

Special Inquiry

into

St Andrew's Hostel, Katanning
(including St Christopher's Hostel, Northam)

Held at: Courtroom 4, Level 18,
111 St Georges Terrace, Perth

Thursday, 28 June 2012 at 9.32am
(Day 38)

Before: The Hon Peter Blaxell

1 HIS HONOUR: Before we start this morning there is an
2 issue I want to raise. That relates to paragraph 37 of
3 your submissions, Mr Rafferty. By the way, I do not seem
4 to have those submissions with me. They must be on my
5 desk. If they could be fetched, please.

6
7 MR URQUHART: I have a copy.

8
9 HIS HONOUR: I have notes on mine. I might have to
10 adjourn and go find them, unfortunately.

11
12 MR RAFFERTY: I have mine here.

13
14 HIS HONOUR: No, but I made notes on mine. What I might
15 do is briefly adjourn to fetch them. I want to raise the
16 issue of these green handwritten notes which I was
17 previously unaware of, which was referred to in your
18 submissions.

19
20 MR RAFFERTY: I did not know they were green handwritten
21 notes. I thought it was one piece of paper.

22
23 HIS HONOUR: That is them. I think they are of
24 significance and they should become an exhibit.

25
26 MR RAFFERTY: I was going to ask if we could exhibit
27 those, considering your Honour can decide. What has
28 occurred, sir - I have referred to it in the footnotes - I
29 actually went through in my examination of Mr Philpott on
30 the very first occasion all the things he did. That
31 information came from that document. I should have
32 tendered the document.

33
34 HIS HONOUR: That is exhibit 145.

35
36 EXHIBIT #145 CONTEMPORANEOUS GREEN HANDWRITTEN NOTES MADE
37 IN 1990, BARCODED 0191

38
39 HIS HONOUR: I do not recall him giving evidence in any
40 detail about these notes. Would that be right?

41
42 MR RAFFERTY: Not about the notes. I asked him: "What
43 did you do? Did you contact the Minister? Did you contact
44 parents? Did you contact Mr McKenna? Did you contact
45 Joan Harris, Industrial Relations Commission?" That was at
46 transcript page 2560. They are at my footnotes on page 14.

47

1 HIS HONOUR: There are some dates on some notes. I assume
2 I can infer that the two pages were more or less
3 contemporaneous.
4
5 MR RAFFERTY: 1990, sir, yes.
6
7 HIS HONOUR: The second page continued on. I am justified
8 in inferring, am I, that all these notes were written prior
9 to the parents meeting on 15 October?
10
11 MR RAFFERTY: Yes, sir.
12
13 HIS HONOUR: Would you agree with that, Mr Urquhart?
14
15 MR URQUHART: I do not have any issue with that
16 whatsoever, sir. Indeed, I was going to take Mr Philpott
17 to this document myself on the first day that he gave
18 evidence. Due to time constraints, it was getting late in
19 the day and I determined not to. I do not take any issue
20 with the fact that they were contemporaneous notes and,
21 obviously, would have been made between the time that
22 Dennis McKenna was arrested and charged on 27 September
23 1990 through to a date on or about 4 October 1990.
24
25 HIS HONOUR: I take it Mr Philpott is not here today?
26
27 MR RAFFERTY: Hopefully he is on a plane to Phuket.
28
29 HIS HONOUR: I would have been very interested to know
30 what he would have said about his conversation with
31 Detective Smart of the Child Abuse Unit.
32
33 MR RAFFERTY: I am not going to give evidence from the Bar
34 table, but during the course of proofing that was
35 discussed. Had he had any recall --
36
37 HIS HONOUR: He does not?
38
39 MR RAFFERTY: No. It was so long ago, that was the
40 difficulty.
41
42 HIS HONOUR: That is all I need to know.
43
44 MR RAFFERTY: Can I also say, sir, while I am on my feet,
45 thank you to yourself and also to Mr Urquhart for
46 accommodating my availability yet again. I appreciate
47 that, sir.

1
2 HIS HONOUR: That is not a problem. I will adjourn for
3 two minutes to go and fetch the submissions with my notes
4 on it. I think others will have trouble finding them. I
5 will be a short time.

6
7 SHORT ADJOURNMENT

8
9 HIS HONOUR: Yes, Mr Urquhart?

10
11 MR URQUHART: Thank you, sir. This is now the second day
12 of closing addresses. Today's hearing solely relates to my
13 recommended adverse findings against Mr Colin Philpott.
14 There are five in total. Before I summarise those I repeat
15 what was said last Friday, on the first day of closing
16 addresses. Any suggested adverse findings I put forward in
17 my closing addresses are merely my recommendations as
18 Counsel Assisting. Your Honour, as Special Inquirer, will
19 make the ultimate decision as to what findings will be made
20 when the Inquiry's report is handed down. That process
21 your Honour will take will occur, having taken on board not
22 just my submissions but the submissions both written and
23 oral of the persons or their legal representatives to whom
24 I have made my recommendations.

25
26 It is entirely a matter for you, your Honour, the
27 Special Inquirer, whether none, all or any of my proposed
28 recommendations are accepted. Furthermore, your Honour may
29 raise a proposed adverse finding that I have not
30 considered. In that instance the affected party will, of
31 course, have the opportunity to respond before your Honour
32 makes a final decision.

33
34 They are the preliminary remarks I am making, sir. I
35 have already provided Mr Rafferty and his client,
36 Mr Philpott, a 20-page letter setting out my adverse
37 finding recommendations and the basis for making those
38 recommendations. Mr Rafferty in turn has provided his own
39 comprehensive written submissions on behalf of his client.
40 Your Honour received copies of both of those documents
41 yesterday.

42
43 It will, therefore, not be necessary for either of us
44 to make the same detailed submissions orally this morning.
45 My remarks will be a truncated version of my letter to
46 Mr Rafferty. I will not cover all the evidence that I have
47 relied on in my written submissions.

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HIS HONOUR: I will put on record I have read both your letter and the submissions from Mr Rafferty. I am familiar with both.

MR URQUHART: Thank you, sir. What I propose to do now, this morning, is to go through each recommendation I am making. As I announce each one I will then give a summary of the evidence and my submission that supports that recommendation.

The first is that as Chairman of the Country High School Hostels Authority - hereafter I will refer to as "the Authority" - Mr Philpott failed to refer a letter he received in 1986 to the Department of Education for investigation, as it was potentially a matter involving sexual misconduct by the warden at the Katanning hostel, Dennis McKenna.

Evidence in support of that: It is not in dispute that Mr Philpott received a letter from Coral Trezise, dated 17 September 1986, exhibit 11.1. Attached to that letter was a handwritten letter titled "To whom it may concern" written by Mr William McPharlin and Mrs Glenys Flanigan dated 22 August 1985. That was exhibit 8. The final sentence read - it is the one that is of importance with respect to this recommendation:

The children were removed because they both complained of suspicious suggestions made to them by the house master, one Dennis McKenna.

