceedings is of itself insufficient.*  
45 *The documents must have an important*  
46 *bearing upon the ultimate decision on the*  
47 *relevant questions.*

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As I am required to investigate and report upon matters within the terms of reference and to form my own views on these matters, in my view it cannot be said that the documents which relate to investigations and considerations by others, including the Queensland government and its agencies or delegates, while no doubt relevant, are so material or have such an important bearing upon my investigations and evaluation that disclosure is warranted in the public interest. Accordingly, as the State has claimed public interest immunity, I shall proceed to consider the role of the Director of Child Protection Litigation unaided by such evaluation as may have been undertaken by the State.

All right. Now, Ms Martin, I believe - Ms Martin, welcome back. I will try to move these screens so I can see you. All right. Yes, thank you, Ms Freeman.

MS FREEMAN: I'll continue with the evidence-in-chief of Ms Martin.

COMMISSIONER: Thank you very much.

**<CLAIR SHIRLEY MARTIN, CONTINUING [10.10 am]**

**<EXAMINATION BY MS FREEMAN, CONTINUING**

MS FREEMAN: Ms Martin, we heard when you gave evidence last year that you have been working for the department since about 2011; is that right?

A. Yes, April 2011.

Q. All right. So you've been involved in the child protection litigation model since its inception in 2016?

A. Yes.

Q. Could you please tell the Commissioner what you see as some of the benefits of the current model and having a separate body undertaking the court work with the exception of emergent orders and an internal legal service?

A. I think one of the clear benefits is having lawyers managing the litigation. So prior to 2016 it was court coordinators that managed the litigation on behalf of the department. The Queensland department has never had the benefit of managing its own litigation with lawyers, and that resulted in a lot of inconsistency. So where you

1 had court coordinators who were lawyers or very experienced  
2 court coordinators there would be good court outcomes, but  
3 in a lot of service centres there would just be child  
4 safety officers who were experienced in that role stepping  
5 up to act in the court coordinator role with minimal  
6 support. A clear benefit is the inclusion and involvement  
7 of lawyers to manage that litigation.

8  
9 I think I spoke in December about how difficult it was to  
10 obtain material from the department and how as  
11 representatives for parents we used to have to subpoena the  
12 deputy to get copies of basic case notes and records. The  
13 introduction of the disclosure regime in 2016 is a clear  
14 benefit. I think having lawyers manage the practical  
15 realities of the strength of the case and try and  
16 articulate that to the social workers also has clear  
17 benefit. That being said, it is my view that the  
18 bifurcated model does not achieve the best outcomes for  
19 children and families and for the department.

20  
21 Q. All right. Can you just explain to the Commissioner  
22 why you say that then, please?

23 A. At the moment the current model sees the State  
24 advancing two different positions before the court. So if  
25 Child Safety holds - if the practitioners hold a different  
26 view to the Director's office, both of those positions are  
27 put before the court and essentially can become part of  
28 the proceedings. So, if Child Safety thinks a less  
29 intrusive order is required, it would advance the argument  
30 of the parents to suggest that they're the experts in child  
31 protection and the court should place more weight on their  
32 material. If Child Safety's assessment is more intrusive  
33 than the Director's office, it would advance the case of  
34 the parents to suggest that the lawyers know the correct  
35 decision and not the social workers. What - as I see it,  
36 that results in the court not having much faith in the  
37 credibility of practice assessments of the department, not  
38 placing much weight on the expertise of social workers, and  
39 it becomes part of the argument, rather than the State  
40 advancing one position to assist the court and all the  
41 parties.

42  
43 I also see that it has created a system where practitioners  
44 are essentially encouraged not to let legal issues  
45 influence their practice assessment and to keep those two  
46 things very separate. I appreciate that I'm a lawyer, but  
47 the reality is that practitioners do need to incorporate

1 the legal issues if they're trying to advance their  
2 position. I understand that a lot more matters get listed  
3 for final hearing and get resolved on the day likely  
4 because of the legal realities of the matter.

5  
6 In my view, if there wasn't a separated model, work could  
7 be done with more senior practitioners to assist the child  
8 safety officers and team leaders to understand the  
9 vulnerabilities in their practice assessment and to correct  
10 them. So a lawyer can't tell a social worker to change  
11 their practice assessment, but a lawyer can point out those  
12 vulnerabilities, and if there was an internal joined model  
13 there could be a process where that CSO or that team leader  
14 is supported with a more experienced practitioner to  
15 understand the legal realities of what their practice  
16 assessment is and make changes.

17  
18 I think that's what's missing from the current system in  
19 that it's so separated the child safety officers are  
20 somewhat - and I appreciate that this was the original  
21 intent, but the child safety officers are so separated from  
22 court that they have no real incentive to take on board  
23 legal advice or take on board legal recommendations and  
24 they don't change their practice assessment, and in them  
25 not changing their practice assessment you then have two  
26 different positions being advanced before the court and you  
27 have limited scope or ability for negotiation to resolve  
28 matters.

29  
30 COMMISSIONER: Ms Martin, can I just ask you this because  
31 I'm a little unclear about some of the distinctions you're  
32 drawing. I think we need to break it down a bit; all  
33 right? Who do you say is best qualified to make a decision  
34 as to whether an application for whatever order it might be  
35 should be made? Is it the lawyer or is it the child safety  
36 officer together with the team leader?

37 A. I think the child safety officer or the team leader  
38 should be the applicant in any proceeding, but I think that  
39 they should not invoke the coercive powers of a court in  
40 the absence of legal advice. So I think they should have  
41 legal advice before pursuing any court action.

42  
43 COMMISSIONER: So you're focusing on who the named  
44 applicant is in the proceeding for whatever order it is  
45 that's being sought?

46 A. I think those two things could be separated. I think  
47 you could have a lawyer as the decision-maker and the - as

1 it currently is, the applicant in making the decision for a  
2 child protection order is a lawyer, or you could have an  
3 applicant being the actual caseworker who works with the  
4 family but with an obligation that they don't make  
5 application to the court without legal advice.  
6

7 COMMISSIONER: Well, if I can just come back to my  
8 question because you've answered it by reference to a  
9 separate issue which may be merely procedural, namely who  
10 the named applicant is. My question is who in your view is  
11 best placed to make an evaluation on the material available  
12 as to whether an application to the court should be made  
13 and, if so, for what kind of order?

14 A. I think that should be a lawyer --  
15

16 COMMISSIONER: Yes.

17 A. -- because I think a lawyer needs to understand what  
18 the evidence is and whether there's a reasonable basis to  
19 bring that application.  
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21 COMMISSIONER: Yes, thank you. Ms Freeman.  
22

23 MS FREEMAN: Thank you.  
24

25 You mentioned in your answers just before that currently  
26 there doesn't seem to be the system set up so that the  
27 practice - the social workers making their practice  
28 decisions have input of a lawyer to consider legal issues  
29 as part of that assessment.

30 A. M'hmm.  
31

32 Q. Can you explain to us why that doesn't occur right  
33 now? If you don't know the answer to that, feel free to  
34 say you don't know. But I'm just interested in  
35 understanding why that doesn't occur and could it occur in  
36 the current model?

37 A. Look, my understanding is that there's guidance in the  
38 child safety practice manual about separating legal from  
39 practice decisions. So it's one of the reasons that  
40 lawyers don't attend practice panels: because that's a  
41 decision-making forum where they make their practice  
42 decision.  
43

44 Q. Okay. And what about child safety officers getting  
45 advice from DCPL lawyers? Does that happen?

46 A. My understanding is that DCPL can't give child safety  
47 officers legal advice.

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Q. Okay.

A. I think the other thing that's difficult about the model is that different parts being quarantined is unhelpful. So previously we had lawyers that could give legal - sorry, we had staff who could give legal advice on the entire Child Protection Act. So that included QCAT. It included carer approval processes. It included standard of care issues. All of those overlapping and interlaying parts of the Act, the court coordinators could guide the service centres in relation to the things they needed to do and the steps they needed to take.

At the moment I think there's probably five to 10 lawyers in Queensland that have that thorough understanding of the whole Child Protection Act. Because of the nature of this model our lawyers focus on the emergent order space and know that part of the Act very well, the Director's lawyers know the child protection order part of the Act very well, and the department has to go to a range of different internal units if they want guidance on QCAT or if they want information sharing guidance.

I think what would be of benefit, if you had one team of lawyers who could give legal advice on the entire Child Protection Act, the interplay with the Family Law Act, the domestic violence Act, so that there was a comprehensive legal service provided to Child Safety.

Q. All right. And do I understand from your answer there that also a continuity of service, so it's not one body dealing with one aspect and then another body dealing with another aspect?

A. Yes.

Q. Okay.

A. So you have the same lawyers involved in a child's life over that period of time rather than having to source advice from multiple different people. I think the other thing that's critical is - I think I said this last time - social workers are relational. They won't pick up the phone and have a Teams call or a telephone call. But what they will do is walk past your desk and update you that, you know, "This parent got arrested," and what you can do is have that really live almost stream of consciousness running of the matter. So if they walk past and give you an update you can say, "Don't forget to do an information

1 request," and then they can get that information as they're  
2 working the case. That, in my experience, works a lot  
3 better than doing a case consult a week before mention and  
4 then they suddenly have to do a range of information  
5 requests to partners.  
6

7 I think the thing that it's really difficult for lawyers to  
8 understand is Child Safety staff don't necessarily know  
9 what's relevant for court. So we see that as our role. We  
10 have to tell them what's relevant. They know what's  
11 relevant for their practice assessment, and those two  
12 things are not automatically the same. I think all Child  
13 Safety lawyers have probably had an experience where  
14 they've gone to court and been surprised at the Bar table  
15 by something a parent has said, and I don't necessarily  
16 think that's malicious. I think it's that child safety  
17 officers don't know the types of things that might be  
18 raised in court, and it can be very difficult to fully have  
19 your head across a child or a family if you're not embedded  
20 within that service centre and have those relationships  
21 formed.  
22

23 Q. All right. So do I take from what you were just  
24 saying there that one of the advantages of having an  
25 internal legal service embedded in the department is that  
26 physical proximity between CSOs and lawyers in terms of  
27 being able to get that on-the-spot advice?

28 A. Yep, on-the-spot advice but also the other side of  
29 that, the information gathering as you go. So you're not  
30 just doing a consult because you have a mention next week,  
31 and then all this relevant information gets told to the  
32 Director's office that everyone's scrambling to do a late  
33 affidavit on; you're gathering that evidence as you go. As  
34 the casework is happening the lawyers are directing them  
35 around, "Well, you'll need this evidence to prove that in  
36 court"; that can happen in a more fluid way if you are  
37 physically sitting next to someone or in the same building  
38 as someone.  
39

40 Q. Okay. Currently, as we understand it, the OCFOS  
41 lawyers conduct the emergent orders proceedings on behalf  
42 of the department before it then gets handed over to the  
43 DCPL. Do you think that an external legal service like  
44 DCPL could effectively conduct the emergent orders on  
45 behalf of the department?

46 A. I don't. I think again the amount - so we sometimes  
47 have our staff covering remotely if someone's on leave or

1 someone's away, and we know from experience how much more  
2 difficult it is to gather the information you need for an  
3 emergent order application if you don't have that  
4 relationship if you're trying to do it on the phone. It is  
5 far easier and you have better quality applications if the  
6 lawyer can walk alongside the child safety officer and the  
7 team leader to gather that information.

8  
9 The legal advice on those matters and the applications,  
10 from when we - our team first gets asked for a legal  
11 consult to a final order being made can sometimes only be  
12 an hour or two hours. That period of time, if you added an  
13 additional step of having to make a referral or involve an  
14 external agency, it would add, in my view, an unnecessary  
15 layer of additional complexity and complication.

16  
17 We've also got strict timeframes in relation to those  
18 orders. So if section 18 is used an application must be  
19 brought within eight hours, and if an application is going  
20 to be brought after hours you have an additional legal test  
21 that it has to be urgent or special circumstances. I would  
22 be concerned that if that piece of work was external you  
23 may create special circumstances or, you know, may have to  
24 go into after-hours applications more frequently because  
25 you're involving another external agency and trying to  
26 convince them to come on board with the application.

27  
28 COMMISSIONER: Ms Martin, if the external agency - and by  
29 that you're referring to the independent office of  
30 the Director - were to operate in connection with emergent  
31 orders on the basis that the staff of that authority,  
32 independent authority, were embedded to the extent required  
33 at child safety centres and operated at a practical level  
34 in the same fashion as OCFOS presently operates save that  
35 the lawyers concerned reported directly to the Director and  
36 had independence from the department in the same way as the  
37 Director has, not being subject to direction by the  
38 department in the performance of the duties of that office,  
39 what practical impediments would arise if that were the  
40 structure?

41 A. Commissioner, I think what we would see if that was  
42 the structure is similar to what we saw in the early years  
43 of OCFOS where our team was the applicant. The number of  
44 disagreements we had with service centre staff around  
45 whether or not to bring an application I suspect would  
46 increase, and I think if - if that were to be the model  
47 I think it would essentially take us back nine years where

1 Child Safety is arguing with its own lawyers - sorry, Child  
2 Safety is arguing with lawyers around whether they have  
3 sufficient evidence to bring an application, and it's  
4 really difficult to only make those decisions based on  
5 evidence because things are unfolding on the day. So  
6 sometimes they might only receive a notification at  
7 3 o'clock. As a lawyer I would like to review their case  
8 notes and review everything before going to court. But the  
9 reality is that child protection is a risk jurisdiction and  
10 sometimes we have to take verbal advice from team leaders  
11 about what their practice assessment is and the things  
12 they're observing without the benefit of having an already  
13 documented case note. My concern about the Director's  
14 office managing that externally would be in relation to the  
15 level of evidence or the scope of evidence expected for a  
16 three-day emergent order.

17  
18 COMMISSIONER: Well, firstly, may I suggest to you that  
19 the argument as you put it, which could just as easily be  
20 characterised as discourse about the question, isn't  
21 necessarily a negative feature of the decision-making  
22 process, a process anterior to an application for a court  
23 order being made, given the consequential nature of any  
24 order involving the removal of a child. Do you disagree  
25 with that?

26 A. I disagree to the extent of emergent circumstances.  
27 So it comes down to how much weight you place on the  
28 practice assessment of experienced human services  
29 practitioners. So sometimes on that day they don't have  
30 everything they might need to satisfy a court that a child  
31 protection order is required, and the reality is they don't  
32 need that yet because they're still assessing. They do  
33 have enough to show that there's unacceptable risk or  
34 there's a need for interim protection. My concern would be  
35 that, if we moved that threshold to needing the level of  
36 evidence that might be required if it was an external  
37 agency, children would be placed at risk, and --

38  
39 COMMISSIONER: Well --

40 A. -- Commissioner, I can use an example from the past  
41 few weeks where a magistrate got information about a family  
42 member and was not satisfied we had sufficient evidence  
43 based on that family member just saying verbally, "These  
44 were the thing" - "This is my history." My office opposed  
45 and said, "It would be premature. We don't know enough.  
46 We need time to assess. Child Safety needs time to assess  
47 these family members." That wasn't allowed, and the very

1 next day we found out about a very significant mental  
2 health history for that person. So we placed a  
3 two-year-old child back overnight with a family in very  
4 unsafe circumstances based on the level of evidence that  
5 was expected within that five-hour timeframe.  
6

7 COMMISSIONER: Well, I do have the impression that you're  
8 conflating a lot of different issue, if I may say so.  
9 Where there is uncertainty at a particular point in time  
10 about the risk assessment there's provision to seek an  
11 order to enable an assessment to be made, is there not?  
12 A. Yes, Commissioner.  
13

14 COMMISSIONER: Right. So, if the department together with  
15 the lawyer form the view that there's reason to be  
16 concerned but it's unclear on the state of the material  
17 presently available whether a particular form of emergent  
18 order and/or subsequently longer term child protection  
19 order is required, the Act contemplates that and provides a  
20 pathway to go before the court, seek an order for the very  
21 purpose of enabling that assessment to be made, does it  
22 not?

23 A. It does, Commissioner, but that assessment order - so  
24 those are the three-day emergent orders. That assessment  
25 order allows the magistrate to grant interim custody to the  
26 Chief Executive if they're satisfied custody is required  
27 during the assessment, and I suggest that if it was an  
28 external agency that's where the point of disagreement  
29 would come, that the Director's office may not be satisfied  
30 interim custody is required, and Child Safety may have a  
31 different practice assessment on that that they would like  
32 the court to make a decision on.  
33

34 COMMISSIONER: But in either case the relevant decision  
35 that we're talking about is to make an application to the  
36 court, is it not?

37 A. Yes.  
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39 COMMISSIONER: And then it's a matter for the court as to  
40 whether it's satisfied that the order that is sought is  
41 required; that's correct, isn't it?

42 A. It is but just with the nuance that there's two  
43 decisions. So you make an application to the court for an  
44 assessment order. There's also the decision about what  
45 provisions are sought. So you might seek an assessment  
46 order that isn't seeking custody of the child or an  
47 assessment order that's only seeking medical treatment of

1 the child. So there's two separate decisions.

2

3 COMMISSIONER: Yes, I understand that. But, if one looks  
4 at the decision-making continuum, the first decision where  
5 concern has matured into the consideration of whether some  
6 intervention, whatever that might be, should occur is to  
7 make an application to the court for an appropriate order,  
8 and there might be internally to the department  
9 disagreement as to what that application should be for,  
10 whether it should be custodial or non-custodial. But  
11 ultimately what is put before the court is a position that  
12 it is for the court to determine whether or not that should  
13 be accepted or not?

14 A. Yes, Commissioner, but - so what I'm suggesting is  
15 that if it was an external model you would still have that  
16 issue of the two separate positions. So you might see an  
17 application from the Director's office for a temporary  
18 assessment order not seeking custody because they don't  
19 agree there's sufficient evidence for that, but the  
20 application would have to say, "We're not seeking custody  
21 but Child Safety thinks they need custody." So you're then  
22 putting the magistrate in a position of trying to separate  
23 between the legal position about whether custody is  
24 supported on the evidence and the practice assessment about  
25 whether they want custody or not. So you'd still have that  
26 issue of the State having two separate positions it's  
27 advocating before the same court.

28

29 COMMISSIONER: Well, firstly, I'm not so sure that if the  
30 question of what application should be made to the court  
31 were clearly a decision to be made on this hypothesis by  
32 the Director, by his staff of course, that it would be  
33 necessary to put the contending view expressed by a  
34 dissenting child safety officer; that's implied in what  
35 you're saying, you think that that is required. It may or  
36 may not be. It may be good practice to do so. But one  
37 would end up in that situation with a position where the  
38 court would be informed that it is the Director's  
39 assessment that an order without, on this hypothesis, a  
40 custodial element to it should be made but there is  
41 disagreement within the department about that, and  
42 effectively the magistrate is asked to decide what in the  
43 circumstances on the evidence is necessary to protect the  
44 child, because ultimately it is the court's decision.

45

46 So I'm not sure why you perceive it to be such an onerous  
47 or unsatisfactory or undesirable thing that there should be

1 any contending positions put to the court - that's the  
2 first thing - and, secondly, why necessarily such  
3 contending positions would have to be put to the court if  
4 there was clarity about who had responsibility for making a  
5 decision as to the nature of the application to be made to  
6 the court. Do you follow what I'm putting to you?

7 A. I do. Commissioner, I think the - I think that then  
8 raises the question about who the applicant is, and if the  
9 person signing the - sorry, who the deponent is that's  
10 signing the application with the evidence. If that's not a  
11 lawyer from the Director's office, if it's a human services  
12 practitioner, my understanding or my view is that they  
13 would want to include their practice assessment about what  
14 should happen to the child and it would be quite difficult  
15 for a lawyer to tell them not to include that.

16  
17 COMMISSIONER: No, I accept that, I think. But the  
18 question of who the applicant is may be a matter of form,  
19 not substance, and if the lawyer were the applicant then  
20 I don't see the difficulty. The question then becomes a  
21 different one, which I've just raised with you, namely  
22 whether the contending positions should or should not be  
23 put before the court. There would be a powerful argument  
24 that the court should have the benefit of all views bearing  
25 upon the assessment it's being asked to make.

26 A. Yep --

27  
28 COMMISSIONER: But it's not a matter of putting separate  
29 departmental positions but rather saying to the court there  
30 are different views about this risk assessment,  
31 hypothetically, "I the Director take this view. There's an  
32 alternative view in these circumstances expressed by the  
33 child safety officer. You decide." And that's the  
34 resolution of a factual question that courts are required  
35 undertake.

36 A. And, Commissioner, the courts do undertake that in the  
37 current child protection litigation model. My suggestion  
38 that a magistrate can or should be tasked with trying to  
39 unravel all those different positions in an application  
40 heard on an urgent basis on the same day the application is  
41 prepared adds a layer of complexity that in my view I think  
42 potentially could place children at risk.

43  
44 COMMISSIONER: Well, in the context of an emergent order  
45 it's for a - the question for the court is what should be  
46 done for a very short period of time, and naturally the  
47 degree of satisfaction that the court requires as to the

1 assessment is less than would be required - for a very  
2 short-term order is less than what would be required for a  
3 much longer term order. So it's not a controversy unknown  
4 to the judicial process. That kind of evaluation arises in  
5 many, many contexts where interim or interlocutory  
6 injunctions are sought, for example. So I don't really  
7 follow why it isn't in fact healthy for that contest of  
8 contending positions to be both debated internally and put  
9 before the court. But you seem to think that there's  
10 something negative about that?

11 A. Commissioner, I think there's more value in the social  
12 workers understanding and accepting the legal advice on  
13 their position if it's fundamentally flawed on a legal  
14 basis. So in the model you propose you would be going to  
15 the court with the two different decisions or the two  
16 different positions and letting the court make that  
17 decision. I'm suggesting that I think it would work better  
18 and result in better outcomes if they wanted to seek an  
19 order based on their practice assessment and they were  
20 given legal advice that there's an insufficient basis to  
21 put that before the court or they're unable to satisfy that  
22 they need custody, and then they're referred off to higher  
23 delegates within practice of Child Safety so the regional  
24 director or the regional practice leader can help them  
25 understand the gaps in their practice assessment.

26  
27 COMMISSIONER: But what you seem to be interested in is  
28 preserving the authority of the internal assessment made by  
29 the child safety officer?

30 A. Not preserving it, Commissioner, because there are  
31 fundamentally times where they don't have the evidence to  
32 support what they want to do. I'm suggesting that if the  
33 two different positions or decisions just run parallel  
34 unchecked you then result in the matter being extended out  
35 longer and no resolution. If it gets escalated to a higher  
36 delegate and a more experienced practitioner is reviewing  
37 that practice assessment alongside any legal advice, they  
38 can help their colleagues - more junior colleagues  
39 understand the legal realities of their practice assessment  
40 or the legal impediments to getting the outcome that they  
41 want, and then help them change their practice assessment  
42 if they need to change it without lawyers telling them to  
43 change their practice assessment. They could have more  
44 experienced practitioners helping guide them in that  
45 practice assessment because --

46  
47 COMMISSIONER: But none of that, the process of internal

1 review escalated to other sort of committees, is precluded  
2 by a process which in the end comes down to being clear  
3 about who the decision-maker is concerning the application.  
4 See, ultimately, if you accept that the decision-maker  
5 making the material decision as to whether an order should  
6 be made is the court, we are talking about a step prior to  
7 that and that may, quite understandably, be the subject of  
8 disagreement as to views about risk assessment and the  
9 like, and all of the processes you've just described could  
10 continue to operate irrespective of whether the  
11 decision-maker, when it comes to an application to the  
12 court, is the child safety officer or not?

13 A. Commissioner, I can only go off my experience, but  
14 that is the model we've had for nine years in the CPO space  
15 and that isn't what happens. So practice and legal is kept  
16 so separate that the practice assessment stays what it is  
17 and the Director's decision stays what it is, and those two  
18 things run alongside each other rather than there being  
19 escalation and review of the practice assessment if a  
20 different legal decision is made.

21  
22 COMMISSIONER: But you're involved in the emergent order  
23 area; correct?

24 A. Yes.

25  
26 COMMISSIONER: So you're not involved once the matter has  
27 been referred to the Director?

28 A. Not currently, but we were for the first four years -  
29 three years of the OCFOS-DCPL model.

30  
31 COMMISSIONER: And you're critical of this bifurcated  
32 model?

33 A. Yes.

34  
35 COMMISSIONER: Yes, and I understood what you said about  
36 that. What I'm not understanding is why it is necessary  
37 that the decision-maker when it comes to what kind of order  
38 is to be sought - and if it was not a bifurcated model this  
39 would apply to both emergent orders and longer term  
40 orders - needs to be the CSO or team leader combined then  
41 giving instructions to the lawyer to effectively act  
42 accordingly on their assessment?

43 A. Commissioner, it's not my evidence that it has to be  
44 the CSO or team leader to be the decision-maker. I do  
45 think before an application is put before the court they  
46 should have legal endorsement to do that or legal advice  
47 saying there's a sufficient basis.

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COMMISSIONER: But who should decide what application is made to the court, in your view?

A. In my view, with the benefit of legal advice it could be a team leader, it could be - if they have the endorsement of - with legal advice supporting that position. If the legal advice --

COMMISSIONER: But I thought you said a little earlier - Id' made a note - the lawyer should be the decision-maker?

A. So, Commissioner, I don't actually have a firm view about whether it should be a lawyer or practitioner. My firm view is about whether it should be done with the endorsement of legal advice or not. So I don't think a team leader should be able to make an application to court unless they have legal advice saying, "This is a proper application to bring." I think that should go all the way up to the Director-General or minister if Child Safety wants to bring an application without legal advice, without legal support of that action.

From my perspective, I think there is benefit in having the applicant in a proceeding also be the practitioner who swears to the accuracy of their practice assessment and the facts obtained. But I accept that that's because I think of the pre-2016 model and I did see that work well.

I don't necessarily - Commissioner, if you were of the view that it should be a lawyer making that decision, I don't take an issue with that provided there's a legislative framework and basis for it. I did have concerns about OCFOS being the decision-maker and applicant because I didn't think we had a legal framework to support our lawyers in making those decisions.

COMMISSIONER: Yes, all right. Thank you. Ms Freeman.

MS FREEMAN: Ms Martin, just following on from what you just said then, as I understood your evidence last year, one of the concerns that you had about an OCFOS lawyer being the applicant in these emergent orders was because part of the application process or the form that was filled in required the applicant to depose to the truth of the facts contained within the application; is that right?

A. Yes. So applications for temporary assessment orders, temporary custody orders and court assessment orders, they have a sworn application rather than - in CPO proceedings

1 the application is a statement of facts and pleadings. The  
2 three emergent orders, the application itself is a sworn  
3 document, and myself and other lawyers in our team had real  
4 concerns about being the person who swore to the accuracy  
5 of what was happening in the field.  
6

7 As I said earlier, a lot of the time those applications are  
8 made before - while a CSO is still at a family's home. So  
9 they don't have the ability to come back, type up a case  
10 note and then we swear to the accuracy of that case note or  
11 departmental record. They're verbally relaying what  
12 they're seeing to the team leader who's typing notes as  
13 they go, and a lot of our lawyers felt uncomfortable about  
14 them being the deponent that swore to the accuracy of that.  
15

16 COMMISSIONER: I recall you raising that issue last year.  
17 We're talking about short-term emergent orders?

18 A. Yes, the three-day orders.  
19

20 COMMISSIONER: And it's not uncommon, indeed it's  
21 commonplace, with applications of that kind for the  
22 application to be based upon information and belief, on  
23 hearsay?

24 A. Yes.  
25

26 COMMISSIONER: And as long as that's expressly clear  
27 I don't understand the discomfort that you identify as  
28 having been felt by lawyers in being the applicant in  
29 relation to an emergent order. I understand the difficulty  
30 of that applicant also being the advocate in the  
31 proceeding, but that's an administrative matter that can be  
32 resolved by some other lawyer being the advocate in the  
33 courtroom. But just explain to me why an application on  
34 information and belief, based on hearsay, for a short-term  
35 emergent order should be distinguished from the many  
36 contexts in which that occurs where a solicitor might swear  
37 an affidavit saying, "On information and belief" - based on  
38 what the client has informed the solicitor about - "we need  
39 a short-term injunction," or something of that kind?

40 A. Commissioner, it's largely in relation to the nature  
41 of how that information is obtained. So it's not even that  
42 it's hearsay; it's that it's like the CSO would talk or the  
43 child safety support officer would talk to the team leader,  
44 the team leader would verbally relay that conversation to  
45 us, and then we're relaying it, and, as you've outlined, it  
46 would say, "This is based on information and belief," that  
47 would be included in the applications, but it is - it was a

1 place where our lawyers and myself felt very uncomfortable.  
2 And then if the CSO comes back and types up her case note  
3 and her case note is something different to what the team  
4 leader understood it to be you then as an officer of  
5 the court are in that position of if you know the court  
6 made an order based on your information and belief that you  
7 knew at the time and then the following day the case note  
8 is somewhat different or materially different you then have  
9 to take steps to go back to the court and essentially  
10 acknowledge that something in your information and belief  
11 material was incorrect. And I'm not suggesting that we  
12 shouldn't take those steps. We of course should. But it  
13 was a position where a number of our lawyers raised feeling  
14 uncomfortable being the ones that actually signed the  
15 affidavit.

16  
17 COMMISSIONER: I understand the problem with - it's like  
18 one of those chain letters, you know --

19 A. Yes.

20  
21 COMMISSIONER: -- the ability for error to creep in the  
22 more times it's repeated and somebody has to record it;  
23 I understand that point. There would be other ways around  
24 that. The CSO could provide whatever note that is the  
25 essence of the evaluation in relation to the risk question  
26 or whatever the circumstances are. That note could be  
27 appended to the application by the lawyer saying, "On the  
28 basis of the information contained in the annexed note,"  
29 however described, "we seek the following order on an  
30 interim" - "emergent order basis"?

31 A. Commissioner, there's not usually a note. So at the  
32 time we're seeking these applications the child safety  
33 officer is still often in the home with the family. They  
34 can't take out their computer and start typing up notes.  
35 They're --

36  
37 COMMISSIONER: I follow that then.

38 A. Yeah.

39  
40 COMMISSIONER: If that's is the circumstance, and it might  
41 sometimes be, "Here is my file note of the conversation  
42 I had with X, who at the home told me the following  
43 matters", that could be the lawyer's note or it could be  
44 the note - a note, if practical, made by the person on the  
45 ground, so to speak. I mean, I just am - the logistical  
46 difficulties you describe are commonplace and dealt with in  
47 urgent applications often made ex parte every day in

1 different contexts?

2 A. Commissioner, I would suggest that the difference is  
3 in these circumstances the child safety officer is out in  
4 the field at a home with the family, with a child. They  
5 can't pause the circumstance of what they're seeing or  
6 observing in the home to type up a case note of what  
7 they're seeing.

8

9 COMMISSIONER: Well, how does it presently happen in those  
10 circumstances?

11 A. Verbally. So the CSO will call their team leader and  
12 they'll say, "This was the discussion we had about safety  
13 planning." They'll give a brief update about why the  
14 parents were agreeing or not agreeing. They'll tell the  
15 team leader, "This is what we're seeing. This is what  
16 we're observing. This is my observations." And then the  
17 team leader will come to us, the legal team, and say, "I've  
18 spoken to the CSO. She's still in the house," or, "He's  
19 still in the house. This is where it's currently up to in  
20 terms of negotiating safety planning. They're trying" -  
21 they can get agreement or can't get agreement, so they  
22 update you during the day, and then when it reaches the  
23 point where the CSO is of the view that an order is  
24 required and they talk to their team leader they'll come  
25 back and they'll give us another verbal update about what  
26 they're seeing in the house. There's no case note on the  
27 system. There's no evidence on the system.

28

29 COMMISSIONER: All right. Okay. But the output of all of  
30 that is somebody records something in writing, don't they?

31 A. Usually our lawyers, Commissioner. So usually the  
32 team leader will tell our lawyers this verbally, and then  
33 we draft the application from all of that information.

34

35 COMMISSIONER: So how does the fact that on this  
36 hypothesis we're testing the applicant is the lawyer - on  
37 the application, what's a subjective difference, because  
38 the process would be the same, it's just that the name of  
39 the applicant would be different?

40 A. But it wouldn't be the lawyer. So at the moment the  
41 team leader had that conversation - so either the child  
42 safety officer, if they're back in the office, will be the  
43 deponent and will read everything that we've typed up and  
44 say, "That's an accurate reflection of what happened," and  
45 then be the deponent and swear to that document, or the  
46 team leader that had the direct conversation with the CSO  
47 about what was happening in the home will read over the

1 drafted application and say, "That's accurate to my  
2 information and belief," and sign it. If you just --

3

4 COMMISSIONER: All right. I don't want to take this too  
5 much further because I think we're going somewhat around in  
6 circles, but if on your latest scenario, which I can well  
7 understand is often the practical circumstance in which  
8 these things arise, let's say it's the team leader who's  
9 had the discussion directly with the CSO in the field, the  
10 lawyer is asked to type up the note, give the note to - or  
11 to not just type it up but to express the substance of what  
12 the lawyer's been told, provides the - I'll call it a note  
13 for present purposes to the team leader, the team leader  
14 says, "Yes, that's accurate," the lawyer makes the  
15 application on information and belief on the basis that the  
16 material in the note which has been accepted by the team  
17 leader as an accurate record of what he or she was told by  
18 the CSO is the hearsay basis of the application to the  
19 court. What I'm struggling with is why there is a  
20 distinction of any substance between that occurring and the  
21 named applicant being the CSO or team leader?

22 A. I think that the - because the other part of that,  
23 Commissioner, is then becoming a witness in your own  
24 proceedings. What you would have to do is hand it over to  
25 another lawyer.

26

27 COMMISSIONER: To be the advocate, yes.

28 A. To be the advocate. So you're then introducing  
29 another lawyer, who has to very quickly get across the  
30 matter - again, this sometimes happens within two hours -  
31 very quickly get across the matter to sufficiently advocate  
32 it. I'm just suggesting in terms of clarity and process,  
33 if the team leader's had that conversation with the CSO and  
34 has an assessment about whether they think the child should  
35 be in the Chief Executive's custody or not, it in my view  
36 makes more sense for them to be the applicant.

37

38 COMMISSIONER: Well, I'm not even sure --

39 A. Or at least be the one to sign the document that  
40 alleges the facts.

41

42 COMMISSIONER: I understand the principle that it's  
43 undesirable for an advocate to be a witness in a  
44 proceeding. But in the context that we've just discussed  
45 for the purposes of an emergent order it is highly  
46 unlikely, if almost - well, highly unlikely that the lawyer  
47 could give relevant evidence because what's put in the

1 application to the court on this scenario is merely, "This  
2 is what I was told"; all right? Now, it's pretty hard to  
3 cross-examine a lawyer about - in a context where all the  
4 lawyer's saying is, "This is what I was told," unless you  
5 want to suggest to the lawyer that he or she was not told  
6 that; okay? So there's a theoretical possibility which  
7 I suppose still makes it desirable to have a separate  
8 advocate. But that's a different issue, isn't it, to who  
9 the applicant is? In any event, I think we've probably  
10 exhausted ourselves on this topic.

11 A. It is. If I could say one more thing, Commissioner,  
12 though.

13  
14 COMMISSIONER: Of course.

15 A. That last point you raised also gives rise to the  
16 thought that, if the emergent order is opposed and the  
17 parents do want to challenge the evidence and the  
18 application, in my view the case is stronger if that's  
19 coming from a practitioner who was out in the field or at  
20 least was the supervisor and manager of the practitioner  
21 out in the field.

22  
23 COMMISSIONER: But surely in that circumstance the  
24 relevant team leader or CSO would come along and give  
25 evidence in the proceeding?

26 A. Commissioner, we're talking about the three-day  
27 emergent orders. That's usually a telephone call,  
28 sometimes parents represented. It's not usually a forum  
29 where there would be cross-examination. I'm suggesting  
30 there could be legal argument about how much weight should  
31 be placed on an application deposed by a lawyer that has no  
32 direct knowledge of what was happening in the field or no  
33 qualifications to make a practice assessment.

34  
35 COMMISSIONER: But you've slightly altered the scenario to  
36 one of where there is a contest by the parents as to the  
37 facts. Now, even in the context of a short-term emergent  
38 order where there is such a contest, the person who is the  
39 source of the instructions would have to be available to  
40 give evidence where there's a contest as to what the facts  
41 were as recorded in the application. So if it were an ex  
42 parte application that wouldn't arise. If it's contested,  
43 then there's no avoiding as a matter of evidence having the  
44 person who made the observations, had the discussions or  
45 whatever the case might be giving evidence?

46 A. Commissioner, there's no avoiding it. But then they  
47 don't have any sworn evidence before the court.

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COMMISSIONER: Who's "they"?

A. The child - in this scenario, if it was the child safety officer that had the direct observations of what was in the home, if they --

COMMISSIONER: Well, of course they would because they have before the court a record of what it is said at least they said, and so if there's a contest the person who actually made the statement can say - can meet that contest, but I don't follow that.

A. So - I mean, they could say whether they agree or don't agree with the lawyer's sworn material. But I'm saying that they wouldn't have any evidence-in-chief of their own before the court, so --

COMMISSIONER: Well, their evidence-in-chief is before the court, it's just by way of hearsay statement as to what they said. But, anyway, I don't think we're getting anywhere with this debate, so, Ms Freeman, thank you.

MS FREEMAN: Thank you, Commissioner.

I'll move on to a different topic. Ms Martin, one of the things that the Commission is interested in understanding is opportunities for early resolution of child protection matters, and I was just wondering in terms of your experience in the current child protection litigation model how could that be improved, where do you see there being points where early resolution of matters could be enhanced or improved?

A. I think there could absolutely be enhancement in early access to legal advice. So I think in December I spoke about the work that BiOC does and Legal Aid Queensland does. I think if there were more points where it was required that a referral be made for legal advice, I think one of those points could be the decision of whether to agree to a support service case for an unborn, for a pregnant woman. In my experience, a few women will say no to working with Child Safety and not necessarily understand the later legal consequences of that decision. So if there could be further access to legal advice in those scenarios. And I also think that there would be real benefit if - again, subject to legal funding. I think there would be real benefit if there was a type of alternative dispute resolution type conference potentially within the 28-day court assessment order phase before a decision is made

1 about a child protection order.

2

3 I think what happens at the moment is the family group  
4 meeting, which is designed to develop a case plan for a  
5 child, is that first opportunity where parents are legally  
6 represented and get to come and put their positions to the  
7 department. I think there would be a lot of benefit if a  
8 meeting of that nature could happen before Child Safety  
9 assesses whether they need a child protection order, and  
10 I think it needs to involve Child Safety because I think a  
11 lot of the time it's not necessarily the decision on what  
12 order, it's the contact decision and it's the placement  
13 decision and it's which kin are being assessed, and I think  
14 if you could have a process where it was really clear what  
15 the contact decision was going to look like, what kinship  
16 assessments were going to be completed, and that the  
17 parents had the benefit of legal representation for those  
18 discussions so they know what they're agreeing to, I think  
19 that's where you could see some resolution.

20

21 Q. So would that be built into the court process?

22 A. I mean I think whether it is or isn't, the ability for  
23 parents or the right of parents to have legal  
24 representation is critical to that.

25

26 COMMISSIONER: Are you speaking about the emergent order  
27 context or the later child protection order context?

28 A. I'm speaking about in the court assessment order  
29 phase. So when you've got a 28-day order or potentially  
30 the extension of that order and Child Safety's assessing  
31 whether the child is in need of protection, I'm saying that  
32 before a decision is made about seeking a child protection  
33 order - if they assess that the child is not in need of  
34 protection and they return the child, then you wouldn't  
35 need to have a conference. But if they're assessing that  
36 they will need a child protection order I think there would  
37 be real benefit in having a conference at that point to  
38 work out what type of order are they looking at, what the  
39 contact decision would be, if they want a short-term order  
40 what a reunification plan could look like, and have really  
41 clearly milestones for the parents but also for the  
42 department to meet over the litigation.

43

44 COMMISSIONER: So we're talking about the child protection  
45 order stage here, aren't we?

46 A. No, I'm talking about in that 28-day assessment  
47 period. So it wouldn't necessarily need to be in the

1 28-day period, but once they've made an assessment that the  
2 child is in need of protection and they want an order there  
3 could automatically be a meeting that occurs.  
4

5 COMMISSIONER: So you're talking about the context of a  
6 court assessment order?

7 A. Yes.  
8

9 COMMISSIONER: And that's one of the orders that OCFOS can  
10 seek, is it not?

11 A. Yes. Yes, Commissioner.  
12

13 COMMISSIONER: And there are family meetings that occur  
14 now as part of the assessment process, is there not?

15 A. Commissioner, there's not family group meetings. So  
16 family group meetings only occur when there's a child in  
17 need of protection. So those occur later. There's no  
18 legislated formal meeting that occurs during the court  
19 assessment order stage. I have seen meetings happen. So  
20 when parents do have lawyers sometimes meetings are  
21 arranged with Child Safety, and they work through any  
22 issues that are arising and contact decisions and those  
23 sorts of things. But there's no process.  
24

25 COMMISSIONER: But there's nothing presently to stop the  
26 department engaging, during that court assessment period of  
27 28 days, with the family?

28 A. There's nothing to stop the department, Commissioner,  
29 but there are limitations on legal advice and the parents'  
30 ability to be legally represented during any meeting like  
31 that.  
32

33 COMMISSIONER: So, as you understand it, what presently  
34 occurs in terms of consultation with the family during the  
35 course of a court assessment order?

36 A. So during the court assessment order Child Safety is  
37 conducting the investigation, so there'd usually be  
38 interviews with the parents. So they would interview them  
39 about the concerns. There would be observations during  
40 contact visits. And then there would - once they're  
41 getting towards the end of the assessment they potentially  
42 would talk to the parents about where they're landing.  
43 They then have to have a conversation with the parents  
44 where they say, "This is my assessment. This is what  
45 I think should happen. But I will make a referral to the  
46 Director's office, which is an independent agency, and then  
47 they'll make a decision about whether they agree with my

1 assessment or they're going to apply for a different  
2 order." So they'll explain that process to parents. But  
3 there's not an inbuilt mechanism to negotiate at that  
4 space.

5

6 What I'm suggesting is, if you had a meeting where they had  
7 their lawyers involved, the lawyers may come along and say,  
8 "My client, you know, accepts the child's in need of  
9 protection, accepts that a one-year order might be  
10 appropriate but would like to see a reunification plan that  
11 looks like this," and you could have that built into the  
12 child protection order litigation.

13

14 COMMISSIONER: It may even avoid the need for an order,  
15 mightn't it?

16

17 A. It could.

18

19 COMMISSIONER: So what you're really saying is that the  
20 process of investigating pursuant to a court assessment  
21 order what should occur - the extent of protection that is  
22 required and what isn't required - could be more effective  
23 if the family were represented legally during that process  
24 so that they could participate?

25

26 A. It - twofold, though, Commissioner, that the family  
27 was represented and that the department was represented.  
28 So the child safety officer or team leader --

29

30 COMMISSIONER: And arguably the child?

31

32 A. -- would need to also understand the strength of their  
33 evidence that they've gathered and the legal prospects if  
34 they wanted to pursue a different course.

35

36 COMMISSIONER: So presently nobody's represented in this  
37 process?

38

39 A. No. So currently Child Safety - so in that process  
40 once our office has got a court assessment order Child  
41 Safety conduct their assessment. Our office rarely has any  
42 involvement in that process or the negotiations with  
43 lawyers, and, if they do have any meetings with lawyers  
44 about contact decisions or anything like that, Child  
45 Safety's not represented in that forum and the Director's  
46 office isn't obviously because their jurisdiction hasn't  
47 been enlivened yet. So Child Safety doesn't necessarily  
48 have lawyers involved in those negotiations.

49

50 COMMISSIONER: So neither is - OCFOS is not involved in it  
51 either?

52

1 A. No.

2

3 COMMISSIONER: So what would happen if in the course of  
4 that assessment Child Safety formed the view that a child  
5 protection order is not required, or at least not one that  
6 would involve removing the child because there are other  
7 options; that decision is not subject to any review or  
8 analysis by lawyers, is it?

9 A. No.

10

11 COMMISSIONER: So if that decision is wrong then there is  
12 no escalation process or anything else that involves an  
13 evaluation of the department's evaluation in the context  
14 where there's no legal representation of either the  
15 department or other interested parties, including the  
16 family or the child?

17 A. Yes --

18

19 COMMISSIONER: So do you regard that as a satisfactory  
20 process?

21 A. No, I think the department should get legal advice on  
22 those. Commissioner, we have had some matters where we've  
23 had a court assessment order made based on very significant  
24 concerns and then Child Safety will come to us and say, "We  
25 don't need anything further. We're going to work with the  
26 family," and those are the types of matters where we would  
27 say, "Based on what we know we're unsure how you can  
28 mitigate that risk in a 28-day period, so it will have to  
29 get escalated," and then we'll give legal advice on the  
30 vulnerabilities of not taking any further statutory action.  
31 But that's only on the cases where we have concerns based  
32 on, you know, the gravity of the risk or the potential  
33 risk. It's not every matter. So there are court  
34 assessment order applications where Child Safety have  
35 assessed they don't need any further intervention where  
36 there's no legal advice on that decision or legal oversight  
37 on that decision.

38

39 COMMISSIONER: Right. Do you regard that as an  
40 unsatisfactory position?

41 A. I do. I also think - I appreciate that's not the  
42 position of the department, but in my view I think there  
43 should be legal advice on any decision that the department  
44 takes that invokes the statutory authority under the Act.

45

46 COMMISSIONER: So on this particular scenario where  
47 there's been a court assessment order made the statute has

1       been invoked --

2       A.    M'hmm.

3

4       COMMISSIONER:   -- and the judicial power has been invoked  
5       to make an order.  But, as things presently stand,  
6       thereafter it's a matter for the department to evaluate  
7       whether or not pursuant to that order - and its evaluation  
8       must be pursuant to that order - there is a risk that  
9       requires a referral to the Director?

10      A.    Yes.

11

12      COMMISSIONER:   Right.  So if a negative decision is made  
13      there is a risk that it might be a false negative decision  
14      made without review or oversight by anybody else, including  
15      any internal lawyer, namely OCFOS?

16      A.    Yes.

17

18      COMMISSIONER:   Yes.  Do you have any experience of that -  
19      of a situation where such a, I'm going to call it, negative  
20      as opposed to an affirmative decision to refer to the  
21      Director, to be clear - where that negative decision has  
22      subsequently proven to be a bad decision?

23      A.    Commissioner, I probably can't assist in terms of it  
24      being a bad decision because child protection assessments  
25      are always point in time.  But I can say I've had  
26      experience in matters where our instructions have been, "We  
27      don't need anything further.  We don't even need a  
28      consult," and I've held concerns based on what we know  
29      about the matter and then we've escalated it to managers to  
30      say, "You need a more senior practitioner to review this  
31      practice assessment or look at the decision," and  
32      frequently they come back with a different position or a  
33      different view.

34

35      COMMISSIONER:   But that requires an OCFOS lawyer on the  
36      present model to be proactively intervening in  
37      circumstances where there's no actual jurisdiction that the  
38      lawyer has where the department makes an evaluation that  
39      further action is not required?

40      A.    Yes.

41

42      COMMISSIONER:   Yes.

43      A.    And, Commissioner, I believe one of the case examples  
44      in my statement refers to that exact situation where Child  
45      Safety had assessed they didn't need any child protection  
46      order for a 16-year-old and our lawyer raised concerns  
47      about the significant vulnerabilities of the department

1 just saying "no child protection order" and walking away,  
2 and that then went through that escalation process and was  
3 resolved.

4

5 COMMISSIONER: But there's no systematic process for the  
6 review of an internal decision or evaluation made by the  
7 department where the result of that is an evaluation that  
8 no further action is required by way of a child protection  
9 order?

10 A. There's no internal review other than a systems and  
11 practice review if there was an injury or significant  
12 injury or death.

13

14 COMMISSIONER: And that would be after the event?

15 A. That would be after the event. But there's no - it's  
16 not mandated to Child Safety when they must do legal advice  
17 consults. So there's recommendations in relation to  
18 expiring orders that they do a legal advice consult six  
19 months before and then three months before. But we have  
20 had some officers say, "We don't want to do those  
21 consults." There's no consequence to them not doing the  
22 consult. It's not mandated that they obtain legal advice  
23 at specific points, and particularly when an order is  
24 expiring and they don't want any further action it's not  
25 mandated a consult, a legal consult, occur at that point.

26

27 COMMISSIONER: And what you're talking about is - well,  
28 you've used the expression "legal advice". But in this  
29 context it's really about a lawyer looking at the  
30 evidentiary material and making an evaluation as to whether  
31 on that material something further is required or isn't.  
32 Now, if on the present process the department is not  
33 required to share its evaluation as to why further action  
34 is not required with the OCFOS lawyer, how does the OCFOS  
35 lawyer make an evaluation of whether or not the negative  
36 decision, that is not to refer, is soundly based or not?

37 A. So, Commissioner, just to be clear, they can ask for a  
38 legal consult and we can give them that legal advice. So  
39 some officers will do that. It's if they say, "We don't  
40 want a legal consult," then we can't get the new  
41 information but we still know the information that led to  
42 the making of the order, and that would immediately be  
43 escalated to a manager to say --

44

45 COMMISSIONER: So the impetus for concern that might cause  
46 a proactive OCFOS lawyer to raise questions would be what  
47 was available at the time the court assessment order was

1 sought?

2 A. Was made.

3

4 COMMISSIONER: But, unless the CSO concerned volunteers  
5 the material that has been gathered pursuant to that court  
6 order in making the assessment that is undertaken by them,  
7 that material is unknown to the OCFOS lawyer?

8 A. Yes, Commissioner, and that's one of those examples  
9 when we were talking earlier about lawyers being embedded  
10 in the service centre. When we're embedded in service  
11 centres it's very difficult to not know what - you know,  
12 not have regular updates about what's going on during that  
13 28-day court assessment period. You know, they'll come up  
14 to your desk and they'll tell you where things are up to.  
15 I think again that goes to one of the benefits of being  
16 embedded in the office, that --

17

18 COMMISSIONER: Sure.

19 A. -- if they're telling you over that four-week period  
20 all of the evidence they're gathering and the things that  
21 are coming out in interviews and then at the end of it they  
22 say, "We don't want an order, it's fine," the lawyer would  
23 be asking more questions because you have more of an  
24 understanding of what's happened in the matter.

25

26 COMMISSIONER: Sure. But in your experience in  
27 circumstances where the evaluation by the department under  
28 a court assessment order results in a decision not to  
29 proceed to a referral to the Director is the material that  
30 is produced as a result of that evaluation by the CSO  
31 customarily shared with you as an OCFOS lawyer or do you  
32 have to ask for it?

33 A. We would have to ask for it, and particularly if  
34 they'd said they didn't want a legal consult we would have  
35 to escalate it to the manager and say, "We're really  
36 concerned about this matter where they don't want a legal  
37 consult. Do you agree we can have a legal consult," and  
38 we'd have to go through that escalation process before we  
39 could get that material to review it.