It was Mr Philpott's evidence that at the relevant time if a matter had come to the attention of the Authority that concerned an allegation of sexual misconduct by a hostel staff member, then the matter would be referred to the industrial relations section of the Department of Education for investigation.

However, in this instance Mr Philpott referred the letter to the Chairman of the Katanning Hostel Board for further inquiry. When asked by myself whether he thought it needed further inquiries Mr Philpott replied at transcript page 2499:

Well, suspicious suggestions, I didn't

1 think that it was. I didn't relate it to
2 the sexual activity. I thought it was
3 suspicious enough for further inquiry to be
4 made.

5
6 I then asked him at page 2501 - or later on rather:

7
8
9 Q. Would you agree with me that when you
10 read that back in 1986 you would have at
11 least thought that it may well have related
12 to sexual activities?

13 A. It could have been a consideration,
14 but not a total consideration.

15
16 In my submission, notwithstanding the fact that this was
17 1986, it should have been, if not the only consideration,
18 then certainly a dominant one. It certainly seems that the
19 Katanning Hostel Board and Dennis McKenna thought that one
20 only has to look at the letters from the lawyers that were
21 fired off to the Trezises and Mr McPharlin and Mrs
22 Flanagan, dated 8 October 1986, which made it abundantly
23 clear what they thought the magnitude of this supposed slur
24 and scurrilous accusation was.

25
26 It is my submission that it is open for your Honour to
27 find that this reference to "suspicious suggestion" being
28 made to these boys by Dennis McKenna would most likely have
29 been related to matters of a sexual nature once it was
30 read.

31
32 Indeed, Mr Philpott was unable, in examination, to
33 cite an example of what it could relate to aside from
34 sexual activity.

35
36 The very fact these two boys were removed from the
37 boys' hostel without their parents giving the required
38 one-term's notice and thereby making themselves liable to
39 pay a term's fee for both of them supports, in my
40 submission, the argument that this was a matter that was
41 clearly of a sufficiently serious concern for the parents
42 to take that action.

43
44 In my submission, it was therefore incumbent upon
45 Mr Philpott to refer the matter to the industrial relations
46 section of the Department of Education for investigation.

47

1 In my submission that is what should have been done once he
2 identified this as a matter requiring further
3 consideration.

4
5 That is all I propose to submit by way of oral
6 submissions with respect to the first recommendation.

7
8 The second is, upon referring the above investigation
9 to the Chairman of the Katanning Hostel Board Mr Philpott
10 failed to ensure that a proper inquiry was undertaken.

11
12 There is evidence before the Inquiry which demonstrated
13 that the Chairman of the Katanning Hostel Board - I will
14 simply refer to that as "the Board" from now on - failed to
15 undertake any proper inquiry of the matter involving the
16 suspicious suggestions allegation made by Mr McPharlin and
17 Mrs Flanigan. Now I will not say too much more about that,
18 as I accept that will be canvassed in more detail tomorrow.
19 When I say that, that is, what measures, what inquiries the
20 Chairman of the time made. Suffice for me to say this:
21 Prior to 8 October 1986 a firm of solicitors had been
22 engaged by the Board and Dennis McKenna to write to Mr and
23 Mrs Trezise and to Mr McPharlin and Mrs Flanigan
24 seeking an immediate retraction of the suspicious
25 suggestions assertion under threats of initiating court
26 proceedings.

27
28 As I have referred to before, those letters were dated
29 8 October 1986 and they appear as exhibits 9 and 11.3 to
30 the Inquiry. That, therefore, establishes that
31 Mr Wilkinson and Dennis McKenna acted independently of the
32 Board, and the reason why I say that is because the minutes
33 of the Board meeting on 22 October 1986, which is
34 exhibit 54, which was held two weeks after the date of
35 those letters, detail at item E under the title "Trezise":

36
37 Discussion followed by the motion moved by
38 B Hendry and seconded by J Ireland: 'Board
39 endorses action taken by the Chairman and
40 warden in recent correspondence concerning
41 Trezises.' Carried.

42
43 HIS HONOUR: Just pause there. Wilkinson gave evidence to
44 the effect he did not remember anything about these
45 matters. He spoke in terms of what he would have done.

46
47 MR URQUHART: Yes, sir.

1
2 HIS HONOUR: One of the things he said he would have done
3 when going to a solicitor he would have consulted
4 individual members of the Board. I think that was his
5 evidence. When you say he did it independently of the
6 Board, I think the thrust of his evidence is that although
7 he cannot remember what he did he believes he would have
8 rung some individual Board members and consulted them
9 before doing that.

10
11 MR URQUHART: That is what he is saying he would have
12 done.

13
14 HIS HONOUR: Yes, that is right.

15
16 MR URQUHART: It is a matter for your Honour as to whether
17 you would accept that that is what he would have done,
18 bearing in mind what appears in the minutes of the meeting.
19 There is no suggestion that in fact the views of the Board
20 members have been canvassed prior to that.

21
22 HIS HONOUR: I would not see the resolution in its terms
23 being inconsistent with him having done that.

24
25 MR URQUHART: No. I simply make the point that is one
26 inference that could be drawn from that. In any event, a
27 more appropriate course of action would have been for it to
28 be discussed with the entire Board at the meeting and then
29 action taken. Now, if Mr Wilkinson says he would have done
30 that, then what he ought to have done is contacted every
31 single member. One wonders why that would be necessary
32 when you could simply convene or raise the matter at the
33 Board meeting that was going to happen two weeks later.

34
35 HIS HONOUR: The other thing that is of interest is that
36 "suspicious suggestions" letter had been previously in
37 circulation at least to the Ombudsman and I think the
38 Minister. I query whether it had also been to the Board
39 previously. It only seems to have triggered a response
40 when it was sent to the Authority and received on
41 19 September.

42
43 MR URQUHART: That is the date it was received, sir, yes.

44
45 HIS HONOUR: I think that is correct. One inference is
46 that someone at the Authority read it and thought, "Well
47 this looks a bit funny and something better be done about

1 the fact." Mr Philpott's evidence is that he thought it
2 required investigation. No doubt it is he who is the one
3 who saw this terminology and decided that it was something
4 which required investigation. As to the words "suspicious
5 suggestions", which obviously are capable of being a fairly
6 innocuous expression, but the evidence generally shows that
7 people in the Katanning area at the time were reluctant to
8 speak explicitly about such things as sexual abuse, not
9 speaking of the code and things of this nature, which I
10 think perhaps explains why, on the evidence, Mrs Flanigan
11 would have used such terminology.
12

13 I am interested to know whether there is any evidence
14 to show that the Board had previously seen this letter or
15 the Chairman and had done nothing about it, for obvious
16 reasons. Now, is there any evidence to show that?
17

18 MR URQUHART: Not direct, because as your Honour has
19 already alluded to, Mr Wilkinson's recollection of this
20 event was hazy at best.
21

22 HIS HONOUR: There is nothing on the file we have
23 retrieved to show that that "suspicious suggestions" letter
24 was enclosed with any previous correspondence direct to the
25 Board?
26