40

41 COMMISSIONER: And what if they don't say anything one way  
42 or the other as to whether they want a legal consult? Are  
43 they required to tell you or --

44 A. So as soon as a court assessment order is made our  
45 lawyers will send an outcome saying, "This is the expiry  
46 date. If you want to make a referral to the Director's  
47 office this will be your timeframe, this is the date we'll

1 need a draft affidavit." So we give them those timeframes,  
2 which inevitably includes, "This is the date we would need  
3 to have a legal consult on the matter about the referral to  
4 the Director's office," and in most cases those legal  
5 consults happen. I'm just suggesting on the ones where if  
6 they say to us, "We don't need anything further, no legal  
7 consult," those would be the ones that would have to go  
8 through that process if the team leader didn't want a  
9 consult. Most of the time they do.

10  
11 COMMISSIONER: Do you know how common it is that a  
12 decision is made following that evaluation not to refer the  
13 matter to the Director?

14 A. Commissioner, I couldn't speak to numbers, but  
15 anecdotally it's quite a bit because that also includes all  
16 of their IPAs, so their voluntary intervention with parents  
17 agreements. So not every court assessment order translates  
18 into a referral to the Director's office. Some are  
19 unsubstantiated or the child's not in need of protection,  
20 some become interventions with parental agreement, and then  
21 it's only the ones that couldn't fall into those two  
22 categories that becomes a referral to the Director's  
23 office.

24  
25 COMMISSIONER: I think you've said that you don't regard  
26 this process presently of an evaluation leading to a  
27 negative decision on the part of the department to be  
28 satisfactory. Tell me if I'm wrong about that, but - or  
29 perhaps let me ask you that question openly: do you regard  
30 this as a satisfactory state of affairs?

31 A. In my view I think if the court's made an order  
32 I think there should be legal advice. I do think in my  
33 experience sometimes we see, you know, with good intentions  
34 and thinking about the least intrusive we actually see more  
35 intrusive interventions in the IPA space with safety plans.  
36 I think we see children's safety plan to go live with other  
37 family with the parents not being legally represented or  
38 understanding the longer term consequences of those  
39 decisions. I think there would be utility if the  
40 department were to obtain legal advice in relation to  
41 safety planning and IPAs, and whether they've gathered  
42 enough evidence to demonstrate the original child  
43 protection concerns were mitigated sufficiently. I think  
44 there would be benefit in legal advice being provided on  
45 all those matters.

46  
47 COMMISSIONER: Doesn't it come down to this: that at

1 present where a negative evaluation is made it's an  
2 evaluation that is exclusively made by the department  
3 without oversight, review or audit by any other person?  
4 A. Yes.

5  
6 COMMISSIONER: Yes. Thank you. Ms Freeman.

7  
8 MS FREEMAN: Thank you, Commissioner.

9  
10 Ms Martin, I'm going to move on to a different topic, and  
11 this is my final topic for the evidence-in-chief:  
12 section 5BA of the Child Protection Act. So we're talking  
13 about hierarchy of long-term guardianship orders and what  
14 best achieves permanency for the child. That particular  
15 provision sets out a hierarchy of types of orders that  
16 should be considered in order of what the legislature says  
17 is necessary. I just want to explore with you how the  
18 application of that section works in practice in terms of  
19 deciding whether an order best achieves permanency for a  
20 child in your experience?

21 A. Yes. I think the - so the service centres will do  
22 their practice panel to determine what the most appropriate  
23 order is. As part of that they will consider less  
24 intrusive. But in terms of that hierarchy there's  
25 additional steps that need to happen to get to each of  
26 those. So even though long-term guardianship - I'm not  
27 talking for Aboriginal or Torres Strait Islander  
28 children --

29  
30 Q. Yes.

31 A. -- but even though, you know, adoption is in that  
32 hierarchy as occurring before a child protection order  
33 granting long-term guardianship to the Chief Executive, the  
34 practical reality under the Adoption Act is that if the  
35 parents don't agree to the adoption plan we can't pursue an  
36 adoption, we can't get that outcome for a child or young  
37 person. So --

38  
39 COMMISSIONER: Can I just be clear, Ms Martin, because  
40 this all arises in the context of child protection orders,  
41 not emergent orders; correct?

42 A. Yes.

43  
44 COMMISSIONER: As I understood your involvement, it's in  
45 the emergent order stage, but you might have experience at  
46 a later stage as well, of course?

47 A. Commissioner, my team also gives advice on expiring

1 orders. So when Child Safety has a two-year child  
2 protection order and then they need a further either  
3 short-term order or long-term order, if they need that  
4 second order, my office gives legal advice on that and then  
5 prepares the referral - the brief of evidence for the  
6 referral to the Director's office. So we do still - we  
7 don't litigate the substantive child protection order  
8 applications, but we have to give legal advice on the  
9 evidence to make the referral to the Director's office  
10 seeking a long-term order in subsequent orders.

11  
12 COMMISSIONER: Yes, I follow. Thank you.

13 A. And as part of that giving legal advice we know that,  
14 if a child is with a carer who might be appropriate to have  
15 the long-term guardianship and that carer is not a family  
16 member, the Chief Executive has to nominate the person as a  
17 suitable person to have guardianship of the child. So that  
18 nomination has to come from Child Safety before the  
19 Director can seek that order or before the court can make  
20 that order. So you might - if you think of the two years  
21 of a child protection order, they might be working really  
22 intensively trying to reunify children to family, to  
23 parents, and they might get towards the end of that and  
24 realise that they're unable to do so and then consider  
25 whether they need to consider a permanent care order or  
26 long-term guardianship to other order. Sometimes at the  
27 two-year point that assessment is not ready. So the  
28 assessment on the carer as a suitable person may not be  
29 ready, and it may not be ready because the child has only  
30 been in a placement for a very short period, or it may not  
31 be ready because the guardian might not want to take on  
32 that responsibility, or it may not be ready because it  
33 simply hasn't been done yet.

34  
35 In the absence of that assessment we have to - would have  
36 to tell the service centre that the Director's office will  
37 want to go, you know, the least intrusive order, but they  
38 might be restrained from doing so if the Chief Executive  
39 doesn't nominate a suitable person. Those suitability  
40 assessments have to consider - it's prescribed in the child  
41 protection regulation what a suitable person to have  
42 custody or guardianship of the child is. So the  
43 suitability assessments are quite fulsome and have to  
44 consider all of those matters, and it's generally an  
45 assessment that would take, you know, a couple of months to  
46 complete. Sometimes the department outsources those to  
47 external assessors as well.

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So you might get to the expiry of a short-term order and really to ensure the continued protection of the child an application has to be made. So sometimes because that assessment has not occurred yet or we don't have that information sometimes the application would have to be made for long-term guardianship to the Chief Executive because you have an absence of evidence on the suitability of the guardian, and then that can be amended later on down the stage. So it might be that that assessment gets completed and then later the assessment gets amended to either a permanent care order or a long-term guardianship to other order.

MS FREEMAN: All right. So am I right in understanding your evidence, Ms Martin, that there are some practical impediments to giving primacy to the hierarchy that this particular section sets out?

A. Yes.

Q. Is that what you're saying?

A. Yes.

Q. Okay. All right. And you've already dealt with the Adoption Act when you gave evidence last year, so we won't go over that again.

If I could just have a moment, please, Commissioner. That was all the questions that I had for this witness.

COMMISSIONER: Thank you very much.

MS FREEMAN: Thank you, Commissioner.

COMMISSIONER: Ms Sweet.

MS SWEET: Yes, thank you, Your Honour.

**<EXAMINATION BY MS SWEET** **[11.32 am]**

MS SWEET: Ms Martin, I want to take you back to some evidence you gave to His Honour when you gave evidence last year, and it relates specifically to a discussion with His Honour which started by you talking about the levels of risk tolerance and that your evidence was that child safety officers and team leaders are in many instances willing to sit with more risk than, say, lawyers were, and that moved

1 on to a discussion about there being times when reasonable  
2 minds might differ about the type of - well, what's  
3 acceptable level of risk, and His Honour said to you that  
4 "there will be a potential variation I suspect in [some of]  
5 the more marginal cases when it comes to risk evaluation",  
6 and that caused you to bring up a - so, for everyone  
7 following this, this is at transcript 3643, that's the page  
8 number, and the line beginning at 23. And you made mention  
9 of the work of delegated authorities, and you made  
10 particular mention of an example where you say there was a  
11 delegated authority who was a community-controlled  
12 organisation and that delegated authority thought that the  
13 child was safe enough at home, and this was in the context  
14 of a placement under 82(2) and an application that Child  
15 Safety wished the Director to make about revoking the  
16 long-term guardianship order to the Chief Executive, and  
17 you made the point - your evidence was that the delegated  
18 authority thought the child was safe enough at home and  
19 that the State no longer needed to have an order and be  
20 involved, and that was a matter where Child Safety  
21 supported that assessment and referred it to the Director's  
22 office, and that the Director wasn't - the Director's  
23 office wasn't satisfied that the child was no longer in  
24 need of protection. This is ringing bells?

25 A. Yes.

26  
27 Q. Yes. And you said that the decision about whether  
28 that order should be revoked should sit with the court, and  
29 I think the effect of your evidence was that your view was  
30 that the Director was, to use the sort of modern parlance,  
31 gatekeeping that decision and that that was not  
32 appropriate?

33 A. Yes.

34  
35 Q. And you said really that's a decision where there  
36 ought to be court oversight and there is power for the  
37 Director to make that application under I think it's  
38 section 65 of the Act, there should be court oversight of  
39 whether the risk that was posed to the child had been  
40 adequately mitigated by the parent such that the State  
41 steps out of the family's life at least in this  
42 particular - in terms of having the guardianship rather  
43 than a lawyer being the barrier to Child Safety getting the  
44 order revoked; and that's still your evidence?

45 A. It is, with a little bit of nuance. So my evidence  
46 was about the order being appropriate and desirable.

47

1 Q. Yes.  
2 A. So there is a possibility that the child who had been  
3 placed at home for over 12 months might still be in need of  
4 protection, might be appropriate to have a voluntary  
5 intervention with the family, not necessarily have the  
6 State completely exit or completely uninvolved. But it's  
7 about whether that child who had been at home for 12 months  
8 still needed to be on an order granting long-term  
9 guardianship to the Chief Executive until he was 18.  
10  
11 Q. And, to be clear, though, the child had been  
12 self-placing at home for two years?  
13 A. Two years, yes.  
14  
15 Q. So there wasn't a decision until much later by the  
16 delegated authority that the child should be formally  
17 placed with the family under 82(2)?  
18 A. Yes.  
19  
20 Q. Yes.  
21 A. And I think that's a - it was an example of families  
22 in the child protection jurisdiction may never resolve  
23 every single child protection concern. There may always be  
24 risk. But when you have a community-controlled  
25 organisation saying, "We can manage this in community," and  
26 that child had been living at home for over two years, did  
27 Child Safety need to have an order granting long-term  
28 guardianship or did the decision about whether Child Safety  
29 needed that order, should that have properly been put  
30 before a court to let the court know that this child had  
31 been home for that period of time.  
32  
33 Q. But the fact that the child is home is not of itself  
34 evidence that the risk that caused the State to intervene  
35 in the first place has been mitigated; correct?  
36 A. It's not evidence that the risk has been mitigated.  
37 But children age, they get older, risks change. So  
38 something that may have been a risk when that child entered  
39 care as a young child might look very different when  
40 they're 16.  
41  
42 Q. But there would need to be casework and assessments  
43 done in order to determine that; correct?  
44 A. Yes.  
45  
46 Q. So one can't lead with one's chin to say, "Well, the  
47 child's been self-placing"?

1 A. Not only the child being self-placing, but the child  
2 being self-placing and then the delegated authority  
3 community-controlled organisation saying, "We've worked  
4 with this family and we think we can mitigate any risk in  
5 the home." So that doesn't necessarily mean all child  
6 protection concerns are addressed, but it is that the risk  
7 can be mitigated within the home.  
8

9 Q. Yes, but there would have to be appropriate evidence  
10 given by that delegated authority that the risks that had  
11 caused Child Safety to become involved and invoke the  
12 jurisdiction of the court had been satisfactorily  
13 mitigated?

14 A. And the answer to that I think comes down to the scope  
15 of evidence. So when we ask Queensland Health for evidence  
16 they prepare us a report or give us a letter or give us an  
17 update. In the example that I used, the Director's office  
18 was requesting direct affidavit evidence from the delegated  
19 authority team, which is not something we've ever seen  
20 asked for from any of our other external stakeholders.  
21

22 Q. Yes. Why would that not be appropriate if it is the  
23 delegated authority who is the one saying, "We're working  
24 with this family. We can mitigate the risk that caused the  
25 State to intervene in the first place"?

26 A. I think it's not about whether it's - so it's about  
27 whether we expect external stakeholders,  
28 community-controlled organisations to have their staff  
29 trained to write affidavits and prepare court work. We  
30 know from CSOs how difficult doing court work is, and then  
31 we would expect an external agency to prepare court work or  
32 have their staff prepare court work when that's not an ask  
33 we have for any of our other external agents. So when  
34 parents are working with psychologists or when there's  
35 family intervention services working in the home they give  
36 a letter or a report to Child Safety and that's annexed to  
37 a CSO's material.  
38

39 Q. But the Chief Executive's powers haven't been  
40 delegated to those parties; correct?

41 A. They haven't.  
42

43 Q. So why is it relevant to compare those two examples?

44 A. I mean, I think it's relevant in terms of the way the  
45 Childrens Court accepts evidence. So the children's court  
46 accepts reports or affidavits - sorry, reports or letters  
47 from all of those other stakeholders. I don't see why it

1 would need to be distinguished to the individual  
2 caseworkers working within the delegated authority team.  
3 So it's not the delegate who held the delegation or made  
4 the 82(2) decision that was asked to do an affidavit; it  
5 was the caseworkers working with its mother.  
6

7 Q. The caseworker of the delegated authority is standing  
8 in the shoes of, if not the Chief Executive, then the  
9 person who would otherwise be a child safety officer;  
10 correct?

11 A. Yes.  
12

13 Q. Why ought they not be held to those standards?

14 A. Well, I think it's if they were going to be held to  
15 those standards then they should have had the support to do  
16 that. I think the community-controlled organisation in  
17 this case was open to do it, came along to some training  
18 that my team ran and were looking to try figure out how to  
19 do an affidavit and try help advance the matter. It's just  
20 it's not something that had been requested in the five  
21 years that the other delegated authority agency was running  
22 on the Sunshine Coast. So it was just in this instance.  
23 It was the first time we'd seen that they've been asked for  
24 an affidavit.  
25

26 Q. Is it your evidence today that that request from the  
27 Director was unreasonable?

28 A. It's not my evidence that it was unreasonable.  
29 I think - I don't know if I said it last time, but I only  
30 became involved at the end of this matter, when a decision  
31 had already been made to refer it back. I think there were  
32 vulnerabilities in Child Safety's brief of evidence.  
33 I think it would be silly to not acknowledge that. I think  
34 there were ways that the brief of evidence could have been  
35 strengthened. But I think - I still think that the  
36 discussion could have been about how you support - so in  
37 other matters where there's insufficient evidence there  
38 will be advice or information requested to support the  
39 assessment. I think in this matter there could have been  
40 advice given about how to demonstrate that the order is no  
41 longer appropriate and desirable, and what evidence could  
42 be sourced to get that, rather than simply saying, "We need  
43 an affidavit from the delegated authority worker about why  
44 the child's not in need of protection."  
45

46 Q. Does that suggest, though, that the delegated  
47 authority's holding itself out to be capable of carrying

1 out these obligations of the Chief Executive in  
2 circumstances where it is too early because there isn't  
3 sufficient training within the authority?

4 A. No, I don't think it's too early. I think it wasn't  
5 anticipated that they would have to give affidavits in  
6 child protection matters in this way because from the  
7 previous example that had been running I'm not aware of any  
8 instance where they were asked to give an affidavit.

9  
10 Q. In the context of an application to revoke a long-term  
11 guardianship to Chief Executive order?

12 A. In the context of any referral to the Director's  
13 office. So there's been multiple matters where either a  
14 subsequent order is required, or quite frequently we have  
15 to get - if a child's been on a two-year order, if we want  
16 a further short-term order you have to demonstrate that  
17 reunification's reasonably achievable. So that would  
18 frequently be evidence with a letter from the relevant  
19 delegated authority saying, "We've been working with  
20 the family. These are the reasons we say reunification is  
21 achievable." So that letter will often be used as evidence  
22 to satisfy a court why a further short-term order should be  
23 made. We just hadn't experienced the specific worker being  
24 asked to give an affidavit or a comprehensive report of  
25 every step they've taken or every piece of casework they've  
26 done. Usually it's a summary report that's given.

27  
28 Q. Do you say that the standard being required by the  
29 Director was not necessary?

30 A. I say that the Director, his delegate, could have  
31 articulated in a different way what Child Safety could have  
32 done or what working with the delegated authority team they  
33 could have done to satisfy the court or the DCPL that an  
34 application should be brought to revoke. But I think that  
35 starting point of trying to prove that there was no risk or  
36 that the child was not in need of protection anymore made  
37 that impossible.

38  
39 Q. Wasn't it your evidence last year that you - your  
40 evidence was that you considered that the Director was  
41 applying the wrong test?

42 A. Yes.

43  
44 Q. And I'm just going to give you a copy of the Child  
45 Protection Act. I'll take you to section 65.

46 A. M'hmm.

47

1 Q. And just let me know when you have that, Ms Martin.

2 A. Yes.

3

4 Q. So:

5

6 *The litigation director, a child's parent*

7 *or the child may apply to the Childrens*

8 *Court for an order to vary or revoke a*

9 *child protection order, other than a*

10 *permanent care order ...*

11

12 A. Yes.

13

14 Q. And what was sought here was for there to be a  
15 revocation of the child protection order without any  
16 further order being in place?

17 A. Yes.

18

19 Q. Yes. And I think your point was if you go to  
20 subsection (6) you were pointing to this is the test:

21

22 *The court may, under subsection (1)(a),*

23 *revoke a child protection order for a child*

24 *only if it is satisfied the order is no*

25 *longer appropriate and desirable for the*

26 *child's protection.*

27

28 A. Yes, but that read with section (5B), which removes  
29 the requirements under section 59 that the court ordinarily  
30 has to be satisfied of, and the first one there is child in  
31 need of protection.

32

33 COMMISSIONER: Sorry, what do I read it with?

34 A. Sorry. So in subsection (5B) of section 65, where we  
35 are --

36

37 MS SWEET: (5B) on the previous page?

38 A. Yes. So that talks about the matters in section 59  
39 that do not apply to these types of applications.

40

41 Q. Yes. And, just for the benefit of the Commission,  
42 we'll go to 59.

43 A. 59.

44

45 Q. And can you take us to what you mean?

46 A. Yes. So section 59 is the relevant provision - all  
47 the things the court needs to be satisfied of when making a

1 child protection order.

2

3 Q. Yes.

4 A. So one of the things exempted in a revoke application  
5 is about the court being satisfied of section 59(1)(a),  
6 that the child is in need of protection and the order is  
7 appropriate and desirable for the child's protection. So  
8 my suggestion is that the court still needs to be satisfied  
9 about the order being appropriate and desirable, but it  
10 does no longer need to be satisfied that the child - about  
11 whether the child is in need of protection or not. That  
12 isn't a test the court has to consider in revoking the  
13 order.

14

15 COMMISSIONER: So the court doesn't have to decide, when  
16 it comes to revoking the order, in effect whether there has  
17 been such a material change in the circumstances of the  
18 child such that the child ceases to be a child in need of  
19 protection?

20 A. Commissioner, the court would consider a material  
21 change of that nature in determining whether the order's  
22 appropriate and desirable. But, no, it does not need to  
23 consider whether the child is in need of protection or not.  
24 So --

25

26 COMMISSIONER: Does that strike you as incongruous?

27 A. It doesn't when you follow that through to - if the  
28 department wants to reunify a child to a parent's care and  
29 then continue to work with that parent for a period where  
30 you didn't need the child on a child protection order, they  
31 might - so they might still have an assessment that a child  
32 is in need of protection and have an IPA in place after a  
33 child protection order is appropriate.

34

35 COMMISSIONER: But isn't it somewhat schizophrenic for the  
36 court's jurisdiction to be invoked on the predicate that  
37 the child is a child in need of protection under section 10  
38 but for that order subsequently to be revoked without the  
39 court being satisfied that that need for protection is no  
40 longer required or that need no longer exists?

41 A. I don't think it is because it - also if you think  
42 through the nuance of families, so there might have been  
43 concerns in relation to mum and dad, mum or dad might have  
44 addressed all of the concerns during the period of an order  
45 and it might be appropriate to revoke that order if the  
46 child is living with one parent and that parent might  
47 pursue Family Court orders, but the child might still be in

1 need of protection in relation to the parent that was  
2 perpetrating violence.

3  
4 COMMISSIONER: But, look, one can imagine any number, a  
5 myriad, of boundless variations in what might occur between  
6 the time the order's made because the child was in need of  
7 protection and the time when an application is made, as in  
8 this case, for the revocation of the long-term guardianship  
9 order. That's not the analytical point. The point is the  
10 court has to be satisfied to remove a child that the child  
11 is in need of protection, whereas this section that you've  
12 just pointed out so skillfully in section 65(6), when read  
13 together with section 59, seems on its face to mean that at  
14 the time that the court is asked to revoke an order it  
15 doesn't need to be satisfied of the requirement in section  
16 59(1)(a) that the child is not any longer in need of  
17 protection. Doesn't that strike you as odd as a lawyer?

18 A. Commissioner, that's consistent with my reading, which  
19 was the issue that I had raised with the Director's office,  
20 and, no, it doesn't strike me as odd because a child can be  
21 in need of protection, a child can require the intervention  
22 of the State without requiring a child protection order.  
23 Those two things are different.

24  
25 COMMISSIONER: But, because section 59(1)(a) is removed  
26 via section 65(6) from consideration, the consideration at  
27 the very heart of the jurisdiction, namely that the child  
28 is a child in need of protection, is not a consideration or  
29 the opposite of that, namely no longer in need of  
30 protection, is not considered at the time that a decision  
31 is made to revoke the order, and you don't see anything  
32 wrong with that?

33 A. Commissioner, it may be. So it may be that Child  
34 Safety has assessed the child is no longer in need of  
35 protection, that might be the precipice for going down that  
36 course, but --

37  
38 COMMISSIONER: But let's not speculate about what the  
39 facts may be or may not be. I'm just talking to you about  
40 a matter of legal principle and how the Act operates, what  
41 it allows for, what it requires and what it doesn't  
42 require. How that manifests itself in particular fact  
43 situations is a totally separate issue; all right? I want  
44 to understand why it is you say that an Act which sets up  
45 as the predicate of action of the jurisdiction itself,  
46 namely that a child is in need of protection, would at the  
47 back end, so to speak, at the time an order is sought to be

1           revoked, not require that there is satisfaction that the  
2           child is no longer in the peril which is the predicate for  
3           the jurisdiction being invoked in the first place?  
4           A.    Commissioner, I think the answer to that is that child  
5           in need of protection has those two limbs. So the first is  
6           about whether the child has experienced or was at an  
7           unacceptable risk of experiencing harm, and the second is  
8           about whether there is a parent willing and able. So it  
9           might be --

10  
11          COMMISSIONER:    I follow that.

12          A.    It might be at the time the original child protection  
13          order was made the child clearly was in need of protection.  
14          It might be that currently one or both of the parents has  
15          addressed the concerns to mitigate it to the point where an  
16          order is no longer required. So the child might not be in  
17          need of protection anymore, in which case that will be a  
18          material consideration for the court, or the child might  
19          still be in need of protection but because of the child's  
20          age or because of the parents' willingness to work  
21          voluntarily with the department the order may no longer be  
22          appropriate and desirable. So the child protection order  
23          may not be the least intrusive way to ensure the child's  
24          safety.

25  
26          COMMISSIONER:    Well, I follow all of that. But by virtue  
27          of section 65(6), which removes from consideration 59(a),  
28          which has two elements to it - the child is in need of  
29          protection and the order is appropriate - that no longer  
30          being a relevant consideration, the order can be revoked  
31          without consideration of those two elements; that is to say  
32          whether the child still is a child in need of protection  
33          and whether the order is appropriate, or, in this case, no  
34          longer appropriate?

35          A.    Commissioner, I believe that subsection (6) of 65  
36          reintroduces the order is appropriate consideration. So,  
37          even though it's removed from section 51(1)(a) as part of  
38          that limb, it's reintroduced at section 65(6).

39  
40          COMMISSIONER:    Well, then I don't know what your point is  
41          because - and indeed it --

42          A.    Well, the only part that's reintroduced is whether the  
43          order is appropriate and desirable, not whether the child  
44          is in need of protection. So the first part of that is  
45          removed, but the order being appropriate and desirable --

46  
47          COMMISSIONER:    How do you unscramble those two concepts?

1 How could you answer the question is the order still  
2 appropriate without considering whether the child remains a  
3 child in need of protection? You might form the view that  
4 the nature of the risk has changed and therefore the order  
5 that was made is no longer needed but some other order is.  
6 Either way, it seems to me impossible to ignore the  
7 question of whether the child is or is not in need of  
8 protection when considering whether to revoke an order?  
9 A. It is - Commissioner, it is a relevant consideration,  
10 but it's not a requirement for the court to be satisfied  
11 of. So --

12  
13 COMMISSIONER: Well, except for the paramount principle  
14 which --

15 A. That goes to the safety, wellbeing and best interests  
16 of the child. So the child might still be in need of  
17 protection but their safety, wellbeing and best interest  
18 might be best met through an IPA, a voluntary intervention  
19 with the family, without an order.  
20

21 COMMISSIONER: I accept all of that. I accept all of  
22 that. But the point I'm struggling to understand is why  
23 section 65(5B) would nakedly remove consideration of the  
24 opposite of section 59(1)(a), that is to say a state of  
25 affairs where the child is no longer in need of protection,  
26 and the order that was originally made is no longer  
27 appropriate, you can express 59(a) in the negative, which  
28 as a matter of rational commonsense, one would have  
29 thought, is necessary given that the anterior requirement  
30 is that the child must be in need of protection before you  
31 do anything, and then you bring it back in, as you point  
32 out, in section 65(6) by the requirement that the order can  
33 only be revoked if the court is satisfied the order is no  
34 longer appropriate and desirable for the child's  
35 protection, which must implicitly include a consideration  
36 of whether the child needs protection and, if so, on what  
37 basis?

38 A. And, Commissioner, I think it can include that, but  
39 I think it's not prescribed to include that, and in my view  
40 I think that's intentional because I think it's that there  
41 may be circumstances where a child remains in need of  
42 protection and the child protection order is no longer  
43 required and the court should have the ability to revoke  
44 the order, even if the child is still in need of  
45 protection, if satisfied that, you know, the parents are  
46 going to work with Child Safety voluntarily, that an order  
47 is no longer appropriate.

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COMMISSIONER: So you can return the child to the parents even though the child is still in need of protection?

A. Yes.

COMMISSIONER: And on your analysis that's because the child can be protected in other practical ways?

A. Commissioner, the department frequently returns children to parents who are still in need of protection using section 82(2). So that's the provision that allows a placement at home with a parent. So, once the parents have started to address the child protection concerns and reunification is on track, there will often be a decision to return the child using that placement provision.

COMMISSIONER: And that's done without court oversight, isn't it?

A. That's done without court oversight.

COMMISSIONER: That's another matter.

A. So that does happen, that child is still in need of protection. What I'm saying is at the end side of that if Child Safety have assessed that the order is no longer appropriate it might still be that the parents - the child might still be in need of protection but the parents might have worked with the department for six months while the child was placed at home and might be agreeable to ongoing visits and services and case plan actions. That's a circumstance where it could go back to the court, the court may still find or could still find that the child is in need of protection but a child protection order - so the most intrusive legal intervention - isn't necessary or isn't appropriate.

COMMISSIONER: But surely the predicate of that - that is, that the child - that the order is no longer - that was originally made doesn't need to be continued - must be that something material has changed that bears upon the risk of harm to the child?

A. Yes. I mean, I couldn't imagine going back to court to revoke an order and say that the order is no longer appropriate and desirable if you haven't had a change of circumstances.

COMMISSIONER: So embedded in that analysis must be consideration of whether or not the child is in need of protection and to what degree or in what ways can that

1 protection be afforded?

2 A. Yes, Commissioner --

3

4 COMMISSIONER: Otherwise it's an exercise in futility,  
5 isn't it?

6 A. And it's the second part of your question, that's  
7 where I say the nuance is. So the court might consider  
8 whether the child is in need of protection or not. But  
9 it's the how the child's safety can be ensured, like what  
10 level of safety is required, does that still need to be an  
11 order or can it be voluntarily or can it be through a  
12 domestic violence order or a Family Court order.

13

14 COMMISSIONER: Of course. But that's the working out of  
15 mechanisms or procedures or whatever it is you put in place  
16 to protect the child, and that may change over time?

17 A. Yes.

18

19 COMMISSIONER: Of course. Anyway, your view is that the  
20 Director had taken an incorrect view of what he was  
21 required to consider in relation to the revocation of this  
22 order; isn't that - if we can come back to that?

23 A. Not incorrect but overly onerous because I don't say  
24 that the child in need of protection test isn't relevant  
25 for all child protection proceedings, like that's going to  
26 be part of whether the order is appropriate or desirable.  
27 But I do say it's incorrect to have it as a prerequisite  
28 test because of the operation of 65(5B).

29

30 COMMISSIONER: All right.

31

32 MS SWEET: And just to clarify, Ms Martin, I think you  
33 said the Director had come back to you, or the Director's  
34 office, and had pointed out - correct me if I'm wrong - a  
35 section of the guidelines?

36 A. Yes.

37

38 Q. The Director's guidelines?

39 A. Yes.

40

41 Q. Which are issued under section 39 of the Director -  
42 Child Protection Act?

43 A. Yes.

44

45 Q. And - I think you'll remember this I think clearly -  
46 they pointed you to a section that said, effectively, "If  
47 you want to refer this to us, one of the things that you

1 need to" - "you need to give us evidence that" - "where the  
2 Child Safety assessment is that a child protection order be  
3 revoked we want to know, we want evidence of the reasons,  
4 why the child is no longer in need of protection"?

5 A. Yes.

6

7 Q. Not necessarily that that is then something that would  
8 specifically need to go on and be proved in a court but  
9 that was - but that what was being said to you at the time  
10 was, "Under our guidelines we require evidence that the  
11 child is no longer a child in need of protection"?

12 A. Yes. So the Assistant Director for the relevant  
13 chamber group provided me or referred me to those  
14 guidelines - or that specific guideline. But my  
15 understanding was that the original decision that had been  
16 made was made on the basis that we couldn't prove the child  
17 was no longer in need of protection.

18

19 Q. And your evidence last year was that the child had  
20 been at home with the mother for almost 12 months; that was  
21 your evidence?

22 A. Yes, I believed it was almost 12 months.

23

24 Q. Yes.

25 A. As part of the 82(2) decision I think it was longer  
26 before that.

27

28 Q. So --

29 A. As a self-placement.

30

31 Q. The child had removed himself from a residential care  
32 placement and had been placed with the mother?

33 A. Yes.

34

35 Q. Had self-placed with the mother for two years prior to  
36 the delegated authority getting involved, and the delegated  
37 authority then makes the decision --

38 A. Yes.

39

40 Q. -- in October, and then I think your exchange with the  
41 Director was in I think maybe May of the next year?

42 A. I believe July.

43

44 Q. July?

45 A. Yes.

46

47 Q. Thank you. You said, "All of the references, all of

1 the information from the community-controlled organisation  
2 were that the risk" - it says here "at the risk of being  
3 mitigated". I'm not sure if you were saying there the  
4 information was that there was evidence that the risk had  
5 been mitigated or there was an assurance by the delegated  
6 authority that they would work with the family in order to  
7 mitigate the risk?

8 A. I believe it was both. I believe it was some of  
9 the risk had been mitigated but that the delegated  
10 authority team or officer saying they could work in the  
11 home or continue to work in the home to support the family.  
12

13 Q. Yes. Ms Martin, there's a folder in front of you.  
14 I think it's called "Additional documents"?

15 A. Yes.  
16

17 Q. I want to show you some of the documents leading up to  
18 your exchanges with the - and there's no need to look at it  
19 just yet, and I'll direct you to a page number - that go to  
20 the back and forth between the various bodies leading up to  
21 your exchange with one of the officers of the Director.  
22

23 A. M'hmm.  
24

25 Q. And I accept that you weren't involved until later on,  
26 but it seems a sort of useful worked example in  
27 circumstances where you have a child who is self-placing -  
28 a child of Aboriginal heritage who has left a residential  
29 care placement, has placed with the mother, and then there  
30 is a - then there's a change of child - there's no need to  
31 look at it right now. There's no need to look at it right  
32 now.  
33

34 A. M'hmm.  
35

36 Q. There's a change in child safety centre. Would you  
37 accept that from me, that there was a change? I'll take  
38 you to it.

39 A. Yep.  
40

41 Q. Okay. And then there becomes a decision - the first  
42 decision is whether or not to delegate authority about the  
43 child, and then the issue becomes - and then there's a  
44 placement decision by the delegated authority, and then the  
45 issue becomes should the long-term order be revoked because  
46 it's no longer appropriate and desirable. All right. So  
47 I want to start with a document that's titled "Department"  
- if I can get you to go to document - sorry, page 343.  
Your Honour, do you also have this folder?

1  
2 COMMISSIONER: Yes, thank you, I have it.  
3  
4 MS SWEET: Thank you.  
5  
6 Document 343, which is headed "Departmental history  
7 report"?  
8 A. Yes.  
9  
10 COMMISSIONER: What's the page number, Ms Sweet, on the  
11 bottom of the page?  
12  
13 MS SWEET: 343, Your Honour.  
14  
15 COMMISSIONER: Okay. Thank you.  
16  
17 MS SWEET: Yes. Thank you.  
18  
19 And you'll see in the top left-hand corner it's created -  
20 this document is created on 31 January 2025; do you see  
21 that?  
22 A. Yes.  
23  
24 Q. Yes. And you see at this time the child is 16 years  
25 old?  
26 A. Yes.  
27  
28 Q. And you'll see there's a column on the right-hand side  
29 halfway down the page that says "Orders"?  
30 A. Yes.  
31  
32 Q. And the last one is "CPO long-term guardianship", and  
33 that's to the Chief Executive; correct?  
34 A. Sorry, the first one?  
35  
36 Q. Sorry, the first one?  
37 A. Yes.  
38  
39 Q. As in the most recent?  
40 A. Yes.  
41  
42 Q. Starts in 2017 and is due to end 2026; do you see  
43 that?  
44 A. Yes.  
45  
46 Q. Yes. And can I ask - so just looking away from that  
47 document for the minute - do you have any knowledge about

1 whether or not an application to revoke the order was  
2 ultimately made?  
3 A. I believe it was not.  
4  
5 Q. Do you understand why?  
6 A. So to revoke the - so the Director's office referred  
7 the matter back to the Chief Executive. So no application  
8 for child protection order was made.  
9  
10 Q. So did you try to re-refer it to the Director?  
11 A. No. As far as I'm aware, no further referral has been  
12 made.  
13  
14 COMMISSIONER: So you said "no application". It's an  
15 application to revoke an order; isn't that --  
16 A. So no application to revoke the order has been made.  
17  
18 COMMISSIONER: Right.  
19  
20 MS SWEET: And so when the - so the Director refers it  
21 back to Child Safety saying, "We want a particular type of  
22 evidence about" - effectively about the child being no  
23 longer in need of protection?  
24 A. M'hmm.  
25  
26 Q. And then you can't say whether or not that evidence  
27 was subsequently obtained?  
28 A. No.  
29  
30 Q. And can you say for certain whether or not there was  
31 an attempt to refer it back?  
32 A. All I can say is that I'm not aware of my team making  
33 a new referral back.  
34  
35 Q. And if that had been made would you be aware of it?  
36 A. I specifically asked my senior legal officer for that  
37 team that if a re-referral was being made on this matter to  
38 let me know so that I could be involved given I was aware  
39 of it previously, and I haven't been informed of any new  
40 referral.  
41  
42 Q. So as you sit there today you can be pretty confident  
43 that another attempt to refer to the Director has not been  
44 made?  
45 A. Yes.  
46  
47 Q. Okay. Thank you. Now, if you go onto the next page,

1 344 I think it is, yes, and you'll see, just to take you  
2 quickly through, on the right-hand side the history of  
3 orders here for this child?  
4 A. M'hmm  
5  
6 Q. So it starts with a protective supervision order?  
7 A. Yes.  
8  
9 Q. And this is when - so if the child is born in 2008  
10 this is in 2010?  
11 A. Yes.  
12  
13 Q. And that's an order where the child is remaining at  
14 home?  
15 A. Yes, the child remains at home and the order requires  
16 the Chief Executive to supervise the child's protection in  
17 relation to the matters stated in the order.  
18  
19 Q. Yes. And can you tell from the next order up, the CPO  
20 interim order, whether or not the child is then removed?  
21 A. I can tell - I can tell that it - not - no, apologies,  
22 not from this. There's - obviously it says "interim  
23 order". I can't tell what the interim order is.  
24  
25 Q. Yes.  
26 A. I could potentially - yeah, like --  
27  
28 Q. No, that's fine.  
29 A. -- it doesn't distinguish when --  
30  
31 Q. That's fine. If we go up to halfway up the page  
32 there's a child protection order short-term custody in  
33 2012; you see that?  
34 A. Yes.  
35  
36 Q. And on that basis you can tell from that that the  
37 child has been removed at this time from the home?  
38 A. It looks to me in reading this that the child was  
39 removed earlier because the end date of the supervision  
40 order was the 1st of --  
41  
42 Q. Yes.  
43 A. And, apologies, I haven't seen this before --.  
44  
45 Q. No, no, no, take your time.  
46 A. So the end date of the PS0 was 1 July 2011 --  
47

1 Q. Yes.  
2 A. -- and that first interim order, where it says "CPO  
3 interim order", starts on 7 January 2011.  
4  
5 Q. Yes.  
6 A. So in reading that I would infer that something's  
7 happened in January 2011 and then interim orders have  
8 continued from that point on.  
9  
10 Q. Yes.  
11 A. Because ordinarily - I mean, if - the PSO would be a  
12 final order, there wouldn't be an ongoing court matter  
13 where interim orders could be made. So I suspect something  
14 has happened in January 2011 that has warranted the child  
15 entering care.  
16  
17 Q. Yes. And based on - going up this column you'll see  
18 there's then short-term custody orders and, moving onto the  
19 next, there are various extensions under section 99, and  
20 then further interim orders leading to the long-term  
21 guardianship order in 2017?  
22 A. Yes.  
23  
24 Q. Which is till the child is 18?  
25 A. Yes.  
26  
27 Q. So the child was out of home from around the age of  
28 perhaps two or three?  
29 A. Yes, if it 's - yeah, 2011.  
30  
31 Q. Yes. And then at some point, I think you agree,  
32 possibly in around 2022, the child starts self-placing?  
33 A. Yes.  
34  
35 Q. And you'll see on page 345 that there's the history  
36 report?  
37 A. Yes.  
38  
39 Q. And you would accept from me, would you, that the top  
40 three reports are child concern reports that have been  
41 made?  
42 A. Yes, with the first one not being [REDACTED] - apologies,  
43 not being this child as a subject child.  
44  
45 Q. Yes, if we could just have the name scrubbed from  
46 the record, please.  
47

1 COMMISSIONER: Yes.  
2  
3 MS SWEET: Yes. So the latter three relate to the subject  
4 child. The other report means there's been a concern  
5 report made in the house that the child we're talking about  
6 is living?  
7 A. Yes.  
8  
9 Q. But that child is not the subject of that concern  
10 report; correct?  
11 A. Not necessarily. It might go the other way as well  
12 where he - that the child might not be living in that home  
13 but may be another child of those parents.  
14  
15 Q. Yes.  
16 A. So may not have experienced the alleged harm for the  
17 purposes of that CCR but is still a relevant child.  
18  
19 Q. Okay. And you would accept that each of these four  
20 reports were made during the time that the child was  
21 self-placing with the mother?  
22 A. I don't have the specifics of - I accept that it was  
23 approximately two years. I don't know the specifics of the  
24 dates, but those do look to be within that timeframe.  
25  
26 Q. Yes. So if you were to just accept from me --  
27 A. Yes.  
28  
29 Q. -- that the self-placing was from January 2022 --  
30 A. Yes.  
31  
32 Q. -- it would be correct to say each of those reports  
33 were within the time period that the child was  
34 self-placing?  
35 A. Yes. Yes.  
36  
37 Q. Yes. Thank you.  
38 A. Can I just acknowledge, though, that those are child  
39 concern reports, which means that there's no investigation  
40 in relation to those.  
41  
42 Q. Yes, I think I was specific to say that they were  
43 child concern reports.  
44 A. Yes.  
45  
46 Q. So what causes you to want to draw - I've correctly  
47 identified the reports. What's made you refer to that

1 specifically?  
2 A. I think just to distinguish that, you know, if you  
3 look at this child's history in full he's also got harm  
4 reports which indicate he experienced actual harm while he  
5 was in his previous placement. The three CCRs during the  
6 period of time in the parents' care, I make the distinction  
7 just to be clear about how much weight should be placed on  
8 that given that that is simply an allegation that's not  
9 even met the threshold for the Chief Executive to have a  
10 reasonable suspicion he may be a child in need of  
11 protection. So no investigation has occurred in relation  
12 to that child concern report.

13  
14 Q. Yes. But if part of the reason to support the  
15 revocation was that there had been no concerns raised  
16 during the self-placing period those child concern - that  
17 would be an incorrect statement if it's correct that those  
18 child concern reports were made?

19 A. No, I don't agree with that. In my view, a child  
20 concern report is simply an allegation and, until it's  
21 substantiated, that's all it is: an allegation. That  
22 does not mean that harm has occurred.

23  
24 Q. No. But, back to my question, if it is stated that in  
25 the self-placing period no concerns were raised, that would  
26 be incorrect given that those child concern reports were  
27 made?

28 A. Yes. So it would be incorrect to say no concerns were  
29 raised. But it would not be incorrect to say no concerns  
30 were assessed.

31  
32 Q. No, but equally I'm not suggesting that was said?

33 A. Okay.

34  
35 Q. All right. Can I get you to go to page 441, which is  
36 a child protection case note. Do you have that?

37 A. Yes.

38  
39 Q. And if you see down the bottom you would accept that  
40 this is a phone call from a child safety officer to the  
41 child's mother?

42 A. Yes.

43  
44 Q. In May of 2024?

45 A. Yes.

46  
47 Q. And you'll see over the page there's details of the

1 call, and it says that the child safety officer introduced  
2 herself as being from a particular child safety centre and  
3 that caused the mother to be escalated; you see that?

4 A. Yes.

5

6 Q. And that the mother advised that the child safety  
7 officer was not to contact her again and, if the child  
8 safety officer was to attend the property, either that the  
9 mother or her child, the subject child, would hurt the  
10 child safety officer?

11 A. Yes.

12

13 Q. And that the mother explained that this service centre  
14 was the reason her family was the way it was, because that  
15 child safety centre was responsible for the removal of  
16 the children, and that the mother said she wanted to sue  
17 the child safety centre?

18 A. Yes.

19

20 Q. Yes. And the second last dot point, the mother  
21 advised that she had not heard from one of the other  
22 children she had that had been removed?

23 A. Yes.

24

25 Q. And that the mother would consider whether or not she  
26 would allow contact between the child safety officer and  
27 herself?

28 A. Yes.

29

30 Q. And you would accept from me, would you, that this is  
31 a call that's occurred because there has been a new CSO  
32 assigned from a new child safety service centre; would you  
33 accept that?

34

35 MS FREEMAN: I don't know whether this witness can really  
36 answer that question, to be honest, Commissioner, when  
37 she's not involved in any of this child's protection.

38

39 COMMISSIONER: You might be right. But, Ms Sweet, is  
40 there something evident on the file that you can direct  
41 attention to to make good that point, if it's necessary?

42

43 MS SWEET: I'll move on for now, Your Honour.

44

45 So this occurs on - I think we've agreed a phone call  
46 occurred on 27 May 2024? If you go back to page 441 you'll  
47 see the date on it?

1 A. There's two dates. So there's that date as being the  
2 date that the alleged call may have happened, but the  
3 actual date of the case note is 25/11/2024.  
4  
5 Q. That's the date that the summary has been created?  
6  
7 COMMISSIONER: There's a date on 442 under the note which  
8 is 27 May 2024, suggesting the note was made on the date of  
9 the phone call, I think?  
10 A. No, it suggests to me that the note was - the case  
11 note was updated on 25 November 2024 and the case note was  
12 27 May 2024. So --  
13  
14 COMMISSIONER: We were talking about the case note,  
15 weren't we?  
16 A. It's, Commissioner, in the workflow history, so at the  
17 bottom it reads to me like the conversation - the telephone  
18 call conversation happened on 27 May, but the workflow  
19 history says that this case note was created some months  
20 later, in November.  
21  
22 MS SWEET: That's all I need for my purposes, that there's  
23 agreement on the face of the document that the phone call  
24 was on 27 May --  
25 A. M'hmm.  
26  
27 Q. -- 2024. And then if I can take you to page 400 you  
28 see that - do you see that as a review report, a  
29 section 51VAA long-term guardianship to Chief Executive  
30 review report?  
31 A. Yes.  
32  
33 Q. Yes. You may have given evidence about this  
34 previously, but this section requires effectively every two  
35 years when the child's on long-term orders that the  
36 department review that child's circumstances and consider  
37 whether or not the permanency needs of that child can be  
38 better met through a different type of order?  
39 A. Through a different type of order or potentially  
40 reunification. It --  
41  
42 Q. A different --  
43 A. A different permanency option.  
44  
45 Q. Yes.  
46 A. Yes.  
47

1 Q. Okay. So this is - you would see that if you go to  
2 page - if you go towards the end of that document where  
3 there's the endorsement, this is occurring on 10 and  
4 11 June 2024?

5  
6 COMMISSIONER: What page is that on?

7  
8 MS SWEET: 404, Your Honour.

9  
10 COMMISSIONER: Thank you.

11  
12 WITNESS: Yes, I can see that.

13  
14 MS SWEET: Yes. Thank you. Sometimes I'm asking you this  
15 just to sense check with myself that I've got that right.  
16 A. Yes.

17  
18 Q. Okay. And this is done through a case panel; is that  
19 right?  
20 A. I can't speak to that. It might be through a practice  
21 panel. They might have had a meeting to discuss the 51VA  
22 review of the case - VAA review of the case plan. I can't  
23 speak to the process.

24  
25 Q. That's fine. But there's not one way in which they're  
26 done; okay. And you see there's the child's details, the  
27 date of birth, there's the Indigenous status, which  
28 indicates the belonging to a particular clan and also a  
29 connection with Elders in another community?  
30 A. Yes.

31  
32 Q. And the care arrangement is stated as self-placing  
33 with mother since 18 January 2022, and it is understood  
34 that he has been staying between both his parents' care  
35 since that time; he's been in out-of-home care since 2011,  
36 in January that year, when he was approximately three years  
37 old and three months?  
38 A. Yes.

39  
40 Q. Yes. Is that the sort of - a standard type of  
41 description of the care arrangement, that it's simply that  
42 he's with mother and is staying between both parents? Is  
43 that a standard level of detail that you would get in these  
44 reviews?

45 A. Ordinarily in these reviews you would have the place -  
46 like an actual placement, so if they're with a kin or if  
47 they're with a foster carer or if they're in a residential

1 placement. Usually this part of the form, on the ones  
2 I see, will usually articulate which of the section 82(1)  
3 placement types the child is in, so whether it's a kinship  
4 carer, a foster carer, a residential placement, a boarding  
5 school; it would usually articulate the placement or living  
6 arrangement. For children like this one who are  
7 self-placing, it will generally document something similar  
8 to this in terms of where the child is without setting out  
9 what the placement decision is.

10  
11 Q. And what is the placement - as the guardian, what is  
12 the department's placement decision here? As it stands in  
13 June 2024 with respect to this child, what is the placement  
14 decision that has been made by the department?

15 A. Apologies, I can't speak to that. Like, I don't know  
16 if they still had a placement open and available at the  
17 previous residential care. I don't know if that placement  
18 was closed. I can't speak to that.

19  
20 Q. Ought this document in these circumstances set that  
21 out when we're talking about a review report to determine  
22 what permanency option would be in the best interests of  
23 the child to achieve his or her permanency needs?

24 A. Again, I can't comment on that. I think it would be  
25 helpful in terms of, you know, demonstrating the legal  
26 placement decision that's been made. But I can't speak to  
27 whether it should or shouldn't have been included.

28  
29 COMMISSIONER: To whom is this report provided, do you  
30 know?

31 A. So the report - the review report - if the matter  
32 doesn't go before the court, it just becomes part of  
33 the child's records. Section 51X requires review reports  
34 be completed for children every six months. These - VAA  
35 are the permanency review ones that have to happen every  
36 two years. But, if a matter proceeds before the court,  
37 that review report along with the new case plan that comes  
38 after it would be filed in the court, and they are one of  
39 the documents referred to in rule 13 in terms of Childrens  
40 Court proceedings and being included in material.

41  
42 MS SWEET: So there's no requirement, like, that this  
43 should go to, say, a regional director?

44 A. No. Not that I'm aware of. So no - I am aware that  
45 most of the teams within my half of the state, the regional  
46 practice - so they have regional practice leaders, which  
47 are senior practice leaders. They have led a lot of the

1 practice support given to regions around permanency and  
2 these section 51VAA reports and what long-term permanency  
3 options can look like. So each region potentially would  
4 have a different process or system in place. But, as far  
5 as I'm aware, there's no requirement that this be sent off  
6 to a specific practitioner once it's endorsed.

7  
8 Q. Thank you.

9 A. I might just say that on that final page the  
10 endorsement of this was the service centre manager.

11  
12 Q. Yes.

13 A. So that may be part of that process built in and that  
14 it may be a service centre manager that endorses the  
15 reports.

16  
17 Q. Yes. So there's an endorsement by the child safety  
18 officer and the senior team leader. Then it's acknowledged  
19 on that last page that it has been discussed at a practice  
20 panel?

21 A. Yes.

22  
23 Q. And that there's been approval by the manager. Can  
24 I take you back to the first page under the heading "Review  
25 details"?

26 A. Yes.

27  
28 Q. And you see it gives the date that the long-term  
29 guardianship to Chief Executive was granted?

30 A. Yes.

31  
32 Q. Do you also see then the date of case plan review is  
33 18 April 2023?

34 A. 13.

35  
36 Q. Sorry, I'm giving the department more credit than it  
37 might deserve here. 18 April 2013, and the date the review  
38 process completed is the date that this review is  
39 completed. Can you speak to how there would be a date of a  
40 case plan being reviewed being 2013 and then the review  
41 process being completed 11 years later? Is there something  
42 I'm not understanding about those dates?