27 MR URQUHART: Not as far as I am concerned. I will not
28 state that categorically. I only say that because the
29 Flanigan/McPharlin letter is actually dated 22 August 1985.
30 It is a year before the letter --
31

32 HIS HONOUR: Which suggests it might have been in
33 circulation for a long time.
34

35 MR URQUHART: It would be on or about that date we can
36 infer that Ms Trezise would have received it from
37 Mr McPharlin and Mrs Flanigan.
38

39 HIS HONOUR: It is also of relevance that Mr Trezise's
40 evidence is to the effect that he did not really fully
41 appreciate what that term meant until he spoke to John.
42 Then he said bells rang. He put two and two together and
43 he realised what that term meant. I think that is of some
44 significance.
45

46 MR URQUHART: It is, sir. Then again, he is not in a
47 position of authority that the Board and members of the

1 Authority were in, in the sense that he may not regard that
2 as his obligation.
3
4 HIS HONOUR: It might be relevant to what others might
5 have thought about those words at the time when they first
6 saw those words.
7
8 MR URQUHART: That is why I refer back to the terms of
9 those letters written by the law firm.
10
11 HIS HONOUR: There is no doubt at all that by the time
12 those solicitors' letters were sent that those terms were
13 regarded as being defamatory in a sexual sense. I think
14 that is fairly clear.
15
16 MR URQUHART: I think it is a clear inference to be drawn
17 there. Obviously that would have been on instructions from
18 Dennis McKenna.
19
20 HIS HONOUR: And Mr Wilkinson.
21
22 MR URQUHART: And Mr Wilkinson. Whether or not it was the
23 instructions of the Board, that is a matter of some
24 conjecture.
25
26 HIS HONOUR: I will be asking Mr Rafferty about this. I
27 am interested to know why the Authority would pay the legal
28 fees for that correspondence if it wasn't the body
29 instructing the solicitors, or ultimately responsible for
30 that action.
31
32 MR URQUHART: That was a concession made by Mr Philpott,
33 although he then added, if I recall correctly --
34
35 HIS HONOUR: What do you say was his concession?
36
37 MR URQUHART: That the legal fees were paid.
38
39 HIS HONOUR: Certainly, yes.
40
41 MR URQUHART: But he said it may not have been entire - I
42 am paraphrasing here, no doubt my learned friend might be
43 able to cite the passages - as far as I understand it at
44 one point in his explanation regarding that that it may not
45 have been entirely clear what the Authority was paying for.
46
47 HIS HONOUR: I query that too. We have the file of the

1 Education Department representative from the Authority --
2
3 MR URQUHART: Yes, I was about to say that, sir.
4
5 HIS HONOUR: In fact, that is one of the few records of
6 that time that we do have. He had a copy of that
7 correspondence on his file, which suggests that the
8 Authority must have had that letter circulated and must
9 have known all about the correspondence at the time.
10
11 MR URQUHART: That is the point I was trying to make.
12
13 MR RAFFERTY: Sorry, which letter, sir?
14
15 HIS HONOUR: On the file that is exhibit --
16
17 MR RAFFERTY: I know the one, sir.
18
19 MR URQUHART: The Secondary Education Authority.
20
21 HIS HONOUR: On that file - unfortunately it is quite
22 obvious at some stage the contents of that file have been
23 re-arranged, because they are not in date order.
24
25 MR RAFFERTY: No. I noticed that.
26
27 HIS HONOUR: In that file are copies of the correspondence
28 sent by the solicitors to the Trezise's and to Flanigan,
29 et cetera. That suggests to me that the correspondence
30 must have been circulated to members of the Authority and
31 they knew what they were paying for. That is the
32 reasonable inference.
33
34 MR RAFFERTY: Or circulated to the Authority. When I say,
35 "the Authority" in the context, at the very least, the
36 administrative staff.
37
38 HIS HONOUR: This is a file of one of the members of the
39 Authority. It is not the Authority's file.
40
41 MR RAFFERTY: The SEA file - the secondary - it is the
42 acronym. Used to be the NCA.
43
44 HIS HONOUR: The Authority had a representative on it from
45 the Department of Education, and this man, or whoever the
46 incumbent was at the time, kept a file, which is one of the
47 few files we have got to show what happened at the time.

1 On that there are copies of the correspondence sent by the
2 Katanning solicitors to the Trezises and the Flanigans.
3
4 MR RAFFERTY: You also may recall that ultimately the
5 "suspicious suggestions" letter first came to the Inquiry's
6 notice by virtue of the file that was provided by my
7 client.
8
9 HIS HONOUR: I am not sure about that. That may be.
10
11 MR URQUHART: That is correct, sir.
12
13 MR RAFFERTY: That is correct. It is correct.
14
15 HIS HONOUR: I accept that.
16
17 MR RAFFERTY: As Mr Philpott said, Mr Lammas would forward
18 things of importance to him. My recollection is that -
19 Mr Urquhart will correct me if I am wrong on this - on my
20 client's file there was certainly none of the
21 correspondence from the solicitors. Whether that is of any
22 significance to your Honour is obviously a matter for you.
23 As to which members of the Board had that particular
24 thing --
25
26 HIS HONOUR: I have had a brief perusal of - I think there
27 are three files from Mr Philpott. I cannot recall whether
28 or not there are copies of that correspondence.
29
30 MR RAFFERTY: There is not.
31
32 HIS HONOUR: There is not?
33
34 MR RAFFERTY: No. That is obviously a matter for your
35 Honour to take into account as well.
36
37 HIS HONOUR: Certainly. All right.
38
39 MR RAFFERTY: We will deal with that issue in due course.
40 Thank you, sir, for clarifying that.
41
42 HIS HONOUR: Yes, Mr Urquhart?
43
44 MR URQUHART: In my submission it is a matter for your
45 Honour to take on board the fact that the original letter
46 from Mrs Trezise, dated 17 September 1986, was actually
47 addressed to Mr Philpott. Therefore, an inference can be

1 drawn that of those on the Authority it would be him, in my
2 submission, who would be taking the most interest in the
3 matter and if correspondence came in one would have
4 expected him to be advised of that correspondence.

5
6 HIS HONOUR: There is support for that inference from the
7 presence of other material, I think, on his file showing
8 that he was taking interest in the Trezise matter. He was
9 given copies of letters and things of that nature.

10
11 MR URQUHART: Yes, sir. It is not just the 17 September
12 1986 letter on the personal files that Mr Philpott had but
13 other material relating to the Trezises, although not
14 necessarily the 8 October 1986 response by the law firm.

15
16 HIS HONOUR: Long prior. He seemed to be keeping abreast
17 of the Trezise matter.

18
19 MR URQUHART: That is right, sir. Turning now to my
20 submission, sir, it is submitted that if a proper inquiry
21 was conducted by the Board then Mr McPharlin and
22 Mrs Flanigan should have been contacted to explain what
23 behaviour of Dennis McKenna's they were referring to when
24 they stated that both their boys had complained of
25 "suspicious suggestions made to them".