43 A. No. So the date the review process completed in 2024  
44 may have been triggered, that this specific review -  
45 because 51VAA I believe was only introduced into the Act in  
46 the 2022 reform --

47

1 Q. Thank you.

2 A. So it may have been that the specific review hasn't  
3 happened previously for this young person.

4

5 Q. Yes.

6 A. But my understanding is that I think there would have  
7 still been a review report under section 51X that would  
8 have been completed some time subsequent to the child  
9 protection order being made in 2017.

10

11 Q. Yes.

12 A. And the 2013 date may have been a typo for 2023.  
13 I can't speak to that.

14

15 Q. That's fine. Just to jump forward to the outcome of  
16 this review before going back to the detail, and you see on  
17 page 403 - do you have that?

18 A. Yes.

19

20 Q.

21 *What is the outcome of the review? It is*  
22 *acknowledged that the child has been*  
23 *self-placing for a significant time with*  
24 *the mother and going between the mother and*  
25 *the father since January 2022. It's*  
26 *understood that the child's view via his*  
27 *mother is that he wishes for her to have*  
28 *his order revoked. Therefore the review*  
29 *identified that the child's permanency may*  
30 *best be achieved by an alternative*  
31 *arrangement.*

32 A. Yes.

33

34 Q. And then over the page, "New primary goal of the case  
35 plan to best achieve permanency":

36

37 *It is acknowledged the child is already at*  
38 *home with his mother, has natural*  
39 *connections with his family. Whilst a*  
40 *formal decision has not been made around*  
41 *the section 82(2) placement at home,*  
42 *decision to date around this, it is*  
43 *acknowledged that the child has been home*  
44 *for a significant period without any*  
45 *additional concerns that have been*  
46 *received. Given this, serious*  
47 *consideration could be given to the*

1                   *revocation of the order at this time.*

2  
3                   So just taking you to that, he's been at home for a  
4                   significant period without any additional concerns as at  
5                   June 2024, would you accept that there should have been  
6                   reference to those child concern reports at this point?

7                   A.    I think - no, I think it would come - I mean, I think  
8                   the practitioner who drafted the report probably could  
9                   speak to it better than I could --

10  
11                  Q.    Yes.

12                 A.    -- but I think when Child Safety use the term  
13                 "concerns" in a report like this they would ordinarily mean  
14                 something that had been investigated or substantiated.  
15                 They wouldn't necessarily - they wouldn't ordinarily refer  
16                 to historical child concern reports in subsequent reports  
17                 or reviews, given they know that there's not been any  
18                 assessment or investigation in relation to those  
19                 allegations.

20  
21                 Q.    Okay. And it says there --

22  
23                 COMMISSIONER: That's an assumption you're making?

24                 A.    Yes.

25  
26                 COMMISSIONER: It's not explicit on the face of the  
27                 document, is it?

28                 A.    It's not, and it's an assumption that I make, though,  
29                 based on experience of frequently telling Child Safety  
30                 staff that a CCR is not evidence of anything because Child  
31                 Safety hasn't made an assessment, hasn't made any  
32                 investigation, hasn't obtained any material. We actually  
33                 frequently tell child safety officers that they should be  
34                 cautious in trying to use multiple child concern reports to  
35                 paint a picture or pattern of concerns given those are  
36                 simply allegations that have not been investigated.  
37                 They're cautioned against using that in reports or in court  
38                 work.

39  
40                 MS SWEET: If you go back to page 401, up the top, and  
41                 this is where it speaks to the source of information for  
42                 the review?

43                 A.    Yes.

44  
45                 Q.    And it says, "Was a family group meeting held as part  
46                 of the review process? No." Where there is consideration  
47                 being given to an 82(2) placement and potential revocation

1 of the order, is that a red flag for you that there hasn't  
2 been a family group meeting held about such an important,  
3 I suppose, intervention or certainly as you might be  
4 removing intervention?

5 A. To be honest, I think that might be a practice  
6 question rather than a me question. But I will say that  
7 I am not at all - I'm not surprised that many families  
8 don't want to have meetings with or engage with the  
9 department based on - in this case it seems based on this  
10 service centre previously removing other children or older  
11 children. It's one of the - so it's not unusual to me that  
12 an FGM hasn't happened, because this report seems to be  
13 leaning towards delegated authority happening and going  
14 down that course. I don't find it unusual that there's the  
15 potential for a family to engage with a delegated authority  
16 team in a very different way to how they engage with the  
17 department.

18  
19 Q. Then it says "The process used to undertake the  
20 review", that there was a discussion between the CSO, the  
21 team leader, another team leader, a senior practitioner,  
22 cultural practice adviser and a critical friend, being a  
23 delegated authority manager. So the discussion about  
24 permanency has been - has occurred without the direct  
25 involvement in that discussion by anyone in the family?

26 A. It seems like they did have the - so at least the  
27 views of the mother and the mother giving the views of the  
28 child.

29  
30 Q. Yes, and it's said the child's direct views weren't  
31 obtained. It's acknowledged that his views have been  
32 shared by his mother and that he wants mum to get rid of  
33 the order?

34 A. Yes.

35  
36 Q. Okay. And then it goes on to ask if the child's  
37 parents' views were sought - you see that there - and it  
38 says "yes"?

39 A. Yes.

40  
41 Q. It says that the child's parents', plural, views were  
42 obtained but it then says that the father was contacted  
43 I think on this day by the delegated authority manager to  
44 obtain consent to the delegated authority process but  
45 didn't answer.

46  
47 *The CSO says has had contact with*

1           *the father in the past, however he recently*  
2           *dropped off from a level of contact. His*  
3           *specific views about an alternative*  
4           *permanency outcome are not directly known*  
5           *at this time.*  
6

7           Is that of concern that were making this review without  
8           having - understanding what the father's position is?

9           A.    I think frequently Child Safety has to make reviews  
10          and assessments and practice decisions without the benefit  
11          of both parents' positions, and it's not unusual to  
12          articulate the attempts that they've made to contact that  
13          parent. I think ideally and particularly for a First  
14          Nations family in the context of self-determination it  
15          would have been ideal to have both parents' views and  
16          potentially this decision made through some sort of  
17          family-led decision-making process. But, even just reading  
18          this report, it appears to me that that was unlikely to be  
19          a way the family would engage with Child Safety. While  
20          they might engage with our delegated authority colleagues  
21          in that way, it didn't seem like they would be open to  
22          engaging with Child Safety, based on the views of the  
23          mother articulated in this report.  
24

25          Q.    Okay. And you'll see that the views of the mother are  
26          recorded as being - having been obtained by the delegated  
27          authority manager in order to obtain consent for the DA  
28          process, and there's an indication from the mother that she  
29          would like to work with the delegated authority about  
30          decision-making for the child and she agreed to the  
31          referral; you see that?

32          A.    Yes.  
33

34          Q.    And that the child is at home and sick of workers  
35          contacting him all the time?

36          A.    Yes.  
37

38          Q.    And that the mother would prefer to see the child's  
39          orders revoked and then worry about financial benefits when  
40          he transitions from care?

41          A.    Yes.  
42

43          Q.    And see there's a reference to a lack of family visits  
44          occurring in respect of two of the child's brothers?

45          A.    Yes.  
46

47          Q.    Sorry, one brother and one sister?

1 A. Yep.  
2  
3 Q. So there's other children who are not having family  
4 visits at this time?  
5 A. Yes.  
6  
7 Q. And that the mother had not had contact with either of  
8 those children for a long time, one of them for 12 years?  
9 A. Yes.  
10  
11 Q. And there's an attempt to contact the father's mobile  
12 but it's not connected. The mother reports the child's  
13 been home for over a year and that the parents are  
14 co-parenting well, and that the mother reports that the  
15 child says, "If you're so smart, mum, why can't you get rid  
16 of the order"; you see that?  
17 A. Yes.  
18  
19 Q. Now, there's no reference here to whether or not -  
20 there's reference to not wanting to engage with Child  
21 Safety, there's reference to the child being tired of  
22 workers contacting them, and there's a specific reference  
23 to the child being at home. There's nothing here about  
24 whether or not Child Safety's concerns have been mitigated  
25 at all. Is that something that - when we're considering  
26 permanency and then ultimately recommending that there's a  
27 potentially better permanency decision, aren't these the  
28 sort of things that should be recorded in this document?  
29 A. Yes, but I also don't think they necessarily need to  
30 be reported in that box on that page. So if you go on to  
31 page 403 they do outline there the discussion during the  
32 review where they talk about potentially the reasons that  
33 the family or the mother was not engaging as well --  
34  
35 Q. Yes.  
36 A. -- and then they talk about the child's views in terms  
37 of engaging and then they also talk about supports that are  
38 engaged.  
39  
40 Q. Yes, and we'll come back to that. So just going over  
41 the page to 402, "Were the views of significant others,  
42 including the child's current or former carers/service  
43 providers, ascertained? Were those views taken into  
44 account?" And the answer is, "No"?  
45 A. Yes.  
46  
47 Q. And then under the next box, "Aboriginal and Torres

1 Strait Islander children", there's an acknowledgment that  
2 an independent person wasn't arranged to help facilitate  
3 the child's participation in the review?

4 A. Yes.

5

6 Q. And you see then the fourth box down under "Aboriginal  
7 and Torres Strait Islander children", "The child has been  
8 identified for delegated authority," although there is no  
9 order yet; correct?

10 A. Yes.

11

12 Q. "And it is identified that he is currently  
13 self-determining, as has been for some time to reside with  
14 the mother." When it's said that - and accepting it's not  
15 your document, to say that somebody is currently  
16 self-determining, what does that mean, as best you can  
17 understand?

18 A. Self-determination has a specific legal meaning under  
19 the Act.

20

21 Q. Does it?

22 A. Well, sorry, it's included in the principles of the  
23 Act in terms of First Nations people having the right to  
24 self-determination.

25

26 Q. Is self-determination itself as a concept - is there a  
27 definition in the Act?

28 A. I believe there is. If --

29

30 Q. That's okay, we can come back to that.

31 A. Yeah, so sometimes when there's a specific term or  
32 phrase used in the Act that then makes its way into the  
33 general vernacular of Child Safety. I would read that  
34 sentence to suggest that it - that this child has chosen to  
35 live at home, and instead of saying he's self-placing,  
36 which is the term usually used within the department,  
37 they've used the term "self-determining". I don't know -  
38 I can't speak to the reason or whether that specific term  
39 has been used given the fact that he is Aboriginal. They  
40 may have seen that his act of choosing to live at home or  
41 speak with his feet and live at home with his family is an  
42 example of him exercising his right to self-determination.

43

44 Q. Yes. And how does that sit with the department's  
45 obligations as his guardian and to ensure that as it  
46 administers the Act with respect to him that it has his -  
47 the paramount principle that his best interests are at

1 heart? How does that all sit together?  
2 A. Self-determination in all of its forms doesn't mean  
3 that a child or a family can determine that Child Safety  
4 should have no involvement in their decisions or in their  
5 life, particularly when a child is already on an order.  
6 It - it's - to be honest, I think that the nuance of why  
7 that term was used in this report potentially might be best  
8 placed going to the practitioner - it may have just been  
9 used as a way to further demonstrate that they're  
10 attempting to make active efforts or they're accepting this  
11 young person's decision to stay at home as an example of  
12 self-determination. But the reason why that term was used  
13 I suspect is best asked to the person who authored the  
14 report.

15  
16 Q. Yes. And can I get you to just stay with this  
17 document for the minute?

18 A. Yes.

19  
20 Q. And you'll see there there's a - the second last box  
21 under "Aboriginal and Torres Strait Islander children", it  
22 says, "The delegated authority manager and the cultural  
23 practice adviser both agree that the child's current  
24 long-term order could be revoked"; you see that?

25 A. Yes.

26  
27 Q. Would you accept that at this stage and based on this  
28 document it's - and given that the delegated authority  
29 manager doesn't currently have decision-making powers, that  
30 that is a premature assessment?

31 A. My legal advice would be that it was a premature  
32 assessment and that they didn't have the evidence to  
33 support whatever work the delegated authority was going to  
34 do with the family.

35  
36 Q. Yes.

37 A. But I couldn't say it was a premature assessment in  
38 terms of practice, that - and that's a matter for them.

39  
40 Q. I see the distinction that you're making, and I accept  
41 that distinction from you.

42  
43 COMMISSIONER: Might I ask, Ms Martin, if one looks at  
44 this document, it's a box-ticking exercise. There are  
45 preset questions, and apart from a few places where at a  
46 very high level there's a recitation of some sort of facts,  
47 like, for example, in the box at page 401, where there's

1 reference to comments made by the mother, and in the box at  
2 403 under "Discussion", "10 June", it is entirely  
3 uninformative as to any analysis of risk, suitability or  
4 any other relevant consideration one would expect to find  
5 in a document purporting to review the question of whether  
6 the placement of this particular child should be changed as  
7 mandated by a section 51VAA, which in turn directs one back  
8 to section 5BA and the hierarchy under that section?

9 A. M'hmm.

10  
11 COMMISSIONER: So a document of this kind, I suggest,  
12 would be pretty uninformative to any lawyer who was then  
13 asked to extract from it facts that might be put before a  
14 court for evaluation of whether an order ought to be  
15 revoked or not?

16 A. Yes.

17  
18 COMMISSIONER: So is there something else that is produced  
19 or is this the basis upon which you might be asked to  
20 advise as to the suitability of making an application to a  
21 court?

22 A. So, Commissioner, this is a review report. Ordinarily  
23 my office would get practice panel minutes, which might  
24 have a little bit more detail than this document does in  
25 relation to how they landed at the assessment or the  
26 decision. I read this as a - essentially when you look at  
27 the outcome on page 403, the outcome is that the delegated  
28 authority team is going to get involved, visit the mother  
29 with the cultural practice adviser, they're going to  
30 explore the decision to place at home with the parent and  
31 they're going to consider an application to revoke the  
32 child protection order, not that this is the document that  
33 leads to them doing those things.

34  
35 COMMISSIONER: No, I understand. But it's a document  
36 which on its own terms, if one was to try and understand  
37 what was going on and what had been evaluated for whatever  
38 purpose, I suggest the reader would be left wondering what  
39 this is all about --

40 A. Yes.

41  
42 COMMISSIONER: -- other than a pro forma document with a  
43 series of questions and boxes to be answered either  
44 affirmatively or in the negative. So I wonder what the  
45 point of such a document is for anybody's purposes, much  
46 less for the purposes of evaluating what is said or what is  
47 required to be evaluated. It might be recorded somewhere

1 else, but it's not recorded in this document, is it?  
2 A. Not that. So the reason that you often see these  
3 sorts of documents with the boxes and the specific  
4 questions is that the Act is very prescriptive in relation  
5 to the different things that need to be proved at every  
6 step. So a lot of the time the yes/no questions are a  
7 record of whether something that is required to be under  
8 the Act is done or has not yet been done. So it's to guide  
9 the practitioner --

10  
11 COMMISSIONER: But it doesn't tell you what's been done --  
12 A. It doesn't tell you what's been done. It tells you --

13  
14 COMMISSIONER: -- or not done.  
15 A. -- whether it's been done or not done.

16  
17 COMMISSIONER: All right.  
18 A. Yes. Commissioner, that goes to what I said earlier  
19 about the department's practice of separating legal and  
20 practice, and I still think - court coordinators used to go  
21 to prac panels. I still think there's benefit in having a  
22 legal voice in these meetings to say, "We appreciate that  
23 might be your practice assessment, but these are the steps  
24 you need to take in terms of gathering evidence to get to  
25 that outcome or before you can make the decision about that  
26 outcome because it would be premature because you don't  
27 have the evidence to support it yet."

28  
29 COMMISSIONER: All right. We'll come back to that and  
30 other topics this afternoon. We'll adjourn to 2.15.

31  
32 **LUNCHEON ADJOURNMENT** **[12.55 pm]**

33  
34 MS SWEET: Ms Martin, a lot of what we've been talking  
35 about is sort of leading up to a decision by a delegated  
36 authority to place a child with a parent in circumstances  
37 where there's a long-term guardianship order to the Chief  
38 Executive.

39 A. Yes.

40  
41 Q. Are you asked to advise about the criteria or  
42 parameters of what the department should be considering  
43 when looking at whether to exercise that placement power?  
44 A. So my team can be asked for legal advice in relation  
45 to a specific case on any part of the Act, but not as a  
46 matter of course in relation to the making of an 82(2)  
47 placement decision.

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Q. But is it something that you are regularly asked to give advice on, your team?

A. Look, I wouldn't say regularly, but in the past I have given that advice; but not on every case.

Q. And if you could draw themes about the types of things you've said the department ought to be looking for when seeking to determine whether to exercise that placement power could you speak to His Honour about those themes?

A. Yep. I had one recently where a legal issue arose because the child was on the wrong type of order. So the child was still subject to section 99 rather than an interim child protection order, which meant it wasn't open to Child Safety to make that decision; so as a starting point whether there's a legal basis to make a section 82(2) decision.

Q. It's always a good starting point.

A. A good starting point. So that, so whether the child's under a child protection order so the decision can be made.

Q. Yes.

A. The other question is in relation to which definition of "parent", so whether it's that narrow definition of "parent" or the broad definition of section 11 or that part of the Act.

COMMISSIONER: What is the case, just remind me?

A. It's the broad definition of section 11 in relation to an 82(2) decision. So the Chief Executive can place with a parent that is not the narrow definition of a parent. The part of the Act that - the place section 82 sits in sits in a part of the Act where the section 11 definition applies. So those are two kind of legalistic preliminary issues.

The other thing that we might give legal advice on is essentially in relation to whether any original child protection concerns have been sufficiently mitigated, whether there's evidence of, you know, parents addressing the concerns or if there's sufficient evidence about whether the child's needs will be met in that placement at home. As I said, it's not every case but it is - on occasion we have been asked to give legal advice on the 82(2) decision. But, as a whole, that is seen as a practice decision that doesn't require legal advice.

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COMMISSIONER: Do you regard the making of a placement decision as one that requires a consideration of whether the child continues to be a child in need of protection within the meaning of section 10 of the Act?

A. I think - apologies, Commissioner, I'm not sure if I - are you asking whether I think it should or whether legally it is required?

COMMISSIONER: No, I'm asking for your legal opinion.

A. Okay.

COMMISSIONER: Let me contextualise it a little bit for you. You pointed out that when it comes to revoking an order under section 65 the requirement in section 59(1)(a) and perhaps other - just bear with me a second. Yes, the requirement in section 59(1)(a) is not a mandated consideration because of section 65(5). But then somehow it's at least arguably drawn back into consideration under section 65(6).

A. The "appropriate and desirable" part, not the "child in need of protection" part.

COMMISSIONER: Yes. The question of how you unscramble those considerations is a separate matter. Section 82(2) confers substantial power on the department via the Chief Executive to place a child. It's constrained by the requirement that the child is either in the custody or guardianship of the Chief Executive; correct?

A. Yes, under a child protection order.

COMMISSIONER: And so it doesn't apply where there's an emergent order extended by virtue of section 99?

A. No. So it doesn't apply, yes, when there's a - it doesn't apply to care agreements where the Chief Executive has custody and it doesn't apply to section 99 continuation of orders.

COMMISSIONER: And section 99 has work to do in relation to emergent orders, does it not, not in relation to child protection orders, or have I got that wrong?

A. It does, but it also - it has a lingering effect into the child protection order proceedings. So if there's an emergent order and that expires and the Director's office files an application for a child protection order that section 99 is triggered. And then sometimes children stay on that section 99 for a number of months or years while

1 the substantive child protection order proceeding is being  
2 litigated.

3

4 COMMISSIONER: Yes. So, in any case, allowing for those  
5 constraints as to its - before the power becomes available,  
6 there's no legislative guidance as to how that power should  
7 be exercised, is there?

8 A. No. So there's practice guidance, but there's - the  
9 only thing that I would suggest might be considered  
10 legislative guidance is in the child protection regulation.  
11 It has a provision that talks to who's a suitable person to  
12 have contact with the child which is a person that does not  
13 pose a risk of harm to the child. There's some guidance in  
14 there. But it doesn't specifically go to when to place a  
15 child back home with parents.

16

17 COMMISSIONER: No. I was a bit general when I said  
18 there's no legislative guidance because the paramount  
19 principle --

20

21

22 COMMISSIONER: -- is expressed to apply for the  
23 administering of this Act --

24

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26 COMMISSIONER: -- and that would include any decision made  
27 under or pursuant to powers conferred under the Act, one  
28 would think.

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1 COMMISSIONER: Do you have the Act in front of you?

2 A. Yes.

3

4 COMMISSIONER: Thank you. Indeed, section 5B, I think you  
5 are right to point that out because it says:

6

7 *The following general principles are*  
8 *relevant to making decisions relating to*  
9 *the safety, wellbeing and best interests of*  
10 *a child.*

11

12 And then it lists a rather extensive number of  
13 considerations.

14 A. Yes.

15

16 COMMISSIONER: So it would --

17 A. And the specific ones there like (c) in relation to  
18 supporting a child's family, you know, (e) only taking  
19 action that's warranted in the circumstances, (f) in terms  
20 of returning to the child's family, so a number of those 5B  
21 other general principles would apply to a placement  
22 decision, all of that would be balanced in the practice  
23 assessment and decision that's made.

24

25 COMMISSIONER: And section 5BA. I'm not talking about  
26 5BA(4), which is the hierarchy, but 5BA(1), for example,  
27 (2), (3), the Aboriginal placement principles in  
28 section 5C.

29 A. All of the principles.

30

31 COMMISSIONER: So in fact there's a rather extensive  
32 exposition of principles that are expressed to apply to the  
33 administration of the Act, to the making of decisions under  
34 it, and also apply to the making of orders that a court  
35 might make.

36 A. Yes, Commissioner. Apologies. Earlier I thought you  
37 meant was there a prescriptive section in relation to  
38 listing out things the Chief Executive needed to consider.  
39 But the principles always apply to all decisions.

40

41 COMMISSIONER: No need to apologise. I misled you with  
42 the proposition that I put. I didn't mean to. What I did  
43 have in mind is that there is no specific principles  
44 relating to section 82(2), but it's wrong to say that the  
45 Act doesn't give guidance to the exercise of that power.

46 A. Yes.

47

1 COMMISSIONER: And indeed, as we've just noted, there are  
2 extensive provisions that govern the making of decisions  
3 and the administration of the Act that bear upon all of  
4 the decisions and administrative powers that exist under  
5 the Act.

6 A. Yes.

7

8 COMMISSIONER: So, with that context in mind, do you not  
9 find it somewhat surprising that the lawyers from within  
10 the department as presently organised via the office of  
11 OCFOS are not consulted about what is required when  
12 exercising that power to ensure that the power is exercised  
13 consistent with the principles that the Act requires?

14 A. Commissioner, I don't find it surprising given the  
15 department culture and process of keeping legal and  
16 practice separate. So I'm not surprised by it. That's a  
17 different question to whether I think there should be legal  
18 advice on a decision that's that significant, and that's a  
19 yes.

20

21 COMMISSIONER: See, these principles are just that,  
22 principles.

23 A. Yes.

24

25 COMMISSIONER: But they to be applied require an  
26 evaluation of the facts by reference to them; do you agree  
27 with that?

28 A. Yes.

29

30 COMMISSIONER: And, looking at the report that we were  
31 looking at before the luncheon adjournment, the report  
32 arises in the context of section 51VAA, that is that  
33 prescribes the review of the long-term guardianship order,  
34 doesn't itself manifest any evaluation of the  
35 decision-making in relation to that cognate subject nor any  
36 consideration of the principles that govern all aspects of  
37 decision-making under the Act. But is there something else  
38 that is routinely produced that would meet my implicit  
39 criticism that it doesn't demonstrate any evaluation?

40 A. Commissioner, unless specific legal advice was  
41 obtained on the specific case, not legal advice. But the  
42 Chief Executive would be required to do a letter. So under  
43 section 82(2) that's a reviewable decision in QCAT. So  
44 they would have to do a letter to the parents or the  
45 child - and the child setting out the reasons for their  
46 decision. So the reasons would be particularised.

47

1 COMMISSIONER: Every placement decision under section 82  
2 leads to a statement of reasons, does it?  
3 A. Not a statement of reasons but a letter to advise of  
4 the decision, and the parent or the young person has a  
5 right to appeal that through QCAT. So it's a reviewable  
6 decision; any placement decision, not just section 82(2).  
7 Sorry, any placement --

8  
9 COMMISSIONER: Every time a placement decision is made?  
10 A. Any placement decision on a child protection order.  
11 So not for the assessment orders. For assessment orders  
12 it's not a reviewable decision. They still need to tell  
13 the parents where the placement is, but it's not  
14 reviewable. And I believe - it's been some time since  
15 I gave advice on placement decisions specifically, but  
16 I believe there's an exception for respite or if the  
17 placement's less than six days. But any longer term  
18 placement decision that gets made is a reviewable decision  
19 and the parent or the young person is entitled to review  
20 that in QCAT.

21  
22 COMMISSIONER: So, coming back to this case we've been  
23 looking at, if the decision had proceeded, that is if the  
24 application to revoke the long-term guardianship order had  
25 proceeded, and the guardianship order was revoked that  
26 would have the effect, would it not, of removing the power  
27 under section 82(2) thereafter?

28 A. I mean, yes, if the order's revoked then the State has  
29 no power to do anything under an order.

30  
31 COMMISSIONER: Right. So that means that the placement  
32 decision either had to already be made before that  
33 application was made to the court and successful?

34 A. Yes.

35  
36 COMMISSIONER: In this particular case there was no need  
37 to make a placement decision because the child in question  
38 had made that decision for himself?

39 A. Yes.

40  
41 COMMISSIONER: Right. But in other contexts, if the  
42 department wanted to make a referral to the Director to  
43 apply for a revocation of a long-term guardianship order,  
44 if they wanted to make a decision about placement they'd  
45 have to do so beforehand?

46 A. Yes, and that decision letter would usually form part  
47 of the brief. If the Chief Executive had made that

1 decision, that forms part of the reasons why the order's no  
2 longer appropriate and desirable.

3  
4 COMMISSIONER: They're not entirely separate issues, are  
5 they? I mean, if you want to say to the court there is no  
6 longer a need for this ongoing guardianship order  
7 presumably you've got to explain to the court why, which  
8 includes what the present state of affairs are so far as  
9 the placement of the child is concerned?

10 A. Yes.

11  
12 COMMISSIONER: Right.

13 A. The court will obviously be interested in what the  
14 current circumstances are for the child. So I would say  
15 that in a lot of revoke applications that would be that the  
16 child's safely at home and an order - and so a placement  
17 decision is no longer needed, in most matters.

18  
19 COMMISSIONER: And so in the case of placement decisions  
20 in respect of child protection orders the department needs  
21 to provide a letter. That letter is effectively a  
22 statement of reasons for its decision, I assume?

23 A. Effectively, but it's not necessarily as detailed as,  
24 you know, a later or subsequent statement of reasons might  
25 be if the parent chose to appeal. So if the parent chose  
26 to appeal and go to QCAT the department produces what's  
27 actually called a statement of reasons. That goes into  
28 further detail for the reasons. So sometimes the letter is  
29 a summary of the reasons.

30  
31 COMMISSIONER: And as a matter of usual practice are you  
32 consulted or your office consulted as to the statement of  
33 reasons - the letter, if you like - that the department  
34 prepares consequent upon making a placement decision?

35 A. No, not my office. The department does have the  
36 ability to reach out to our court services unit, which is  
37 an internal unit that supports delegates through QCAT. So,  
38 given that that unit has the expertise in relation to QCAT,  
39 they will often or sometimes help the service centre draft  
40 that letter and outline the reasons. But my team doesn't  
41 do that drafting of those letters.

42  
43 COMMISSIONER: Sure. If it becomes a matter of dispute  
44 then it might be referred to that division. But I'm really  
45 more interested in at this point understanding the process  
46 by which a decision is made to place a child and what the  
47 inputs in that process are, including any evaluation of the

1 reasons that might include a contribution to that  
2 evaluation by the lawyers who work within the department.  
3 A. As I indicated, we can be invited to give legal advice  
4 on that issue but it's not mandated and it doesn't happen  
5 in every case. I am aware that the delegate to make an  
6 82(2) decision is the service centre manager or above. So  
7 if the CSO and team leader think a child can safely be  
8 placed at home they would generally have to brief their  
9 manager to get delegate sign-off on that decision.

10  
11 COMMISSIONER: But you've indicated that placed at home  
12 is, strictly speaking, not necessarily placed back with the  
13 parent from whom the child was removed because of the  
14 broader definition of "parent" did you say in section 11  
15 I think?

16 A. In section 11, yes.

17  
18 COMMISSIONER: So it's a placement decision that could  
19 result in reunification, strictly speaking, to the parent  
20 of the child, parent or parents --

21 A. Yes.

22  
23 COMMISSIONER: -- or placement of the child with a kin  
24 member or extended family member or indeed with a foster  
25 carer, the whole range of placement decisions, and I assume  
26 that would include also non-family based residential care?

27 A. Not --

28  
29 COMMISSIONER: Not for 82(2)?

30 A. Not for 82(2). And I might just clarify 82(2), it  
31 would be very unusual for it to also incorporate a foster  
32 carer, unless that was a former foster carer who somehow  
33 meets the definition of a parent, so that's exercising  
34 parental responsibility for the child.

35  
36 COMMISSIONER: Sorry, you're quite right. I've conflated  
37 it.

38 A. But it could be a grandparent or an aunt or an uncle  
39 or generally - generally it's a parent, but it could  
40 arguably also be a family member under that broader  
41 definition.

42  
43 COMMISSIONER: Sorry, I've conflated 82(1) and 82(2). So,  
44 yes, thank you for correcting me on that. All right.  
45 Thank you.

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47 MS SWEET: Thank you.

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Ms Martin, if we go back to page 402, which contains the discussion in the review.

A. Yes.

Q. Now, in terms of legal advice, where we're looking at a 51VAA review whether there should be a different permanency arrangement it would be your advice, wouldn't it, that you should look at those specific definitions of what permanency means to a child which are in --

A. Section 5BC?

Q. So in 5BA --

A. A.

Q. -- which is:

*Principles for achieving permanency for a child. "Permanency" means the experience by the child of having the things mentioned in (2)(a) to (c)" [which talks about]:*

*... ongoing positive, trusting and nurturing relationships with persons of significance to the child [which includes] stable living arrangements, with connections to the child's community, that meet the child's developmental, educational, emotional, health, intellectual and physical needs.*

And it gives a specific example there about:

*Living arrangements that provide for a stable and continuous school environment.*

And then legal arrangements that provide for the sense of permanence and long-term stability. So in terms of the discussion here would it be your advice that those types of permanence were not sufficiently - as it's recorded here, were not sufficiently reviewed before determining that this child's needs could be better met through a different permanency arrangement?

A. So my reading of this document is that we had a young person who would not engage with the department, had not engaged with the department for many years, and - well, for a significant period of time. And from this review they

1 looked to potentially considering whether it can be revoked  
2 or whether an 82(2) decision could be explored or whether  
3 the delegated authority agency could go visit the mother to  
4 get engaged. In my reading of this document this isn't  
5 making a decision to pursue any of those courses; it's  
6 about exploring those courses.

7  
8 Q. Yes. But to even get to the point where you would  
9 say, "We should explore it," there should have been - would  
10 your advice be that there should have been specific  
11 consideration of these - at least in this initial document  
12 about those types of permanency?

13 A. I don't know how the department could explore those  
14 types of permanency without having a conversation with the  
15 young person.

16  
17 Q. Yes.

18 A. So that is - again, it's one of the principles about  
19 child participation. It's very difficult to explore legal,  
20 relational, all of those permanency when the only  
21 information they have is that this young person had  
22 criticised his mother for not getting the order revoked.

23  
24 Q. Yes.

25 A. I think these steps in terms of the delegated  
26 authority going out, meeting with the mother and getting  
27 involved were the steps that needed to happen so they could  
28 gather that information and that evidence to make the  
29 decision about whether to revoke the order.

30  
31 Q. Yes.

32 A. But they need the young person's views before they can  
33 further explore that.

34  
35 Q. But it records here, doesn't it, that the delegated  
36 authority manager and the cultural practice adviser had  
37 said, "Look, that order could be revoked"?

38 A. But I think it's about clarifying they are not saying  
39 that order should be revoked. They're saying, "It's been a  
40 period of time where this young person has been home with  
41 very little involvement from Child Safety. It may be a  
42 case where that order can be considered to be revoked and  
43 the community can support this family without Child  
44 Safety's involvement, and that needs to be explored." So  
45 this review starts that process of exploring that.

46  
47 Q. And it's relevant, isn't it, that the child had in

1 fact not been going to school for a period of one or two  
2 years?

3 A. Yes, that's relevant.

4

5 Q. And it's relevant that - I mean, it's cast here as the  
6 mother was engaging well with the CSO until she found out  
7 she was from a particular area.

8 A. That service centre.

9

10 Q. But really what needs to be considered is the fact  
11 that not only was there they're not engaging well; the  
12 mother has then threatened to hurt the CSO if the CSO comes  
13 to the house or that her son would - she would stand back  
14 and allow her son to hurt the CSO, where she says - when we  
15 went back to that note, the one she said, "If you come here  
16 I will or my son will hurt you." And these are the types  
17 of things that ought to be considered before making an  
18 82(2) decision; correct?

19 A. Yes.

20

21 Q. And before deciding whether the child's permanency  
22 needs, including the need for stable relationships and the  
23 need for stage schooling, whether that order could be  
24 revoked and his permanency needs could be dealt with by a  
25 different arrangement?

26 A. Yes. But I also think part of considering permanency  
27 is considering whether a family might be more inclined to  
28 work with a community-controlled organisation and engage  
29 with the community-controlled organisation and go to school  
30 or, you know, have proper support in relation to that if  
31 it's not Child Safety.

32

33 Q. Yes. So the child's been in the community for, say, a  
34 period of two years and these outcomes haven't occurred?

35 A. No.

36

37 Q. And in order to agree to delegate authority under  
38 148BB the department can only delegate or the Chief  
39 Executive can only delegate his or her authority if the  
40 child is in need of protection or is likely to be in need  
41 of protection; correct?

42 A. Yes.

43

44 Q. So, even if it's implicit, there is a recognition when  
45 the delegation is made that the child is in fact in need of  
46 protection or is likely to be in need of protection?

47 A. Yes, that's included in the provision.

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Q. It's unclear here the basis on which the department might have reached that view.

A. It's unclear from this document.

Q. Yes.

A. But I'm aware that only the DG can delegate. So that, I'm assuming, would be in a brief to the DG for her to sign off on the delegations with respect to the specific functions.

Q. Yes, thank you.

COMMISSIONER: Does that follow then that the delegation has to occur before the child's circumstances have changed such that the child is no longer in need of protection?

A. No, because - so specific provisions can be delegated. But a child who - so it's not limited to just children in need of protection. A child who's likely to be in need of protection can also have functions delegated. So in a situation like this hypothetically you could have section 82 delegated and contact decisions delegated while the child is in need of protection and on an order.

But if it reached a point where the child was no longer in need of protection but the family still needed support or the young person still needed support specific functions could hypothetically be delegated. So that might be things in relation to exit from care and transition to adulthood. I'm not aware of those things being delegated in any of my areas, but it's open on the legislation given it's a child who - it could include a child who is likely to be in need of protection. That poses practical difficulties because each delegation has to be related to individual children. So you could see it working on the back end of a young person who's been involved with the department. But you wouldn't be able to hypothesise what children in the community might become in need of protection so as to warrant a delegation outside of young people like this who have been on orders or been involved in the system.

COMMISSIONER: Going back to the example we've been talking about, had things been different and the long-term guardianship order had been revoked, that brings an end to the delegated authority, does it, because it brings an end to the authority of the principal, that is the Chief Executive, so it must also bring an end to the authority of

1 the delegate; doesn't that follow?  
2 A. Yes. So the specific delegations that were delegated  
3 of this child would come to an end if the child was no  
4 longer in the custody of the Chief Executive. But it then  
5 opens the door for other potential delegations with respect  
6 to case planning. If the family - actually I believe this  
7 family did have case planning delegated as well. If the  
8 family was agreeable to work on an IPA the case planning  
9 functions could still remain delegated.

10

11 COMMISSIONER: But that would require, wouldn't it, that  
12 the child remains a child likely to become a child in need  
13 of protection?

14

A. No.

15

16 COMMISSIONER: Because there's two preconditions, aren't  
17 there?

18

19 A. No, because - so if the child was still in need of  
20 protection and the order was revoked and the Chief  
21 Executive had an IPA, so an intervention with parents  
22 agreement, so if the parents were agreeing to work with  
23 Child Safety then you would still - the child would still  
24 be in need of protection and you would have case planning  
25 still.

25

26 COMMISSIONER: Yes, but just thinking of the scenario that  
27 is the counterfactual on the example we were looking at,  
28 namely that the order's revoked, that brings an end to the  
29 power of the department via the Chief Executive over that  
30 child?

31

32 A. In the absence of parental consent. So I appreciate  
33 it would be unlikely in this case where the mother in that  
34 case note had indicated she didn't really want to work with  
35 the department. But if they've still assessed that the  
36 child is in need of protection and they want to work  
37 voluntarily or if they want a supervision order, so it  
38 might be the case that they don't think they need a  
39 long-term guardianship order but they still need a  
40 supervision order to go into the mother's home and visit  
41 with the child, so if it was a vary instead of a revoke or  
42 if it was a revoke and they planned to have an intervention  
43 with parents' agreement --

43

44 COMMISSIONER: All I'm trying to get clear is that you  
45 need one of two preconditions to delegate power. One is  
46 that the child is - this is under section 148BB.

47

A. Yes.

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COMMISSIONER: One is that the child is a child in need of protection; and, the other, or likely to become a child in need of protection. Now, if neither of those conditions exist, as I would read this section, there's no power to delegate anything.

A. But, Commissioner, what I'm saying is there's no requirement for child in need of protection to be established before an order's revoked. So the court may allow the revocation of the order but still think the child's in need of protection.

COMMISSIONER: So in this scenario that we're looking at you're saying that the court could revoke the long-term guardianship order?

A. Yes.

COMMISSIONER: And, in the absence of any other order made presumably contemporaneously, that would bring to an end the department's involvement with this child, would it not?

A. No, Commissioner. It would if the parent didn't agree to work voluntarily with the department. So if they had still assessed the child was in need of protection but the order was no longer appropriate they would - I would assume they would have some sort of engagement or agreement from the parents to work with Child Safety. So the child would still be in need of protection, which means that the case planning provisions can still be delegated.

COMMISSIONER: I'll have to digest that.

A. It's the same issue from this morning with respect to the court being able to revoke a child protection order but the child still being in need of protection. It goes back to that same issue.

COMMISSIONER: Well, I can understand the court being asked to revoke a particular kind of order because as circumstances have evolved, say, that order is unnecessarily intrusive in some way or another --

A. Yes.

COMMISSIONER: -- and protection can be afforded by something less than what had been ordered previously; that's effectively what I understood you were saying?

A. Yes.

COMMISSIONER: So you can revoke the order because -

1 I mean, another way to look at it is that the child is in  
2 need of protection but can be adequately protected by a  
3 different mechanism --

4 A. Mechanism, yes.

5

6 COMMISSIONER: -- of some sort.

7 A. Yes.

8

9 COMMISSIONER: I follow. Thank you.

10

11 MS SWEET: And you see just at page 402 the first dot  
12 point under "Discussion" is that case management recently  
13 moved across to and there's a reference to a particular  
14 service centre? Under "Discussion" that's the first dot  
15 point?

16 A. Sorry, 403; yes.

17

18 Q. 402, yes. And that was the basis of my question  
19 earlier; did you accept that this was sort of a first -  
20 where there was the discussion between the mother and the  
21 CSO, was this sort of the first discussion having - once  
22 there had been a change of child safety service centre. So  
23 is it fair to take from case management recently moved  
24 across to this service centre that there has been a move?

25 A. I mean, I think - so this document or that discussion  
26 is dated 6 June and that original case note in terms of  
27 that conversation was May --

28

29 Q. Yes.

30 A. -- it makes sense that the move to that service centre  
31 would have happened approximately at that time.

32

33 Q. Yes. And in giving consideration to an 82(2) decision  
34 would it be your legal advice that the case planning and  
35 case management that had occurred at the previous centre  
36 should be gathered and considered?

37 A. Yes, particularly if it was a newly transferred  
38 matter.

39

40 Q. And particularly if the child has been self-placing  
41 for two years --

42 A. Yes.

43

44 Q. -- one would want to understand what the department's  
45 involvement with the child had been, what the parent or  
46 attitudes had been during those two years, whether the  
47 child was getting the needs met?

1 A. Yes.  
2  
3 Q. Okay. All right. And then if I can take you  
4 briefly - then you'd accept from me that paperwork is then  
5 put in place for the delegated authority?  
6 A. Yes, I'd accept that.  
7  
8 Q. I'll take you to 415 and you'll see - tell me when you  
9 have that?  
10 A. Yes.  
11  
12 Q. So it's an email 21 June 2024. There's an attachment  
13 and it refers to the delegated authority. That delegated  
14 authority, see a letter of request for delegation of  
15 functions and powers for the particular child; do you see  
16 that --  
17 A. At 415?  
18  
19 Q. Yes, where there's the subject line "attachment"?  
20 A. The subject, yes, apologies.  
21  
22 Q. And there's the cultural practice adviser:  
23  
24 *Congratulations, everyone. I'm so happy*  
25 *for the family in being all safely back*  
26 *together at home.*  
27  
28 And the proceeding pages are just getting the documentation  
29 correct?  
30 A. Yes.  
31  
32 Q. Okay. So that's happened by 21 June. Can I then take  
33 you to 410, which is a case note. So we've gone from  
34 the paperwork being in place and then there's a case note.  
35 And if you go to page 412 you'll see that there's a  
36 protected notifier notification; do you see that?  
37 A. Yes.  
38  
39 Q. And that then goes on to detail interactions between  
40 the police and the mother and the subject child?  
41 A. Yes.  
42  
43 Q. So if we look at the information gathered, if we start  
44 with this, the notifier reports that:  
45  
46 *The young person is also a respondent in*  
47 *this matter. The police are unable to take*

1                    *action in the form of a PPN.*

2

3                    Can you tell me what a PPN is?

4                    A.    It's a police protection notice.    So --

5

6                    Q.    Yes, thank you.

7

8                    *They can't take action in the form of that*  
9                    *and have him ousted from the house. As a*  
10                    *result of the child's behaviour the mother*  
11                    *has said that she is unwilling to parent*  
12                    *and house him any longer and wants him out*  
13                    *of the house. The mother made threats to*  
14                    *police multiple times that she would hit or*  
15                    *bash him, and even admitted to having asked*  
16                    *the child's older siblings to come and set*  
17                    *him straight and essentially have him*  
18                    *bashed up. There's a younger brother who's*  
19                    *generally at home during these events, does*  
20                    *not get involved and stays in his room.*  
21                    *The mother's happy to parent and care for*  
22                    *the younger child because he doesn't cause*  
23                    *her any issues.*

24

25                    The notifier says:

26

27                    *The mother's in a very heightened state*  
28                    *when saying and doing these things, and was*  
29                    *at wit's end in having to deal with*  
30                    *the child. The child has significant*  
31                    *mental health issues which result in very*  
32                    *explosive personality, very quickly*  
33                    *triggered and unable to de-escalate by any*  
34                    *means. The mother is also very escalated*  
35                    *in her reactions to the child which results*  
36                    *in repeat calls to services for DV between*  
37                    *the pair.*

38

39                    The notifier reported that:

40

41                    *The child has limited options for family*  
42                    *housing. The father does not proactively*  
43                    *parent, and will accept him at the house*  
44                    *but won't care for, feed, clothe him and*  
45                    *will just let him fend for himself.*

46

47                    The notifier is of the opinion that:

1  
2 Without intervention, this will continue to  
3 be a repeat call for service until DV  
4 action can be taken out. The mother's  
5 unwilling to make complaints or statements  
6 for any criminal offences that occur as a  
7 result of the DV events. When the police  
8 attended, both the child and the mother can  
9 be quickly calmed down and are very  
10 friendly once separated and spoken to.  
11 They quickly return to a caring mother/son  
12 dynamic, but repeat calls to service  
13 indicate it doesn't take much for arguments  
14 to reach an excessive level where police  
15 intervention is required. The house is  
16 quite messy, generally unhygienic and  
17 unorganised, but effort is made by the  
18 mother, and plenty of food, clean clothes  
19 and appropriate bedding exists.  
20

21 Family's impacted by repetitive DV. The  
22 mother is a respondent or an aggrieved in  
23 17 lots of DV relationships with family or  
24 ex-partners. Likely suffers from  
25 undiagnosed mental health. The child does  
26 not have a supportive family dynamic with  
27 positive role models or persons willing to  
28 care for him and help manage his mental  
29 health concerns and developmental  
30 challenges.  
31

32 It then goes on to say a couple of points down that:  
33

34 The child does have other close relatives,  
35 including his father, who he occasionally  
36 resides with, who is in and out of prison,  
37 abused drug and alcohol, and these persons  
38 are significantly present enough to have an  
39 influence on him and his wellbeing.  
40 Enrolled with a youth support worker.  
41 Doesn't always actively engage in visits  
42 and does not feel this is helping him.  
43 He's enrolled in a particular high school  
44 but has missed recent terms. Both the  
45 mother and the child intend for him to  
46 return at the beginning of next term. Most  
47 interactions with the family are DV in

1 nature, most recently involving both the  
2 child as a respondent and the mother as the  
3 aggrieved, but the reverse has also  
4 occurred, as been reported with the child  
5 named as the aggrieved.

6  
7 The child has also been present during many  
8 police interactions at the current  
9 residence with the mother and other DV  
10 respondents. The child has previously been  
11 in the care of Child Safety when he was  
12 younger.

13  
14 Although, as we know, there is a current order in place.  
15 The child was taken to the father and aunty's home at a  
16 particular suburb:

17  
18 *These persons are known to abuse drugs and*  
19 *alcohol. This is not an ideal situation.*  
20 *There are no other options available to the*  
21 *child. The notifier is aware that police*  
22 *attended the address of the child,*  
23 *confirmed adults were home willing to take*  
24 *him and not under the influence of any*  
25 *drugs or alcohol. This option is temporary*  
26 *and the child will likely return home to*  
27 *his mother's care after a few days.*

28  
29 And then it goes down three sort of lines down:

30  
31 *Ongoing intervention CSO was advised of*  
32 *the concerns via email for further*  
33 *discussion with the family and the*  
34 *management via casework. No further action*  
35 *will be taken by the relevant regional*  
36 *intake service.*

37  
38 Looking at that, does it seem that the basis of the 51VAA  
39 review on your advice was quite extremely premature and the  
40 fact that there are significant issues that mean this boy's  
41 needs were not being met by his parents or by Child Safety?  
42 A. No, because I didn't accept that the 51VAA review was  
43 a decision to make an 82(2) placement decision or decision  
44 to revoke the order. In my view, it was the starting point  
45 to consider those things. That delegated authority from  
46 the previous email I think was 21 June. These are concerns  
47 received on 1 July.

1  
2 Q. Yes.  
3 A. I would be interested to see what response the  
4 delegated authority team took in terms of assessing these  
5 things, investigating these things, and what response the  
6 service centre took in working with them through these  
7 issues. But none of these issues in this notification are  
8 outside the scope of what Child Safety sees on a daily  
9 basis.  
10  
11 Q. Yes.  
12  
13 COMMISSIONER: Just remind me of the chronology as between  
14 the report and this file note?  
15 A. I believe the discussion in the report was 10 June.  
16  
17 COMMISSIONER: Sorry, so what's the page number of the  
18 report again?  
19  
20 MS SWEET: When you say the "report" --  
21  
22 COMMISSIONER: I mean the review.  
23  
24 MS SWEET: The review?  
25  
26 COMMISSIONER: Yes.  
27  
28 MS SWEET: The review is 400, from memory.  
29  
30 COMMISSIONER: Right.  
31  
32 MS SWEET: Where there's the review of whether permanency  
33 could be best achieved by other measures.  
34  
35 COMMISSIONER: Yes, that's right.  
36 A. So that's 11 June.  
37  
38 MS SWEET: Yes.  
39 A. It's approved by the manager.  
40  
41 COMMISSIONER: 11 June 2024?  
42 A. '24.  
43  
44 MS SWEET: Yes.  
45  
46 COMMISSIONER: And this note is?  
47

1 MS SWEET: So this notification is --

2

3 COMMISSIONER: A bit later.

4 A. 1 July.

5

6 MS SWEET: 1 July 2024.

7 A. With the delegation being approved on 21 June.

8

9 COMMISSIONER: But the description in the note of  
10 the circumstances pertaining at the home don't suggest, in  
11 fact suggest - I'll start again, suggest that these issues  
12 were of longstanding and ongoing, and yet there is not a  
13 single mention of those matters in the review.

14 A. So these ongoing concerns were recorded on 1 July.

15

16 COMMISSIONER: Yes, but looking at the nature of them --

17 A. But I take your point the historical nature of the  
18 child protection concerns were known to the department and  
19 were known to the court when the long-term guardianship  
20 order was made in 2017. That review report doesn't  
21 specifically go through each child protection concern or  
22 the historical context of child protection concerns.

23

24 COMMISSIONER: But the point is this: the review report  
25 comes to the conclusion that it would be appropriate - I'm  
26 paraphrasing - to at least embark upon a changed set of  
27 circumstances --

28

29 MS SWEET: To consider revocation.

30

31 COMMISSIONER: -- to consider revocation against the  
32 background of what appear to be quite long-term significant  
33 concerns for the wellbeing of this child, allowing of  
34 course that this is arising in a context where the child  
35 himself has chosen to place back at the family home or back  
36 with the mother. All the same, the review, if one were  
37 reading it without the benefit of this material, wouldn't  
38 tell you anything about what is actually going on and what  
39 appears to have been going on for a substantial period of  
40 time. I mean, that's part of the - well, it's worthy of  
41 observation that there's a conclusion for a recommendation  
42 in terms of reviewing the long-term guardianship order  
43 without reference to these matters. Am I right in thinking  
44 that no evaluation has been made by the OCFOS lawyers in  
45 relation to this process?

46 A. No, Commissioner, we wouldn't be involved at that  
47 early process in June 2024.

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COMMISSIONER: All right. Thank you. Ms Sweet.

MS SWEET: Thank you.

I will take you to it but if you could accept from me that there's a Director-General briefing note that's also the next day about the delegated authority and approving the delegated authority. Based on that file note what type of advice would you give about whether or not the delegated authority should proceed where the situation seems more complicated than the reviews suggest and whether or not this is an appropriate case for an 82(2) placement decision or a long-term revocation of the guardianship order?