26
27 It is apparent that Mr Wilkinson did not contact these
28 parents to clarify that point. Had he done so he would
29 have been informed that one boy had his fly on his pants
30 undone by Dennis McKenna whilst he was standing next to him
31 in Dennis McKenna's office, and that the other son had
32 complained that Dennis McKenna used to make comments to him
33 like, "Do you want to warm up my bed?"

34
35 Peter Bachelard-Lammas, the then Authority's
36 administrative assistant, was actually present at the
37 Katanning Board meeting on 22 October 1986, and in his
38 evidence he conceded that if nothing was said in the
39 discussions that was had before the Board at that meeting
40 that this matter regarding what the parents meant when they
41 said, "suspicious suggestions", and that if he had been
42 doing his job properly, he would have said in hindsight
43 "Well, hold on, what have the parents got to say about
44 this?"

45
46 HIS HONOUR: He conceded he should have done that.

47

1 MR URQUHART: Yes. I was going to say it was apparent
2 that he did not.

3
4 Mr Philpott was asked by myself at 2514: "Do you have
5 a recollection of getting any response from Mr Wilkinson?"
6 His answer was, "No, I don't recall getting it. But I'm
7 sure that we would have got some feedback, but it was
8 nothing implying to me that I had to take it further."
9 Mr Philpott then went on to say that he thought the
10 Authority did get a response back from Mr Wilkinson and
11 there was nothing adverse about it requiring him to take
12 further action. That was at page 2514.

13
14 I simply make the observation that whether a response
15 was received from Mr Wilkinson insofar as a written
16 response is concerned is not borne out by the material
17 relating to the Trezise matter that the Inquiry has located
18 in that file, the secondary education file. That entire
19 file is now exhibit 143.

20
21 That file contains a significant amount of
22 correspondence regarding the Trezise matter but no copy of
23 a letter from the Katanning Hostel Board detailing its
24 findings.

25
26 As we have already discussed, what is located is the
27 law firm's letters dated 8 October.

28
29 The other document of significance, sir, is the
30 unsigned letter prepared in the name of the Minister for
31 Education and Planning. That is exhibit 142.

32
33 HIS HONOUR: It is clearly a draft.

34
35 MR URQUHART: Yes.

36
37 HIS HONOUR: I should add, that is something else that I
38 will invite both of you to comment on. This again comes
39 from the file that represented the Education Department.
40 There is an issue as to the font or the typeface on the
41 draft letter that you are about to refer to. From my
42 observations of the file, I would suggest that that font
43 matches a memo dated 26 September 1986, which obviously was
44 signed by Mr Lammas.

45
46 MR RAFFERTY: It also matches other letters, sir.

47

1 HIS HONOUR: It is clear that I can draw the inference
2 that that draft letter was prepared by Mr Lammas.
3
4 MR URQUHART: Yes. Is that the document immediately
5 before this draft letter?
6
7 HIS HONOUR: No, it is not.
8
9 MR URQUHART: There is one immediately before the draft
10 letter.
11
12 HIS HONOUR: It is not in date order.
13
14 MR URQUHART: No. I know, sir. There is one immediately
15 before that one that I drew Mr Philpott's attention to in
16 his evidence. It was also the same. Is that there?
17
18 HIS HONOUR: No, it is not. Not immediately before.
19
20 MR URQUHART: It may well be somewhere before.
21
22 HIS HONOUR: In any event, there is material there to
23 indicate that the characteristic font, which is quite
24 unique with a few letters, I think I can draw the inference
25 that that draft letter for the Minister to sign, which
26 obviously contemplated the Flanigans signing the letter
27 sent to them by the solicitors, that that draft letter was
28 prepared by Mr Lammas using the same typewriter he used for
29 other correspondence.
30
31 MR URQUHART: Yes, sir. I was about to say it got stamped
32 "draft" in the top right-hand corner. The penultimate
33 paragraph reads:
34
35 Further, I am a little disturbed by the
36 fact that support references you attached
37 to your letter have now been refuted by
38 Mr B McPharlin and Mrs G Flanigan in signed
39 statements to Messrs Taylor Nott & Murray
40 Barristers of Katanning.
41
42 Of course, that is an incorrect assertion, and the
43 reference to "signed statements" would obviously have to be
44 a reference to the pro forma statements that were attached
45 to that law firm's letter to these parents, which is
46 exhibit 9.
47

1 Now, the statement which retracts that reference in
2 the handwritten letter was never signed by Mr McPharlin or
3 Mrs Flanigan. So it's open for your Honour to find, in my
4 submission, that this draft letter was prepared at the
5 direction of Mr Philpott, notwithstanding Mr Philpott's
6 denial that it was.

7
8 Now, he did concede the possibility that this letter
9 may have been drafted by someone in the Authority, but in
10 reality that is really the only explanation. It was a
11 draft letter that was on a file under the control of the
12 Authority. So what I should say, sir, if your Honour was
13 to find Mr Lammas drafted that letter, then it had to have
14 been - another inference to be drawn was that it had to
15 have been at the direction of Mr Philpott, bearing in mind
16 what Mr Lammas' evidence about what his relationship was
17 with Mr Philpott, insofar as receiving directions from Mr
18 Philpott.

19
20 So in light of this evidence and the other evidence
21 that I have referred to in my letter, it's open for your
22 Honour to find, notwithstanding Mr Philpott's strident
23 denials, that he failed to ensure a proper inquiry was
24 undertaken by the Chairman of the Board regarding that
25 letter written by Mr McPharlin and Mrs Flanigan.

26
27 Turning now to Recommendation 3. That reads:

28
29 As Chairman of the Authority, and upon
30 hearing a complaint from Lynley Day in
31 October 1990 regarding the treatment of her
32 son, her disclosure he'd been sexually
33 abused by Dennis McKenna, Mr Philpott did
34 not respond to that complaint, and thereby
35 failed to ensure that the matter was
36 appropriately handled.

37
38 Just a brief summary. Lynley Day was the mother of
39 Todd Jefferis, who was sexually interfered with by Dennis
40 McKenna in early August of 1990. Dennis McKenna was not
41 charged with any offending relating to Mr Jefferis, until 3
42 January 1991.

43
44 On 15 October a meeting took place at the Katanning
45 Hostel recreation shed that had been organised by parents
46 following the charging of Dennis McKenna. Mr Philpott was
47 chairing that meeting. It was evident there were a large

1 number of people in attendance. Estimates are at about
2 150, and that a substantial number were supporters of
3 Dennis McKenna.
4

5 Mrs Day's account of what she said at that meeting
6 appeared at transcript 751. She said that after Mr
7 Philpott asked if anyone else wanted to get up and say
8 something, she stood up and said:
9

10 "Yes, I want to tell my story of my son's
11 sexual abuse and what happened, and how I
12 went and saw Ian Murray", and he was not
13 the least bit interested in what had
14 happened to Todd, and that my son's
15 character had been sullied by McKenna to
16 cover his own dirty track.
17

18 And then I asked:

19
20 And did you say what type of sullyng that
21 was?
22

23 She answered:

24
25 Yes, he had been accused of stealing from
26 the canteen, that he lied about the sexual
27 abuse from McKenna and that he had been
28 expelled, which he hadn't, because we had
29 taken him out of the --
30

31 She says "school", but it's later clarified to mean
32 "hostel". I then asked:

33
34 Were you able to give this account
35 uninterrupted?
36

37 A. No.

38 Q. What happened?

39 A. Well, you know, I had murmurings and
40 boodings around me and also Philpott told me
41 to sit down.
42

43 Q. Was that after you had completed --

44 A. No, no, I said "I'm not going to sit
45 down, I'm going to finish what I have to
46 say."
47

1 Q. And what was the manner in which he
2 told you to sit down?

3
4 The answer was, "Very abrupt".