A. I would give - sorry, are you saying the day after these concerns were received, not 21 June?

Q. Yes. So I'll just take you quickly. If you go to 389. Just let me know when you have that.

A. Yes.

Q. And do you see a heading "Director-General briefing note"?

A. Okay, yeah.

Q. And the contact officer is the regional executive director of a particular region; you see that?

A. Yes.

Q. Yes. And you'll see that if you go over to page 391 there's an approval --

A. Yes.

Q. -- dated 2 July 2024?

A. Yes.

Q. So just to orient you in that way. So we've got the significant concerns notice that seem to be longstanding, and I think I asked you three questions at once and I ought not to have. So let's break it down. First of all, are these concerns something that should be noted prior to any decision to delegate to the delegated authority and be given consideration as to whether or not this is an appropriate case for delegated authority?

A. I would expect that the Director-General was updated. So, I mean, I can see that the briefing note was first endorsed on 28 June, and obviously these concerns were

1 recorded on 1 July. So I don't know if there was any  
2 further update that went to the Director-General. But if  
3 I was asked I would say she should be given that update  
4 before making the decision.

5  
6 Q. Yes. And I was not trying to extract from you whether  
7 or not that had happened, but why would that be important?

8 A. I think as additional context for what's going on for  
9 the child and the family. I think in this briefing note it  
10 talks to the mother consenting on 10 June to work with the  
11 delegated authority and attempts to get the father's  
12 engagement.

13  
14 Q. Yes.

15 A. I think the new concerns are relevant. But it  
16 wouldn't be my advice that the new concerns are sufficient  
17 so as to not progress the delegation or the delegated  
18 authority.

19  
20 Q. And if, having seen those concerns and say - all  
21 right, let me ask you this. Would it give you any concern  
22 to proceed with a delegation of the placement power in  
23 circumstances where the complexity has just become  
24 apparent?

25 A. For an immediate delegation - not for the delegation  
26 of a placement power. So I actually wouldn't have an issue  
27 with that because I think there's evidence to support that  
28 there's far more likelihood this family and this young  
29 person will engage with the community-controlled  
30 organisation than they will with the department. So, the  
31 actual delegation of the power, I don't necessarily think  
32 there's an issue with that. But I would have concerns if  
33 it was proposed that that decision would be made  
34 immediately at the same time.

35  
36 COMMISSIONER: Can we just interrogate that proposition a  
37 little bit. The power is a power to place, to make a  
38 placement decision in the context of the constraints that  
39 the statute itself provides and, I would say, governed by  
40 the principles in the Act, including the paramount  
41 principle and the other principles that we looked at a  
42 little while ago. The proposition is that that power  
43 should be delegated to a community-controlled organisation.  
44 Is there any reason to not - against the background of the  
45 concerns that have been detailed in the note of 1 July that  
46 you were taken to, is there reason to be concerned about  
47 the exercise of that power being impartially undertaken

1 consistent with the principles in the Act that focus upon  
2 what is in the best interests of the child, specifically  
3 the paramount principle and the adumbration of that  
4 paramount principle in section 5, including the Aboriginal  
5 placement principles? You see, what on its face could be  
6 problematic is if that power is exercised by an entity that  
7 has an interest which is not exclusively the interrogation  
8 of the best interest of the child. Now, do you not see any  
9 problem with that?

10 A. I guess, Commissioner, I disagree because I think if a  
11 community-controlled organisation is making a decision they  
12 may look at cultural connection and culture differently to  
13 how the department might. But I still think they're guided  
14 by the paramount principle in terms of safety, wellbeing  
15 and best interest.

16  
17 COMMISSIONER: Well, they're governed by it, aren't they?  
18 A. Yes.

19  
20 COMMISSIONER: They must be because that power itself is  
21 governed by those requirements?

22 A. Yes.

23  
24 COMMISSIONER: But the power itself, as it presently  
25 stands, is not subject to overview and scrutiny by the  
26 courts. So we have an asymmetrical situation where the  
27 court's power is invoked to remove but not called upon to  
28 scrutinise placement. And so the situation is that the  
29 decision, whether made by the Chief Executive or made by a  
30 delegate, is not subject to scrutiny by a court.

31 A. Yes.

32  
33 COMMISSIONER: And that means there is not an opportunity  
34 for interested parties to come forward and, if so advised,  
35 express views or put on evidence to the contrary of a  
36 particular decision; that's correct, isn't it?

37 A. That's correct.

38  
39 COMMISSIONER: And at the moment all that one could do is  
40 wait for a letter explaining the decision and, if you're,  
41 say, a parent aggrieved by it or - it's really only a  
42 parent, I think --

43 A. I believe it's the parent or the child, and --

44  
45 COMMISSIONER: And the "parent" narrowly defined, isn't  
46 it? Who can appeal the decision?

47 A. So a person affected by the decision, which for a

1 placement decision is a parent broadly defined because it  
2 falls into that part of the Act. There's also a right for  
3 the Office of the Public Guardian to appeal a placement  
4 decision if they disagree with a placement decision. So  
5 the OPG under their legislation, the parent or the child.

6  
7 COMMISSIONER: So "parent" for the purposes of 82(2) is  
8 the broad definition?

9 A. Broad definition.

10  
11 COMMISSIONER: And you say that the right to seek a review  
12 of the decision at QCAT applies to a parent broadly defined  
13 as well?

14 A. Yes.

15  
16 COMMISSIONER: All right. But at the minute the present  
17 process would involve review only if an application were  
18 made to QCAT to review the decision, either to make the  
19 placement decision or not make it?

20 A. Yeah, a formal review would - so a parent might ask  
21 Child Safety to internally review or to look at a decision  
22 or through the complaints process that might occur. But a  
23 tribunal or a court's oversight would only occur if a  
24 person aggrieved by the decision made an application to  
25 QCAT.

26  
27 COMMISSIONER: Do you think it would be desirable to have  
28 court oversight of the power that is presently exercised  
29 bereft of court oversight?

30 A. I think, Commissioner, one of the reasons I brought  
31 this case up was that in my view - and I appreciate that  
32 there's evidentiary issues and the department's evidence  
33 wasn't perfect, but this was a case where I thought there  
34 was a barrier to invoking the court relooking at it. So  
35 that original child protection order was made in 2017.  
36 I think this child would have been 10 or 11, or maybe nine  
37 at that point. Apologies for my math.

38  
39 MS SWEET: Born in '08.

40 A. Born in '08. So that child was nine years old. We  
41 had this two-year period where essentially the department  
42 hadn't provided any practical support for this young person  
43 or this family. The opening of the court reconsidering it  
44 and relooking at it would have meant that the parents could  
45 get legal advice. It would have meant that a separate  
46 representative could have been appointed to look at whether  
47 there was any utility in this child protection order until

1 the child was 18 remained.

2

3 COMMISSIONER: Well, I accept that. That's on the facts  
4 of this particular case. I understood the point you'd made  
5 back in December and you've just repeated is that the  
6 barrier to the court looking at it was a refusal on the  
7 part of the Director to make the application.

8 A. Well, it was the refusal to make the application  
9 unless Child Safety could prove the child was not in need  
10 of protection. So it goes back to that legal technicality.

11

12 COMMISSIONER: Well, I would think the question of whether  
13 a child is a child in need of protection is more than a  
14 technicality, but you pointed out what you mean by that by  
15 reference to section 65. Okay; I understand that. But on  
16 the facts of this case the court did not have oversight  
17 because the Director decided, in the absence of being  
18 provided with whatever material he required, he wasn't  
19 going to make the application. So I understand that's how  
20 the court's oversight did not occur on the facts of this  
21 particular case.

22 A. Yes.

23

24 COMMISSIONER: But I'm asking you a broader question which  
25 is, in relation to the exercise of power by the department  
26 under section 82(2), should that exercise of power in  
27 certain circumstances at least yet to be sort of fully  
28 explored be subject to court oversight?

29 A. Commissioner, I think it's difficult to answer that  
30 question because it's difficult to operationalise in terms  
31 of the capacity of the courts. Like, we know that there's  
32 already significant waiting lists or waiting periods before  
33 we can get a first mention, and if we have circumstances  
34 where Child Safety thinks a child can go safely home or if  
35 any placement decision is being made I would worry about  
36 essentially clogging the courts up with decisions like that  
37 and the delay that would impact other children.

38

39 COMMISSIONER: That's doubtless a valid consideration.  
40 But we operationalise at the front end but it would appear  
41 not at the back end, and that's what I mean by an  
42 asymmetry. You invoke the court's power to remove a child,  
43 but then the executive branch arrogates to itself the power  
44 to undo what was done in the first place only by the  
45 exercise of judicial power. And the question is is that  
46 likely to put the safety of children at risk.

47 A. Commissioner, I think those two things are different.

1 I think the court is tasked with, "Is an order required?  
2 Do we need it? Does Child Safety need a child protection  
3 order to keep this child safe" --

4

5 COMMISSIONER: But it's not the order per se. It's the  
6 legislation requires the court to decide whether a child  
7 should be removed; okay?

8 A. Yes.

9

10 COMMISSIONER: And at least as the system presently  
11 operates that's a decision the parliament has decided is  
12 best left in the hands of the courts, I would suggest  
13 because of the consequential nature of that decision for  
14 the families who are affected, and the significant issue of  
15 the protection of the child. So that's the front end, as  
16 it were, if you look at this as a bookend sort of analogy.

17

18 But at the other end the court doesn't get a say because  
19 there are all these powers that are unconstrained, it would  
20 appear, even by internal legal advice much less the  
21 involvement of the court in evaluation of whether a  
22 decision to return the child either to the child's parents  
23 from whom the child was removed or the extended definition  
24 of "parents" should or should not occur. And my question  
25 is is that a desirable process.

26 A. Commissioner, I think it is desirable because I think  
27 if it was that you had to go to court every time a  
28 placement decision changed or every time a child was being  
29 placed at home I would worry that decisions to reunify  
30 children to their family would be delayed by further court  
31 processes. I do think the decision to revoke an order so  
32 that Child Safety doesn't need to be involved at all  
33 anymore, that should go to a court. But I don't agree that  
34 every placement decision should go to a court.

35

36 COMMISSIONER: Well, I said a minute ago that there's a  
37 question as to whether - well, it may be that it's  
38 impractical that every placement decision is subject to  
39 judicial oversight, but it may be that certain placement  
40 decisions in certain contexts ought to be. And when we are  
41 talking about reunification, which is not defined in the  
42 Act as I would read it, you're talking about the at least  
43 aspirationally long-term return of the child. And in those  
44 circumstances I'm wondering whether the process shouldn't  
45 involve evaluation by an independent party, namely the  
46 courts, because the risks of harm to the child which was  
47 the basis in the first place for removing the child need no

1 longer to exist if one is to be rational about what's being  
2 done to protect children because it can't be rational to  
3 return a child without being satisfied that the harm which  
4 led to the removal is no longer operative. That's the way  
5 I'm putting it to you.

6 A. Look, I think there could be benefit in even like an  
7 alternative dispute resolution process where the department  
8 was proposing to place at home with the parent and seeing  
9 whether, you know, the other parent or the child, if anyone  
10 disagreed. With the benefit of legal advice you  
11 potentially could take those ones where there was a dispute  
12 back to court. But my concern would be in relation to the  
13 court delay and the potential to not progress  
14 reunifications if you first have to go to the court before  
15 that can happen.

16  
17 But I think it could be explored in terms of putting people  
18 on notice that a proposed section 82(2) was being  
19 considered, letting parents and the young person get legal  
20 advice on that decision, and then if there's any dispute  
21 amongst all of the parties then potentially it can go to  
22 court for adjudication.

23  
24 COMMISSIONER: Look, there are all sorts of mechanisms  
25 that could be fashioned within a court process that would  
26 hopefully facilitate all of the ways in which outcomes  
27 could be mediated rather than adjudicated; I accept that.  
28 I'm just trying to understand it as a matter of principle  
29 presently which is, as I put it to you, whether there is a  
30 risk in the process as it presently exists being  
31 unscrutinised that children might be returned - and this  
32 would apply to any child, whether from an Aboriginal or  
33 Torres Strait Islander background or not - if the placement  
34 decision is evaluated only internally and it would seem  
35 also without the input of lawyers advising the department  
36 as to the evaluation by reference to the principles in the  
37 Act.

38 A. Commissioner, I think I said this in December, but my  
39 concern there is that in my experience lawyers are more  
40 risk averse than child safety practitioners and I would be  
41 concerned about the number of children that would remain in  
42 care and not be reunified in those circumstances.

43  
44 COMMISSIONER: Well, that may be so. But a false negative  
45 decision, that is a decision not to remove, that turns out  
46 not to be a good decision, I accept with the benefit of  
47 hindsight, carries substantial risk if things go badly for

1 the child. And, as I understand the system presently,  
2 there is no evaluation by any person other than the  
3 operational arm of the department when it comes to a  
4 decision at the outset that action is not required. We  
5 discussed that this morning.

6  
7 And the false negative at the other end, at the  
8 reunification end, is a decision to reunify where that has  
9 not been evaluated by anybody other than the internal  
10 operational organ of the department. And that, too,  
11 carries with it the risk of harm to the child if later  
12 events should develop in a way that demonstrate that that  
13 decision, again with the benefit of hindsight, was not a  
14 good one for the child.

15 A. Yes.

16  
17 COMMISSIONER: So if one recognises the risks of those two  
18 outcomes either at the outset or at the end then shouldn't  
19 there be a process designed to test and evaluate those  
20 decisions in the interest of keeping children safe?

21 A. I think there should be a process, there should be a  
22 mechanism, I just don't necessarily think that should be a  
23 court making that decision.

24  
25 COMMISSIONER: All right.

26 A. I think in my experience it's quite difficult to  
27 satisfy a court that the department needs custody. And  
28 I think if you had Child Safety saying, "We think this is  
29 safe enough, we've assessed it's safe enough for the child  
30 to return home," I would be very surprised to come across a  
31 magistrate that disagreed with that in terms of a placement  
32 decision. I would worry about it causing unnecessary delay  
33 and the potential that less children will get removed and  
34 the number of children in care would increase if they had  
35 to go through a process of legal advice or a court process  
36 to reunify children.

37  
38 COMMISSIONER: Well, you may well be right about that.  
39 But the question is what is the higher objective, what is  
40 the fundamental obligation of this system and how is that  
41 achieved. Do you have any suggestions as to what body by  
42 way of review could be fashioned to provide evaluation and  
43 oversight of intradepartmental decisions of this  
44 significance?

45 A. Commissioner, I do think there's some difficulties  
46 with the Act as it's currently drafted in that there's  
47 overlaps between QCAT and the Childrens Court in relation

1 to contact decisions, and it can get complicated. But I do  
2 think there's utility in a tribunal or less formal type  
3 response to some administrative decisions so that families  
4 and young people have the ability to challenge decisions or  
5 ask questions about decisions or have them reviewed without  
6 having to go to a court. I'm not sure whether that's a  
7 specialist commission or it's, you know, something done  
8 within QCAT. I'm aware that that's all being reviewed at  
9 the moment; so that likely complicates it.

10  
11 I do also think that - I think one of the consistent  
12 complaints I've heard over the last 15 years is that if a  
13 parent or anyone wants to complain about the department  
14 they have to complain to the department about the  
15 department and then the department investigates it  
16 themselves. I do think potentially having an external  
17 complaints mechanism might assist with some of those  
18 administrative decisions being reviewed in an actually  
19 independent way. But I haven't specifically thought about  
20 what that could look like in any great detail.

21  
22 COMMISSIONER: There's a lot of different subject matters  
23 about which somebody might complain, given the nature of  
24 the jurisdiction and the human interaction, the human  
25 services framework.

26 A. Yes.

27  
28 COMMISSIONER: But I was focusing on the critical  
29 decisions of entry and exit, if I can put it that way.

30 A. Yes.

31  
32 COMMISSIONER: And of course a lot happens in between and  
33 there's a lot of decisions that have to be made of pretty  
34 granular nature because the State has become the parent  
35 once the child is under the - well, under the authority of  
36 the department in one way or another. So, yes, I hear what  
37 you say about complaints tribunals that might be able to  
38 deal with many topics that aren't perhaps presently being  
39 well addressed perhaps including for the reason you've  
40 identified. But, the ingress and exit of the child from  
41 the care of the State, they're two critical points.  
42 I think you agreed that when it comes to the original  
43 removal of the child that should be something that the  
44 court should sanction?

45 A. Absolutely.

46  
47 COMMISSIONER: Right. Then why isn't the egress or exit

1 of the child also something that the court should sanction;  
2 not every placement decision along the way, but the  
3 aspirational exit of the child from the system?

4 A. Commissioner, I think my reticence comes from  
5 practising in child protection circa 2010 when the  
6 department as practitioners were exceptionally risk averse  
7 and it was very, very difficult to have a child reunified  
8 to a parent who I was representing at the time. But even  
9 when I joined the department reunifications to family or to  
10 parents did not happen as frequently as they currently  
11 happen. And I think in introducing the new framework for  
12 practice the department shifted from a practice perspective  
13 to being strengths based and looking at what protective  
14 factors there are rather than in being punitive to parents.  
15 And, in my view, that shifted the practitioners from being  
16 very risk averse to being more strengths based. I worry  
17 that if they then have to go through lawyers to get to that  
18 point it will put them back to the 2010 practice.

19  
20 COMMISSIONER: Well, if I may say so, you might be  
21 conflating a couple of issues. I'm not suggesting that  
22 there be any punitive element. The principles in the Act  
23 need to be considered, subject to agreeing that the  
24 principles are sound principles, which presently I regard  
25 as sort of particulars of the overarching or paramount  
26 principle. If the department's approach internally to  
27 reunification is as good as you say it is then it ought be  
28 easily and readily subject to evaluation and scrutiny. So  
29 I take your point about the process perhaps taking longer.  
30 But against that is the potential for reassurance that the  
31 process which if good will be readily identified as being  
32 good and ought be readily available to be evaluated. Now,  
33 maybe that should be done by some other independent entity  
34 other than the courts or maybe the court is best placed to  
35 make that evaluation. And it doesn't follow, I don't  
36 think, that the court process needs to be unduly  
37 legalistic. It should be tailored to the subject matter  
38 that is in issue, which is the interest and welfare of  
39 the child.

40 A. I accept that, Commissioner. But I say with the  
41 bifurcated model that's not where we will be.

42  
43 COMMISSIONER: No.

44 A. And that's from my experience in 2016, 2017, every -  
45 when we tried to revoke orders. So it was my practice as a  
46 court coordinator to stand up in court and say if a parent  
47 had addressed the concerns, even if it was two weeks before

1 the end of the order, and I never had a magistrate say,  
2 "You haven't sufficient evidence to do a revocation." But  
3 we did see matters referred to the Director's office where  
4 there was insufficient evidence. And I'm not saying that  
5 as a criticism of the Director's office. I understand that  
6 their brief is to look at the evidence and make sure it  
7 reaches a standard. I'm saying that the evidence the court  
8 would need to be satisfied that a child should go home  
9 shouldn't be held to the same standard as a decision to  
10 remove the child.

11  
12 COMMISSIONER: I'm not sure why that follows as a matter  
13 of principle because should that evidence - should it be  
14 required that that evidence demonstrate that the risk that  
15 existed that justified the removal is no longer operative,  
16 and it could include because of other arrangements that  
17 have been made with the family for a whole variety of  
18 reasons, there's no sort of single suite of things that  
19 might have changed, but surely it has to be established  
20 that things have changed?

21 A. I don't think it's necessarily that you'll be able to  
22 evidence that the risk is no longer there; but the risk  
23 should be mitigated in some way and they will be able to  
24 evidence that before they're reunifying the child to  
25 family. So it's either mitigated or reunification is  
26 happening to, you know, a different parent or a different  
27 family member so that that risk is managed and contained.  
28 But I think it's very difficult to establish that the risk  
29 is gone because I think that's not what we see with  
30 families engaged.

31  
32 COMMISSIONER: Well, that the risk is nil - I mean,  
33 I accept that. None of us live in a risk-free environment.  
34 So you've got to be realistic about the risk evaluation.

35  
36 And just finally on that point you mentioned the bifurcated  
37 model, which is another element that presently exists that  
38 I've heard you criticise, and I understand why you do. But  
39 let's assume if that were no longer the case, if the  
40 jurisdiction wasn't bifurcated, if one makes that  
41 assumption, then that might remove a number of present  
42 impediments that cause the process to be clunky in a  
43 variety of ways.

44 A. Yes.

45  
46 COMMISSIONER: If you could do that then it may be  
47 possible to fashion some evaluation of a reunification

1 decision. And by reunification, again, we have to be clear  
2 about what we're talking about because one risk mitigation  
3 may be not to reunify the child with the child's parents  
4 but with some family member or kinship member.

5 A. Yes.

6

7 COMMISSIONER: In any event, thank you for that.  
8 Ms Sweet.

9

10 MS SWEET: Thank you, Your Honour.

11

12 Ms Martin, can I take you now to page 489 of the bundle?

13

14

15 Q. Thank you. And do you see there there is an email  
16 dated Thursday, July 18, 2024?

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*I have yarned to the mother today. I have not been able to connect with the father but I'll do an unannounced visit this afternoon. The mother and the child would both like to see an 82(2) decision be made as the child has been self-placing with the mother for approximately two years. I am preparing information for a section 82(2) recommendation to our CEO [who is the delegate] to make the decision for the child to be placed at home with his mother.*

This is less than - just over two weeks after the notification that we've just been dealing with:

*As our colleagues and partners, please can I request any feedback and thoughts that you believe is important to take into consideration and incorporate into my recommendation to our CEO. Could you please indicate if you support the recommendation above. I'll be going out to*

1           *the child and the mother tomorrow to*  
2           *complete NATs ...*

3

4           What are NATs?

5           A.    I don't know.

6

7           Q.    Thank you:

8

9           *... in order to prepare for a family*  
10          *meeting that will support development of a*  
11          *family plan ...*

12

13          So there's not yet a plan in place:

14

15          *... that will guide the next six months for*  
16          *the child officially living with mum, and*  
17          *mum and the kids being supported in the way*  
18          *she identifies she needs.*

19

20          And then just moving backwards to 488 you'll see that the  
21          manager of the service centre says:

22

23          *Supported. Spoke with [a person who*  
24          *I understand is the CSO] who also supports.*  
25          *No additional considerations or information*  
26          *provided to the delegate.*

27

28          The cultural practice adviser also supports. Then over the  
29          page again, 487, the senior team leader also very much  
30          supported:

31

32          *Is there a possibility of endorsing this*  
33          *for dad's household too?*

34

35          Noting that he goes between both addresses. And then above  
36          that the senior practitioner also supports. So there's a  
37          chorus of support and there is no mention by anybody, be it  
38          the Child Safety or the delegate, about, "Hey, there was an  
39          incident on 1 July. Dad can't meet his needs and really  
40          mum can't meet his needs either." But the delegate wants  
41          to go ahead with an 82(2) placement and there's no pushback  
42          from Child Safety, who at the very least must know about  
43          the report. In your position would you have advised that  
44          the delegate should take into account that notification of  
45          concerns from 1 July in considering whether or not to make  
46          the placement at that time?

47

A.    Yes.

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Q. Would you advise that in fact there are reasons based on that notification on 1 July to remove the child from the mother entirely?

A. Not necessarily. So the child is already in the guardianship of the Chief Executive.

Q. Yes.

A. The Chief Executive can only get a warrant if there's been an unlawful removal of the child.

Q. Yes.

A. I think in these circumstances there's no suggestion there's an unlawful removal of the child.

Q. No, I don't think there is.

A. No. So I actually don't think the Chief Executive has any authority to forcibly remove the young person from the home. But I think it's very difficult to suggest what advice I would give without a full picture. So I don't know what conversations the delegated authority team has had with the family, has had with the young person in the days between 1 July and 18 July. I don't know if any assessments have happened. I really can't hypothesise on that. And I know that our service centres and the community-controlled organisations work together in partnership. And I know that sometimes one-line emails endorsing does not fully reflect the scope of partnership and work and consultation that happens. So I would suspect that there's a lot more communication and conversation and partnership that's happened than is documented here. So I wouldn't want to speculate on what advice I would or wouldn't have given to the delegate.

COMMISSIONER: Ms Martin, if one reads the note at page 412 and understands that the note records a history that is not, you know, a passing single event but quite a substantial history of significant problems associated with the safety of this child or certainly relevant to the safety of the child; do you agree?

A. Yes.

COMMISSIONER: With the request for support from the department of the child being formally placed with the mother. Now, I accept that there's a degree of kind of sort of a slightly academic nature to this because the child is placing himself there. But what is being

1 proposed, for what reason is not clear, is that the child  
2 be formally placed; "officially" is the words at 489, "The  
3 child officially living with mum", that's at 489, the email  
4 from the delegated authority. Why in the circumstances  
5 that are described in the note of 1 July would there be  
6 such ready support as appears to have been the case for  
7 that proposition?

8 A. Commissioner, the historical circumstances of that  
9 family wouldn't be new to the department. The department  
10 knew that.

11  
12 COMMISSIONER: Sure.

13 A. They knew this child was on a long-term order. They  
14 obviously - the incident that occurred - I don't have the  
15 details as to whether that was assessed or explored or -  
16 the circumstances of that incident I suspect may have been  
17 explained in some way --

18  
19 COMMISSIONER: Ms Martin, but we've sought from  
20 the department all of this material because of  
21 the observation you made or motivated by the observation  
22 you made in December that the Director was standing in the  
23 way, effectively - I'm paraphrasing, Ms Martin - of the  
24 application supported by the department, supported by the  
25 delegated authority for the revocation of the long-term  
26 guardianship order. That's a separate question but not  
27 unrelated to this question of whether the child is safe in  
28 the place where the child has self-placed, which makes it a  
29 somewhat - to a degree a bit of an academic argument  
30 because the child's decided where he's going to be;  
31 I accept that.

32  
33 But the point is nevertheless why it would be the case that  
34 in the circumstances that are described in that note of  
35 1 July the department would so readily accept the  
36 proposition that the child ought be officially placed in  
37 that circumstance, or with the mother, and, just to sort of  
38 make it clear what I'm thinking, it rather speaks to me of  
39 the need for evaluation of decisions which involve  
40 placement and reunification which are made internally on  
41 the basis of this material without evaluation of the  
42 factors that stand out, cry out for evaluation as set out  
43 in the email of 1 July.

44  
45 Now, it may be that there are other explanations for the  
46 department's alacrity in agreeing to this proposition, and  
47 I invite the department to come forward and tell me what

1 those other considerations were that aren't apparent on the  
2 face of this material. This is not your work; I understand  
3 that. We're just looking at it through you, if you like.  
4 So, again, the department doesn't seek the input and  
5 evaluation from your office in making decisions about  
6 whether it should support a request of the kind that is  
7 here made in the circumstances that that request was made?  
8 A. Yep.

9  
10 COMMISSIONER: So what can you do about it? Nothing  
11 because you're not asked?

12 A. We're not asked, so we don't give advice on it. But  
13 we might in making a referral to the Director's office ask  
14 for further context around how that decision may have been  
15 made. There's a lot of discussion and consultation that  
16 I'm sure would have occurred outside of the email record or  
17 might be documented on the system. There might be  
18 financial implications --

19  
20 COMMISSIONER: That's fine, Ms Martin --

21 A. -- in terms of the formal placement --

22  
23 COMMISSIONER: -- I don't expect you to make the defence  
24 for the department on this point. They're well represented  
25 here and, if they would want to put on any further  
26 explanation about these particular circumstance, I invite  
27 them to do so. Sorry, Ms Sweet.

28  
29 MS SWEET: Thank you, Commissioner.

30  
31 Can I take you to page 491, please, Ms Martin, which starts  
32 with an email of 2 December 2024?

33 A. Yes.

34  
35 Q. Yes, and I'll just get you to go over the page and  
36 again to 493, and see down the bottom it's a senior team  
37 leader saying - just go up about four lines:

38  
39 *Panel supports revoking LTG to the Chief*  
40 *Executive for the child. The delegated*  
41 *authority team, including the CEO, are*  
42 *supportive of this outcome for the child.*

43  
44 And if you go back to 491 you'll see again that's endorsed  
45 and approved by the manager of the safety centre; you see  
46 that?

47 A. M'hmm.

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Q. And, just down below, the senior team leader:

*Also, after reading the below I would endorse for reference. Good outcome for the family and in line with their self-determination."*

I don't ask you about that. I just ask you to note that there's been that endorsement as at December?

A. Yeah.

Q. Okay. So once there's that endorsement what is your team's involvement? Do you start to prepare the application?

A. So once there's that endorsement the team leader or the CSO would approach my team and ask for a legal consult.

Q. Yes.

A. So we would do a legal consult.

Q. Yes.

A. And in this case it would be a legal consult in relation to progressing a referral to the Director's office to revoke the order.

Q. Yes. And part of that would be advice given on what's required for the affidavit?

A. Yes.

Q. Now, I understand in this bundle, Your Honour, there is legal advice. Privilege is claimed over it.

COMMISSIONER: What's the legal advice? Where do I find it?

MS SWEET: 517, Commissioner.

COMMISSIONER: Who is it from?

MS SWEET: It is an OCFOS lawyer to I think the senior team leader, the CSO and the cultural practice adviser about the revocation.

COMMISSIONER: Do you wish to maintain your claim for privilege in relation to this?

1 MS FREEMAN: Yes, those are my instructions, Commissioner.  
2  
3 COMMISSIONER: It's advice - just so I can understand what  
4 the - you claim that it's legal advice which is subject to  
5 privilege, legal professional privilege?  
6  
7 MS FREEMAN: Yes.  
8  
9 COMMISSIONER: And it's given by a lawyer from within  
10 OCFOS, is it?  
11  
12 MS FREEMAN: Yes.  
13  
14 COMMISSIONER: To whom? To the department?  
15  
16 MS FREEMAN: To the department. To the child safety  
17 officers, as I understand it. So [REDACTED] - sorry. So  
18 DR and then there's some people that the advice is  
19 addressed to, and the first two are child safety officers,  
20 as I understand it, Commissioner.  
21  
22 COMMISSIONER: Well, it's been produced on a confidential  
23 basis.  
24  
25 MS FREEMAN: It has.  
26  
27 COMMISSIONER: So I can look at it for the purposes of at  
28 least forming a view on the face of it that it's  
29 privileged.  
30  
31 MS FREEMAN: Yes. But if Counsel Assisting wish to ask  
32 this witness questions about it and make it available to  
33 the other parties, that's the basis upon which we make the  
34 claim. It's obviously been produced to the Commission, but  
35 the privilege is maintained.  
36  
37 COMMISSIONER: So if she asked questions for my benefit  
38 but the material was not provided to other counsel, there  
39 wouldn't be an objection, I mean provided the content of  
40 the advice is not disclosed openly?  
41  
42 MS FREEMAN: Yes.  
43  
44 COMMISSIONER: Is that the --  
45  
46 MS FREEMAN: I might just have to get some instructions  
47 about that.

1  
2 COMMISSIONER: Yes. Perhaps one way I can deal with this  
3 is to ask other counsel whether you would feel it necessary  
4 to see this material if there were questions asked of this  
5 witness because, if you don't, then - and I suppose I'm  
6 asking you an impossible question in a sense because you  
7 don't know, what you don't know you don't know, but you  
8 might take a risk and then I wouldn't have to rule on the  
9 privilege argument. But on the face of it it seems to be a  
10 privileged document. I mean, there is another approach,  
11 which is the Attorney might see fit to waive privilege in  
12 this.

13  
14 MS FREEMAN: Yes, and my instructions - that has been  
15 looked at today. My instructions are that that won't be  
16 able to happen quickly, unfortunately, and is unlikely to  
17 happen by Wednesday, when this witness is likely to have to  
18 come back. So I might be able to get those instructions,  
19 but unfortunately that process is not something that can  
20 happen fast, Commissioner.

21  
22 COMMISSIONER: No. Well, that's unfortunate and --

23  
24 MS FREEMAN: Yes.

25  
26 COMMISSIONER: Well, I think I am obliged to uphold the  
27 claim for legal professional privilege, and on the face of  
28 it it is a privileged communication. So I will await your  
29 advice as to whether the Attorney is prepared to waive the  
30 privilege. It's certainly a relevant matter. But  
31 otherwise, subject to that, I'll uphold your claim to  
32 privilege.

33  
34 MS FREEMAN: Thank you, Commissioner.

35  
36 COMMISSIONER: And, Ms Sweet, accordingly, I think you  
37 shouldn't ask this witness any questions about it,  
38 otherwise the other parties here may have grounds for being  
39 aggrieved that they haven't been able to look at the  
40 material also.

41  
42 MS FREEMAN: Thank you, Commissioner.

43  
44 COMMISSIONER: Thank you.

45  
46 MS SWEET: Thank you. If I can take you, Ms Martin, to  
47 page 431, and then can I - which is - if you have that,

1 that's an email from the delegated authority to other  
2 people within the delegated authority and Child Safety; do  
3 you see that?

4 A. Yes.

5

6 Q. Yes. And the starting email talks about healing camps  
7 would be perfect for the child and the mother?

8 A. Yes.

9

10 Q. And that relates to an earlier discussion about - so  
11 we're now at the - if we go to page 433, we're now at  
12 10 March 2025?

13 A. Yep.

14

15 Q. And you see this is a delegated authority reporting in  
16 about an incident between the child and the mother where  
17 the police are called to the mother's home due to the  
18 mother and the child fighting. The mother reports that the  
19 child has hit her in the face with a wooden stick, possibly  
20 a wooden paling. The mother is shocked and shaken about  
21 the incident, and explained that the argument started about  
22 the child not being happy that the mother was going to pick  
23 up her vehicle. The mother mentioned that the child stated  
24 the money the child saved was paying for the vehicle to be  
25 repaired is his money, not the mother's. The mother tried  
26 to explain to the child that the financial contribution was  
27 to support the whole family to have a car to be able to get  
28 around and the argument escalated to physical reaction.  
29 The mother then states that the police were judgmental,  
30 discriminated against her and were not helpful. She felt  
31 that instead of supporting her to enforce that the child's  
32 behaviour was not okay they sided with the child and gave  
33 them a pat on the back for assaulting his mother. The  
34 mother mentioned that the child had said things along the  
35 lines of, "You didn't fight for your kids and you're not my  
36 mother." The child's staying at an aunt's house. Although  
37 the mother believes the child is safe with the aunt, she's  
38 not happy about the child being at the aunt's house as the  
39 older cousin of the child has recently been released from  
40 prison and is worried that the child will be influenced to  
41 participate in anti-social activities. The mother stated  
42 this is the first time that the child has assaulted her.  
43 The mother's indicated that the child cannot return to the  
44 house at this time as there's a police investigation. The  
45 delegated authority are saying, "We need further details  
46 about this," and the mother was encouraged to focus on  
47 immediate safety for her, the younger child and the subject

1 child over the weekend with current weather conditions -  
2 I think this is when Cyclone Alan was coming.  
3 A. The cyclone. Yep.

4  
5 Q. And then there's some various requests for people to  
6 do certain things.

7  
8 *Considering the current circumstances,*  
9 *important we offer therapeutic support to*  
10 *the family. There's so much hurt and*  
11 *trauma that has been experienced due to*  
12 *removal, Child Safety involvement, ongoing*  
13 *grief and loss. The mother's response to*  
14 *the child is influenced by her previous*  
15 *experiences of domestic violence,*  
16 *disempowerment and violence experienced*  
17 *from the systems. The child's responses to*  
18 *the mother are influenced by his previous*  
19 *experiences of removal and time in care,*  
20 *which has significantly impacted his*  
21 *attachment to his mother, as well as lack*  
22 *of access to appropriate supports and*  
23 *resources over the years to meet his*  
24 *disability and developmental needs. The*  
25 *child does have a network of family and*  
26 *community who are willing to keep him safe*  
27 *and supported, but I request that we lean*  
28 *in to prioritise providing the necessary*  
29 *supports for the child, the family and the*  
30 *community so they are able to continue to*  
31 *sufficiently meet his needs.*

32  
33 And then if we go back to 433 there's a comment from the  
34 manager:

35  
36 *Hopefully this is only a minor setback. Is*  
37 *there a specialised cultural camp that*  
38 *maybe the child could go on for a week? It*  
39 *might give both mum and the child some*  
40 *space and ensure his free time is invested*  
41 *in something productive and based in*  
42 *culture and connection. There used to be*  
43 *an Elder somewhere out in a particular*  
44 *location that did something like this.*

45  
46 And then you see then the NDIS support coordinator says  
47 there's a couple of things, there's a cultural camp and

1 there's some holiday programs run by a certain Aboriginal  
2 cultural service. Then back to 431:

3  
4 *We will do some looking into what might be*  
5 *available during the school holiday period.*  
6 *There are some healing camps for the young*  
7 *person and their families. We'll share it*  
8 *with the group if we can find anything for*  
9 *the said period.*

10  
11 And then back to the start for the NDIS support:

12  
13 *Healing camps will be perfect for the child*  
14 *and the mother.*

15  
16 Is it a practice decision, which may mean you can't give an  
17 answer to this, but is a child assaulting his mother with a  
18 weapon - whether or not what the immediate need of  
19 the child is for some sort of cultural camp or healing camp  
20 or whether or not there might be other measures,  
21 therapeutic measures, that should be put in place and more  
22 intensively, is that a practice decision and not a legal  
23 decision?

24 A. That's a practice decision.

25  
26 Q. Do you have anything you want to say about that?

27 A. I think the only thing I do want to say is that in the  
28 period of 2022 to 2024 when this child was self-placing  
29 with his parent there was very little involvement or  
30 engagement with the department, and I think the distinction  
31 once this delegated authority agency became involved is you  
32 actually see the family engaging with workers putting in  
33 supports and allowing those supports to happen. So in my  
34 experience practitioners would be guided by the practice  
35 advice from the community-controlled agency around how they  
36 best can engage with the family and get the family to  
37 accept those supports and engage, and that that decision  
38 would generally be made collaboratively.

39  
40 COMMISSIONER: But are these matters relevant to the  
41 decision to apply to the court for revocation of the  
42 long-term guardianship order or do you see that as  
43 something separate?

44 A. I think these matters are relevant to whether or not  
45 there's still a child in need of protection, and I say and  
46 the department said on their material this is still a child  
47 in need of protection. There's nothing that will

1 completely mitigate that history and the current  
2 circumstances so as to make this child no longer in need of  
3 protection. But what the department was saying and what we  
4 were saying in the referral is that there's a different way  
5 and there's a less intrusive way than a child protection  
6 order, and the less intrusive way would be to allow this  
7 family to engage with community supports, which they have  
8 far more likelihood of following through and agreeing to  
9 than they did historically with the department.

10  
11 COMMISSIONER: So do you say notwithstanding this evidence  
12 about what was occurring it was still justified to refer  
13 the matter to the Director and urge him to make an  
14 application to revoke the long-term guardianship order?

15 A. I think it is.

16  
17 COMMISSIONER: Because the guardianship order is about the  
18 legal authority of the department related to but separate  
19 from what's happening in terms of placement or  
20 self-placement, as is the case here. But placement on  
21 those facts or self-placement here is not going that well  
22 at this point by the look of it?

23 A. Yes. I mean, there's - to be clear, I don't think  
24 this was self-placement if this was March 2025. I think a  
25 placement decision had been made in the previous July. So  
26 it was an 82(2) placement decision.

27  
28 COMMISSIONER: So did the department actually make a  
29 decision - or the delegate --

30 A. The delegate.

31  
32 COMMISSIONER: -- made a decision to formally place the  
33 child with the mother; to in a sense ratify what was  
34 existing on the ground, so to speak?

35 A. Yes. Yes, my understanding is that that was in July  
36 of 2024 that decision was made.

37  
38 COMMISSIONER: Right. But, nevertheless, in the  
39 circumstances that are described in this email exchange  
40 that you've just been taken to, you think it's suitable for  
41 the long-term guardianship order, which is the source of  
42 the department's power, to be revoked?

43 A. I think it's suitable for the powers of the court to  
44 be invoked so the court can make a decision about whether  
45 to revoke the order or whether to vary the order, whether  
46 there's a more appropriate order to make. I think a child  
47 who's been self-placed at home for two years and then

1 placed at home for almost another year - that there's very  
2 little utility remaining on an order until they're 18.  
3 I think you would have the ability to have the family and  
4 the young person engaged in services and practical supports  
5 in a way that has better outcomes than simply remaining on  
6 a child protection order until they're 18. I think the  
7 court should be looking at that.

8  
9 COMMISSIONER: Sure. But in practical terms the child is  
10 with the family and now formally with the family, and these  
11 problems are still arising on the ground. But,  
12 notwithstanding those problems, it's your view that the  
13 courts have had the opportunity to consider whether the  
14 order should be revoked, and I think we're about to come to  
15 that material, so we'll see.

16 A. Yes. Commissioner, my understanding is that this  
17 young person has FASD, has ADHD, experienced actual harm  
18 while in care, has made that decision to place at home, and  
19 has experienced significant trauma. I don't think anyone  
20 in the department was expecting that that placement would  
21 be without issue or that decision to remain at home would  
22 be without issue. This young person and family will  
23 require ongoing support. It's part of the reason why their  
24 assessment remained that he was a child in need of  
25 protection.

26  
27 COMMISSIONER: But you say that a decision to revoke that  
28 long-term guardianship order doesn't involve proving that  
29 he's no longer a child in need of protection?

30 A. Yes.

31  
32 COMMISSIONER: In any case, there's two questions. One,  
33 should the matter have gone to the court? That's your  
34 contention, it should have. Well, the court never got an  
35 opportunity to decide whether in the present circumstances  
36 the order should be revoked; that's your point, isn't it?

37 A. I want to clarify, though, it's not - my contention is  
38 not that it should have gone to court. My contention is  
39 that had the starting point of the Director's office not  
40 been, "You have to prove this child is not in need of  
41 protection," I think a conversation could have occurred or  
42 extra information or evidence could have been sourced from  
43 Child Safety to demonstrate why this was the appropriate  
44 action to take to seek a revocation. The issue - and  
45 I said in the beginning there absolutely were gaps in Child  
46 Safety's evidence on this matter. But I think not being  
47 able to even put to the Director's office an argument or

1 suggestion that, "This child is still in need of protection  
2 but this order is no longer appropriate and desirable,"  
3 that's where the barrier came.

4

5 COMMISSIONER: But doesn't the revocation of the order, if  
6 that were to have occurred, remove the authority of  
7 the department to care for the child?

8 A. It removes the authority of the department. It  
9 doesn't remove community-controlled organisations. It  
10 doesn't remove the ability of the family to work on a  
11 voluntary basis with the department. But, yes, it removes  
12 the ability to have the daily care or the long-term  
13 responsibility for the child.

14

15 COMMISSIONER: But the reality was that the child was  
16 self-placing and on a day-to-day basis the existence of the  
17 long-term guardianship order didn't have much work to do at  
18 a day-to-day practical level, did it?

19 A. It didn't have much --

20

21 COMMISSIONER: I could see that argument being made.

22 A. It didn't have much work to do, but it's also  
23 considering from the family's perspective what it means  
24 that their child remains on a long-term guardianship order  
25 to the Chief Executive even though they're the ones looking  
26 after the child and caring for the child. So it doesn't  
27 have much work to do, but the revocation of it is  
28 potentially a significant decision for that young person  
29 and family.

30

31 COMMISSIONER: Yes, I understand that point.

32

33 MS SWEET: Commissioner, I note the time but I also want  
34 to say that the next thing I was going to take Ms Martin to  
35 was the very next day after this update from the delegated  
36 authority where there's been the allegation of the assault  
37 with the stick, the very next day that's when the form A  
38 referral to the DCPL for revocation of the order occurs.  
39 There is a claim for privilege over that form and the draft  
40 affidavit that is behind it.

41

42 COMMISSIONER: Where is that?

43

44 MS SWEET: Yes, thank you, Your Honour; 463.

45

46 COMMISSIONER: 463?

47

1 MS SWEET: 463. It should say, "Form A referral of child  
2 protection matters summary form". 463.  
3  
4 COMMISSIONER: Okay. Well, that's a form produced by  
5 whom?  
6  
7 MS SWEET: That is a form that is filled in by Child  
8 Safety. In this case it is filled in by an OCFOS  
9 solicitor, but it's capable of being filled in by a child  
10 safety service officer, referring the matter of whether --  
11  
12 COMMISSIONER: That's not legal advice. It's just a  
13 process. And there's a draft affidavit?  
14  
15 MS SWEET: Yes.  
16  
17 COMMISSIONER: That's not legal advice either. How is  
18 that privileged?  
19  
20 MS FREEMAN: Commissioner, it is a document that is  
21 prepared in anticipation of litigation.  
22  
23 COMMISSIONER: What, for the sole purpose? So you say it  
24 fits within the sole purpose test?  
25  
26 MS FREEMAN: Yes. Why else would it be created?  
27  
28 COMMISSIONER: But it's a document that is furnished by  
29 the delegated authority to the Director for the Director's  
30 consideration as to whether the Director will bring  
31 proceedings.  
32  
33 MS FREEMAN: Commissioner, my understanding is it is  
34 created by the OCFOS lawyers on behalf of the department  
35 for --  
36  
37 COMMISSIONER: But the OCFOS lawyers at this point might  
38 create documents on behalf of the department but for the  
39 purposes of furnishing to the Director or referring to the  
40 Director a request that the Director exercise his powers to  
41 make an application to the court.  
42  
43 MS FREEMAN: Yes.  
44  
45 COMMISSIONER: So I fail to see on its face how it fits  
46 within that limb of legal professional privilege where a  
47 document is produced for the sole purpose of and in

1 contemplation of litigation. This is not litigation by the  
2 department. If litigation is brought, it's brought by the  
3 Director, who's a separate statutory office, isn't he?

4  
5 MS FREEMAN: Yes, but also the Attorney-General holds the  
6 privilege in relation to the Director's documents as well.

7  
8 COMMISSIONER: But this is not created by the Director.  
9 So it won't be --

10  
11 MS FREEMAN: No, but it's received by the Director in  
12 anticipation of litigation.

13  
14 COMMISSIONER: On the face of it it doesn't fall, as I see  
15 it, within an established category of documents that are  
16 privileged. But if you want to advance some considered  
17 submissions on this point - and I'd prefer them to be in  
18 writing - I'll consider them.

19  
20 MS FREEMAN: Thank you, Commissioner.

21  
22 COMMISSIONER: When one looks at it in context it is  
23 merely part of the process that was undertaken by the  
24 department presumably to assist the delegate to make the  
25 application or to refer to the Director an application  
26 sought to be made or they sought to make to revoke the  
27 order, or have I got that wrong? Who applies to seek the  
28 revocation of the order? It's the Director; right?

29  
30 MS FREEMAN: Yes.

31  
32 COMMISSIONER: And at whose behest? Was this at the  
33 behest of the delegate or at the behest of the department?

34  
35 MS FREEMAN: At the behest of the department, on the face  
36 of this document, Commissioner.

37  
38 COMMISSIONER: Okay. So let's leave the delegate out of  
39 this. It's the department asking the Director to do  
40 something?

41  
42 MS FREEMAN: Correct; to instigate legal proceedings.

43  
44 COMMISSIONER: Yes.

45  
46 MS FREEMAN: So we say this is a document that's created  
47 for the sole purpose of anticipated legal proceedings. But

1 I will confirm those instructions and --

2

3 COMMISSIONER: Well, I'll think about that. It strikes me  
4 as - well, it's an unusual context. I mean, this is the  
5 department asking the Director to do something, which the  
6 Director's refused to do, which is now the subject of  
7 complaint on the basis he shouldn't have refused to do what  
8 he refused to do, and the department wants to claim  
9 privilege over something about which the Director is being  
10 criticised for not doing. But perhaps you might think  
11 about it and --

12

13 MS FREEMAN: Yes.

14

15 COMMISSIONER: -- find out whether the Attorney really  
16 wants to maintain privilege on this --

17

18 MS FREEMAN: Yes.

19

20 COMMISSIONER: -- because I'm certainly able and will ask  
21 the Director what his reasons were for refusing to accede  
22 to the request. And it would --

23

24 MS FREEMAN: Yes, and the Director may not be able to  
25 answer those questions either, Commissioner; but that's a  
26 matter for the Director.

27

28 COMMISSIONER: Well, he'll be able to answer questions as  
29 to his reasons, unless you say anything that he says is  
30 somehow cloaked by privilege that belongs to the Attorney.

31

32 MS FREEMAN: It depends on I guess the questions that he's  
33 asked. But there are circumstances where the Director has  
34 had to seek instructions from the Attorney about whether  
35 he's allowed to provide certain documents and whether  
36 they're covered by privilege.

37

38 COMMISSIONER: But if I ask the Director the question,  
39 "Why didn't you accede to the request to make an  
40 application to revoke the order in this case," are you  
41 saying that what he might say in answer to that would  
42 involve providing - or breaching his obligations in  
43 relation to privilege that is held by the Attorney? Is  
44 that your point?

45

46 MS FREEMAN: I'm not saying that definitively,  
47 Commissioner, but there is a prospect that that might be an

1 issue. But perhaps I need to get some instructions about  
2 all of that and --  
3  
4 COMMISSIONER: That would tie us all up in some knots,  
5 I must say.  
6  
7 MS FREEMAN: Indeed it would, Commissioner.  
8  
9 COMMISSIONER: But, anyway, we'll see where that goes.  
10 I'll wait to hear further in relation to this document from  
11 you, hopefully tomorrow at some point if you could.  
12  
13 MS FREEMAN: Thank you, Commissioner.  
14  
15 COMMISSIONER: And also on the question of waiver, the  
16 waiver of the privilege by the Attorney if so advised.  
17  
18 MS FREEMAN: Yes. I won't be able to get those  
19 instructions by tomorrow, Commissioner, but I will have --  
20  
21 COMMISSIONER: I understand that.  
22  
23 MS FREEMAN: I'll get some instructions as to how far I  
24 can progress things tomorrow.  
25  
26 COMMISSIONER: All right. Thank you very much,  
27 Ms Freeman. I understand that tomorrow we need to  
28 interpose another witness, who waited around for quite  
29 substantial time in November and December, by videolink?  
30  
31 MS FREEMAN: Yes. That witness, as I understand it, is  
32 available at 10 o'clock. A link just needs to be provided  
33 to that witness.  
34  
35 COMMISSIONER: Yes.  
36  
37 MS FREEMAN: So if Your Honour was minded to deal with  
38 that first, and then perhaps we then deal with this  
39 privilege issue.  
40  
41 COMMISSIONER: I think we'll certainly deal with  
42 the evidence first and come back to this issue.  
43  
44 Ms Martin, I'm afraid that your patience is being tested.  
45 We won't be able to come back to you tomorrow because  
46 I think the other witness will in all likelihood take the  
47 day. So I think Wednesday is the proposal. So my

1 apologies for that.  
2 A. That's okay, Commissioner.

3  
4 COMMISSIONER: Such is the process. All right. We'll  
5 adjourn until 10 o'clock.

6  
7 <THE WITNESS WITHDREW

8  
9 THE HEARING WAS ADJOURNED AT 4.20PM UNTIL TUESDAY,  
10 3 FEBRUARY 2026

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