5
6 Sir, Mr Philpott admitted that he hadn't followed up
7 any of the complaints that Mrs Day was making, bearing in
8 mind, of course, she was not just referring to her son's
9 allegation that Dennis McKenna had sexually abused him, but
10 also the way he had been treated in the aftermath. And so
11 I therefore asked Mr Philpott at page 2562:

12
13 Had she said that --

14
15 That was meaning her son was being sexually abused:

16
17 -- and had she also recounted what she told
18 the Inquiry about her disappointment of the
19 behaviour of the school principal and that
20 her son had been falsely accused about
21 stealing from the canteen and had been
22 expelled from the hostel when he hadn't,
23 and that accusations were made that he lied
24 about the sexual abuse. Isn't this a
25 matter, as Chairman of the authority, who
26 has heard that complaint firsthand - wasn't
27 it incumbent upon you to follow it up?

28
29 Mr Philpott's answer was:

30
31 If we are looking hindsight now back to it,
32 I would probably say yes. At the state of
33 that meeting at the time, I probably didn't
34 take that in. I was more worried about the
35 orderliness of the meeting.

36
37 Given the fact, sir, that the Authority had only been
38 notified that Dennis McKenna had been charged with offences
39 dating back to 1979, it may be difficult in my submission
40 to accept that Mr Philpott had believed at the time of this
41 meeting that Dennis McKenna had also been charged with his
42 alleged offending against Mrs Day's son.

43
44 HIS HONOUR: Just dealing with that, that's where this
45 exhibit admitted this morning is important.

46
47 MR URQUHART: Yes, it is, sir.

1
2 HIS HONOUR: Because what it shows is that Mr Philpott, in
3 the course of - what you might term - investigating the
4 matter, he spoke to Ian Murray first, and he's listed the
5 people he spoke to, and towards the end he spoke to - in
6 fact, the last person he spoke to is Detective Smart at the
7 Child Abuse Unit.

8
9 Now, we've got evidence from a parent who attended the
10 meeting who had also telephoned the Child Abuse Unit, and
11 that's at page 844, Tom Fisher, and he said before the
12 meeting he:

13
14 -- rang the Child Abuse Unit in Perth and
15 spoke to a detective there ... he couldn't
16 allow me to give me any indication of what
17 he --

18
19 He wouldn't allow me to tell the meeting, but:

20
21 -- he did tell me that he believed the
22 charges against McKenna were sound, and
23 that there'll be more charges laid, and
24 please to keep Dennis McKenna from being
25 reinstated as warden.

26
27 So a parent who rang the Child Abuse Squad was informed
28 that more charges were pending.

29
30 MR URQUHART: Yes. But I think Mrs Jefferis was as well.
31 I've got a recollection she also rang the Child Abuse Unit
32 and was told, off the record, that there may well be
33 further charges pending; but, I would say, sir, that would
34 be in light of what Mr Hilder would have advised police
35 about the fact that he was not the only victim of Dennis
36 McKenna's.

37
38 HIS HONOUR: But, in any event, the relevance of this is
39 that Mr Philpott evidently has instructed his counsel he
40 doesn't remember what was discussed with Detective Smart,
41 and he hasn't been asked to testify about that, but
42 shouldn't I draw the inference that he would have been told
43 the same things as the Chairman of the Authority, or
44 perhaps even more than what a mere parent would have been
45 told?

46
47 MR URQUHART: He may well have been, sir.

1
2 HIS HONOUR: And putting two and two together, might not
3 he have thought that what Mrs Jefferis was complaining
4 about would have been one of those matters? Might not he
5 have reasonably thought that?
6
7 MR URQUHART: That's certainly open, sir. I would accept
8 that.
9
10 HIS HONOUR: I think they are fair inferences.
11
12 MR URQUHART: Yes.
13
14 HIS HONOUR: And therefore I should judge his conduct in
15 that context, I think.
16
17 MR URQUHART: And also, sir, we can take some note of the
18 matter in the far right-hand side of that document which is
19 now exhibit 145, where it reads:
20
21 If reoffend prima facie case for neg
22 against AUTH.
23
24 Which I would --
25
26 HIS HONOUR: The Authority.
27
28 MR URQUHART: Yes, "for negligence against the Authority".
29
30 HIS HONOUR: Yes. Well, that's what that means. Now --
31
32 MR URQUHART: So, it could - - -
33
34 HIS HONOUR: - - - is that the note that he's thought of
35 himself, do you think, or is it what someone's said to him?
36
37 MR URQUHART: Well, it's hard to say, sir, and it would
38 appear, upon my learned friend's instructions, that if he
39 was recalled he wouldn't be able to say that. Now, it
40 could mean one of two things. It could mean that he had
41 been told by the police that there might be other charges
42 pending; or, alternatively, he might have been amusing
43 himself, or he might have been told by the police only that
44 if this comes up again, if there's further charges,
45 different complainants, it might be a case for negligence
46 against the Authority. But having said that, sir, I doubt
47 whether the police would give you that sort of advice.

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HIS HONOUR: It would also be relevant that prior to Detective Smart, he spoke to John Graham, liaison from the Department to Operation Paradox. So I think it can be assumed that he's given some information about the results of Operation Paradox.

MR URQUHART: Yes.

MR RAFFERTY: And also Joan Harris too, sir from the Industrial Relations section, which is the major fall, but obviously one follows the other.

HIS HONOUR: Right.

MR URQUHART: Yes.

HIS HONOUR: But, in any event, they're probably the inferences I'll draw.

MR URQUHART: Yes. Well, what I'm going to say, sir, even if your Honour was to accept that Mr Philpott had that mistaken belief, it was still incumbent upon him to inquire about the other matters that Mrs Day had raised because from her evidence it wasn't just simply her case of stating at this meeting that her son had also been sexually abused, but what she was also concentrating on was the reaction that her son had been subjected to, once he had come forward. And there's the --

HIS HONOUR: Putting that aspect within the terms of reference of this Inquiry, what do you say is the relevance of that?

MR URQUHART: Well, sir, it's relevant insofar as this point is concerned. It's something that I have made - I intend making a submission upon tomorrow in my closing address, that the response by those in positions of authority - and you use authority with a lower case "a" - their reaction to when Todd Jefferis made this complaint had a potential to prevent or persuade other victims of Dennis McKenna coming forward, because here is a boy who come forward and was immediately victimised, was immediately the subject matter of false accusations, accusations that he made up against Dennis McKenna, an allegation that he had been expelled from the hostel because he was stealing when, as a matter of fact he was

1 voluntarily withdrawn by his parents.

2
3 His evidence about not just teachers telling him he
4 was a liar, but also, more relevantly, the principal, who
5 was on the Board, and the Chairman of the Board at the time
6 telling him that he was lying, and he was likely to be sued
7 for defamation, and that was Mr Addis. So there was this
8 groundswell of opposition against this boy by people in
9 Authority who ought to have been supporting him; or, at the
10 very least, remaining neutral. In my submission they ought
11 to have been supporting him.

12
13 And it was a matter for the Authority do follow-up
14 once this complaint had been made, to see whether the Board
15 was acting appropriately in all these circumstances, and if
16 the matter had been followed up with Mrs Day, it's more
17 likely than not - in fact, it's highly probable that Mr
18 Philpott or somebody else from the Authority would have
19 been told about the reaction to the allegation being made
20 by their son, the response by the Board as far as its
21 Chairman was concerned, and also the principal of the high
22 school, who also happened to be a member of the Board.

23
24 And when a Board is behaving inappropriately like
25 that, it was incumbent upon the Authority to intervene. So
26 that's the submission I would make with respect to that.

27
28 HIS HONOUR: Very well.

29
30 MR URQUHART: And then further evidence in support of my
31 submission that Mr Philpott made a deliberate decision not
32 to pursue Mrs Day's complaints of that nature is found in
33 the evidence of her sister, Karen Davies, who says that she
34 wrote a letter addressed to Mr Philpott, and also to the
35 Secretary of the Board, complaining about the way Todd
36 Jefferis was being dealt with by the then principal, Mr
37 Murray. When I questioned Mr Philpott --

38
39 HIS HONOUR: So the substance of his submission is that
40 are you saying Mr Philpott allowed this rejection of Todd
41 Jefferis to continue, and that dissuaded other complainants
42 from coming forward, and we know there were some that
43 didn't come forward at that time because they've come
44 forward in the course of this inquiry.

45
46 MR URQUHART: Yes. Well, potentially.

47

1 HIS HONOUR: Yes.
2
3 MR URQUHART: I can't say that it did.
4
5 HIS HONOUR: Complainants, I said.
6
7 MR URQUHART: Sorry, complainants, yes.
8
9 HIS HONOUR: Yes.
10
11 MR URQUHART: I can only say that potentially had that,
12 because for a young teenage boy who had been sexually
13 abused, and then to see the vilification and ostracism that
14 was extended to Todd Jefferis - they would be reluctant to
15 come forward. In summary, sir, Mr Philpott denied that
16 Mrs Davies' letter ever came to the Authority. That's at
17 page 2564, I've dealt with at page 14 of my letter.
18
19 But it appears that he was saying that he can state
20 that the letter never arrived because if it did, it would
21 have prompted him to do something about it. So, he's
22 drawing an inference that he never got the letter because
23 he would have done something about it. Well, there's,
24 interestingly enough - there is that earlier occasion with
25 the - no, sorry, the latter occasion on the 15 October
26 meeting on which he did not do anything, so therefore an
27 inference can be drawn that if he had received this letter,
28 he would not have done anything either.
29
30 Sir, that's all I intend to say about Recommendation
31 3.
32
33 Recommendation 4 reads:
34
35 As Chairman of the Authority, Mr Philpott
36 failed to restrict Dennis McKenna to
37 appropriate duties when employed by the
38 Authority whilst he was on bail on serious
39 child abuse offences.
40
41 After Dennis McKenna - my submissions on this point. After
42 Dennis McKenna was initially charged on 27 September, of -
43 my letter reads 1991, it should read 1990. That's at the
44 bottom of page 14, sir. He was eventually assigned to
45 perform duties at the Authority's head office. Mr Philpott
46 assigned him. Incidentally, I make absolutely no criticism
47 of the fact that Mr Philpott was - continued to be employed

1 by the Authority, and I accept what Mr Philpott's evidence
2 was, the advice he received --

3
4 HIS HONOUR: Well, it was done on advice as to industrial
5 matters.

6
7 MR URQUHART: Yes. This concerns the duties that he was
8 assigned. And Mr Philpott assigned him the task of writing
9 a pastoral care handbook for hostel staff, and it's also
10 apparent from Authority documents that he was attending
11 meetings or events at at least two hostels. Now, as to the
12 task of writing a pastoral care handbook, the Inquiry heard
13 from three persons who were wardens at this time, give
14 accounts of their views as to the appropriateness of Dennis
15 McKenna being assigned such a task when on bail for serious
16 child abuse offences, and that was a statement of Mr
17 Nicholas Christy, the evidence of David Smart, and the
18 evidence of Donald Dixon.

19
20 HIS HONOUR: Now, as to this area of the evidence, I can
21 see that Mr Philpott's conduct with regard to McKenna at
22 that time might have been in terms of interpreting his
23 actions in the past, but the fact that he did that, in what
24 way does that relate to my terms of reference?

25
26 MR URQUHART: It relates to the fact that Dennis McKenna
27 was extended arguably preferential treatment not just by
28 the Board, who was supposed to be overseeing his behaviour,
29 but also by the Authority. And there was --

30
31 HIS HONOUR: I mean, I'm asked to report on what
32 allegations were made by whom and to whom and when and what
33 the response was, and also asked to report on why McKenna
34 was able to get away with offending for so long.

35
36 MR URQUHART: And that would be in support of that
37 contention - that, in fact, those --

38
39 HIS HONOUR: There was no evidence that he continued to
40 offend after --

41
42 MR URQUHART: No, no, sir. What I'm saying is the fact
43 that he was held in such high regard by those bodies, and
44 those people within those bodies who had the responsibility
45 overseeing him.

46
47 HIS HONOUR: That's - I can say I see the relevance of

1 this to - yes, to give an indication of why things might
2 not have been done in the past, but in terms of the actual
3 act of allowing him to prepare the pastoral handbook, why
4 should that be an adverse finding as distinct from just a
5 fact which helps to explain what had happened previously.
6

7 MR URQUHART: I hear the point that you're making there,
8 sir. I can only place it as high as what I have done
9 insofar as evidence in support of the general submission
10 that can be made regarding the level of approval he seemed
11 to have got from those that were overseeing his management
12 of the hostel.
13

14 HIS HONOUR: Right.
15

16 MR URQUHART: Sir, I cited page 15, some transcript of my
17 questioning of Mr McKenna at page 2541, 2542 and, again,
18 this may well underlie that submission I made a moment ago
19 - and I'll read out what I've quoted in my letter at
20 page 15, and this is at 2542:
21

22 Q. Mr Philpott, you're asking an alleged
23 paedophile to write a book as to how to
24 care for children. Don't you see the
25 problem with that?
26

27 The answer:
28

29 The point being, without debating that
30 point, it was really to give him a job to
31 do.
32

33 I asked:
34

35 Did you see the problem with that at the
36 time?
37

38 A. No.
39

40 Q. Do you see the problem with that now?
41

42 A. Not really, because the book - the
43 book that he was doing would only be on
44 things that projected to the community.
45

46 Sir, that's all I intend to state about recommendation
47 number 4. As to number 5, that reads:

As Chairman of the Authority, Mr Philpott

1 failed to ensure that an effective system
2 was in place that addressed the
3 reemployment of former hostel staff that
4 were unsuitable for positions within a
5 hostel.
6

7 Now, the evidence in support of that, sir, in a summary
8 form. Now, it's evident from the Authority's minutes of
9 meetings that Mr Philpott's predecessor, Mr Lange, had put
10 in place a process, albeit a rudimentary one by today's
11 standards, for placing undesirable people on a list that
12 would prevent them from being re-employed in the hostel
13 system.
14

15 What was required was that the hostel which had
16 terminated such undesirable staff, staff were to notify the
17 Authority of that fact, and that at least when Mr Lange was
18 Chairman of the Authority, the process was that the matter
19 would then be raised at a meeting of the Authority, and if
20 there was agreement, that that would - the name of that
21 person should be placed on this list, then it would be put
22 on the list, and that can be gleaned from an
23 Authority's minutes of a meeting in April 1976, which was
24 three months before Mr Philpott became Chairman.
25

26 HIS HONOUR: There was also material in the circular
27 letters of the Student Hostels Association, setting out
28 this scheme.
29

30 MR URQUHART: That is, sir, too, yes, interestingly
31 enough, written by, it would seem, Mr Stowell, Mr Richard
32 Stowell, the then director of Swanleigh Hostel. It would
33 appear that he did not practice what he preached.
34

35 HIS HONOUR: Just on that point, there's a suggestion, I
36 think, in the Authority minutes, that the list was kept
37 elsewhere, whereas Mr Philpott said it was kept at the
38 Authority. How wide was it? Mr Stowell came from a hostel
39 which wasn't under the ambit of the Authority, but he
40 apparently was advocating that this list - the system
41 should be followed, so do we know if the system encompassed
42 hostels outside of the Authority's hostel?
43

44 MR URQUHART: Well, we know that Mr Stowell was a
45 supporter of it, and one would think, as I understand it,
46 that you could be a member of the Student Hostels
47 Association without necessarily being part of a

1 Government-run hostel; that if he was issuing this policy
2 or recommending this practice to those members at the
3 Student Hostels Association, then it would encompass all --
4
5 HIS HONOUR: He's speaking of - in those newsletters he's
6 speaking of a system which was in existence --
7
8 MR URQUHART: Yes.
9
10 HIS HONOUR: -- and just querying whether - firstly,
11 whether the list was kept by the Authority or by some other
12 department. I know our investigations of that have not met
13 with any success. And also did it encompass hostels
14 outside of those which were managed or the responsibility
15 of the Authority?
16
17 MR URQUHART: Sir, one would have assumed it would have,
18 because of the fact what they were looking at here is
19 preventing re-employment of hostel staff within the hostels
20 that they managed, and so, therefore, it would be not - it
21 wouldn't be very effectual if someone from a
22 non-Government-run hostel had been dismissed for engaging
23 in undesirable conduct - and I also say that could be of a
24 non-sexual nature - it wouldn't be a very effectual system
25 if, at the very least, management of those - that
26 particular hostel was not encouraged to advise the
27 Authority of that because otherwise this person could slip
28 under the net and apply for a position in a Government-run
29 hostel, but I hear what your Honour is saying. There's no
30 direct evidence of a documentary nature, aside from what is
31 in those Student Hostels Association newsletters to support
32 the contention that it extended beyond Government-run
33 hostels.
34
35 HIS HONOUR: Another issue I'll raise at this stage, and
36 that is one wonders whether any failings in the area of
37 your proposed adverse finding 5 should rest on the
38 Authority as an agency, rather than on Mr Philpott
39 personally, and there may be others as well. But, I mean,
40 for example, I would have thought it's open to me on the
41 evidence to make an adverse finding that the Authority
42 failed to provide adequate guidance to hostel members
43 generally --
44
45 MR URQUHART: Yes, sir.
46
47 HIS HONOUR: -- to inform them of their responsibilities

1 under the letters of arrangement, and also how to deal with
2 complaints against wardens. In other words, not have
3 wardens at the meetings and so on. Some basic things like
4 that. And one thing is clear from the evidence, is that I
5 think I'm right in saying that no one at the Katanning
6 Hostel, amongst the Board members that we heard evidence
7 from, knew of the existence of the letter of arrangement.
8 I think I'm right in saying that. Am I right about that or
9 not?

10
11 MR URQUHART: That's right, sir, although --

12
13 MR RAFFERTY: That's contrary to the minutes of
14 22 October.

15
16 HIS HONOUR: Sorry?

17
18 MR RAFFERTY: That's contrary to the minutes of October
19 22 --

20
21 HIS HONOUR: You are right.

22
23 MR RAFFERTY: -- 1986.

24
25 HIS HONOUR: You are right. But when individual witnesses
26 were questioned about it, they knew nothing.

27
28 MR RAFFERTY: Mr Hendry was the one who said, "I know
29 nothing", and he was the one who moved the motion.

30
31 HIS HONOUR: That's right, so --

32
33 MR RAFFERTY: That's right. And that's the difficulty
34 with the passage of time.

35
36 HIS HONOUR: The general thrust of the evidence was that
37 they really didn't have any clue.

38
39 MR RAFFERTY: That's right. And I tendered the letter of
40 arrangement through Mr Philpott, and he accepted that was
41 the type that went out, and then he looked at the minute of
42 22 October '86.

43
44 HIS HONOUR: Yes, it's there.

45
46 MR RAFFERTY: And clearly it's been tendered, it's been
47 discussed, it's been agreed upon, signed and sent back.

1
2 HIS HONOUR: Yes. That speaks for itself then.
3
4 MR RAFFERTY: It does.
5
6 MR URQUHART: I was about to refer to that. I couldn't
7 recall the exact meeting, but I knew Mr Rafferty would be
8 able to. However, on that, there wasn't any practice in
9 place for members, or new members of boards, to be provided
10 with any material insofar as Katanning was concerned. And
11 so what ought to have happened is that every new member
12 should have been given, at the very least, a copy of the
13 letters of arrangement.
14
15 HIS HONOUR: I think the crux of this goes to the failure
16 to have any system for dealing with complaints against
17 wardens, and if there had been such a system, it may well
18 have been that Dennis McKenna's offending would have been
19 discovered back in 1980 - it was off Noel Parkin's
20 complaint, because as we know, so I think I'm likely to
21 find the Katanning Board was notified of Parkin's complaint
22 by the Authority, and it was notified via Dennis McKenna
23 himself.
24
25 MR URQUHART: Yes, sir.
26
27 HIS HONOUR: And he was able to effectively present that
28 issue to the Board at the time, in a way where nothing
29 happened.
30
31 MR URQUHART: And such was the arrogance or confidence of
32 the man that he could raise this matter himself.
33
34 HIS HONOUR: In any event, it was a very significant
35 shortcoming of a system, but there was no way in which -
36 there was no guidance as to how a Hostel Board should deal
37 with a complaint involving a warden, and no board was told
38 they should deal with that in the way where the warden was
39 not present at the meeting.
40
41 MR URQUHART: Yes. Getting back to the point that your
42 Honour originally made that this could be a finding made
43 against the Authority, I completely accept that. A reason
44 why I am also stating can be found against Mr Philpott is
45 that on his own evidence he was aware that such a list
46 existed, yet we had heard from a number of witnesses who
47 had no idea of the list and were not aware of the procedure

1 that was to be followed with respect to this list. Two
2 such witnesses for the latter were Bishop Michael Challen
3 and Mr Don Dixon, who was a long-standing warden at
4 Narrogin and a person who fitted within the former
5 category. Not even knowing this list existed was Mr.
6 Bachelard-Lammas, who stated that he had no recollection of
7 such a list.

8
9 I asked him, though about that at page 2795 in the
10 context of his evidence regarding the two supervisors who
11 had been relieved of their duties, one from Northam and
12 another from South Hedland in the 1980s. I asked him
13 whether he knew of the list that had been prepared because
14 the circumstances of those two supervisors' removals would
15 clearly be a case in which they would be placed on such a
16 list because they both involved allegations - I emphasise
17 "allegations" - of sexual interference of students, because
18 neither of them were subsequently charged but they were
19 relieved of their duties as a result of those allegations.
20 So one would expect those to be placed on the list.
21 However, we never got to the point of me asking Mr Lammas
22 about whether he placed those names on the list because his
23 evidence was that he had no recollection that such a list
24 even existed.

25
26 The reason why I am singling out the Chairman of the
27 Authority as a possible recommended adverse finding be made
28 against him, quite separate from the Authority, is that he
29 was aware that the list was in existence, by his own
30 evidence; that it would seem, also on the evidence that the
31 Inquiry has heard, that it fell into disuse during the time
32 that he was Chairman from 1976 up until 1991, when Dennis
33 McKenna was convicted. I accept at that point in time
34 there was an overhaul of the procedures to be followed when
35 complaints of such a nature that were made against Dennis
36 McKenna arose.

37
38 Now, once more, sir, Mr Philpott attributed
39 responsibility for the failings that appeared to be evident
40 regarding this list to the Boards. I asked him at
41 page 3892 did he think the Authority should accept
42 responsibility for the apparent failure of Hostel Boards
43 and wardens to be aware of their responsibility to notify
44 the Authority of such staff. His answer was: "We have an
45 overarching responsibility but the major part of the
46 responsibility is with the Boards".

1 So from all the evidence I would simply submit that it
2 is open for your Honour to find that Mr Philpott, as
3 Chairman, failed to ensure that there was a formal system
4 in place so that the Authority, and not the Hostel Boards,
5 could monitor whether any former hostel staff who were
6 unsuitable for positions were being re-employed.
7

8 Now I do accept, finally, that in my letter that there
9 was an informal process in place, but in my submission the
10 formal process that existed prior to Mr Philpott being
11 Chairman should have been maintained and appropriate
12 measures should have been taken to ensure that boards were
13 aware of their responsibilities.
14

15 That is all I intended to state by way of a summary of
16 my adverse finding recommendations.
17

18 HIS HONOUR: Thank you. Yes, Mr Rafferty?
19

20 MR RAFFERTY: Your Honour, the first issue for your Honour
21 to consider is: What is an adverse finding? The effect of
22 an adverse finding is considered in cases such as
23 Annette's, Ainsworth, Greiner. But what actually an
24 adverse finding is, is never defined. That is obviously a
25 matter for your Honour to determine.
26

27 HIS HONOUR: If I can say this, it is one thing to make a
28 formal adverse finding in the context of the terms of
29 reference. It is another thing for me, in the course of
30 arriving at whatever conclusions I arrive at factually, to
31 make an adverse finding I do not believe a witness or
32 things of that nature, going to credit --
33

34 MR RAFFERTY: Yes.
35

36 HIS HONOUR: -- but the authorities essentially say if I
37 am going to make any formal finding, even as to credit,
38 which impacts on a person's reputation, then procedural
39 fairness requires that certain things happen.
40

41 MR RAFFERTY: I accept that.
42

43 HIS HONOUR: There are two types of adverse findings.
44

45 MR RAFFERTY: That is right. I am making my submission in
46 the context of what Mr Urquhart is submitting to you should
47 be found.

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HIS HONOUR: Yes.

MR RAFFERTY: Ultimately, if you apply its ordinary meaning you would have to make a finding that somebody has done something wrong either by way of a deliberate act or by having a look at something and saying, "you should have done that differently".

HIS HONOUR: I agree.

MR RAFFERTY: In these circumstances, your Honour, it would appear, save for one particular issue which we are not going to deal with - they are dealt with in both of the written submissions - the suggestion that my client should have done things differently. That is the most important thing. I did discuss the issue of whether these proceedings should be dealt with in-camera because when you consider these, they are only my friend's suggestions to your Honour, they are not findings.

HIS HONOUR: No.

MR RAFFERTY: My learned friend very properly dealt with that at the start. For those who are reporting this, it should be understood that what is being suggested in relation to my client is that there is not any improper conduct per se, it is that he should have done things differently.

HIS HONOUR: Yes.

MR RAFFERTY: That is the point worth making at the start. Obviously, in making that assessment you should consider matters as they existed at the time that the decisions were made. Time, place and circumstance --

HIS HONOUR: I have no trouble in accepting that proposition. It mustn't look at the conduct of people subject to adverse recommendations through the lens of today. Have a look at what the standards were at the time and understandings were at the time.

MR RAFFERTY: Your Honour will clearly go about that task entirely properly, but it is so difficult knowing what we now know about McKenna. He is an evil man. He is a man who perpetrated evil over 14 years - acts of evil over such

1 a long period of time. Your Honour, no doubt, gained an
2 impression of him on the day that he gave evidence.
3 Obviously your Honour must completely disassociate all of
4 that and consider what was known at the time. The
5 difficulty with these types of people and with what McKenna
6 did is to the outside world he was clearly a very good
7 person, because the things that were being done were so
8 good.
9

10 HIS HONOUR: I am going to find that he was grooming the
11 community as well as the victims.
12

13 MR RAFFERTY: Exactly. Exactly. When you are the person
14 who is not in the community, you are dissociated from the
15 community, as my client was, he is in Perth, everything is
16 happening in Katanning. When you are looking through that
17 perspective you could only ever have a positive view of his
18 activities within the Katanning community.
19

20 Mr Philpott is one of those - I won't say rare
21 commodities - but sometimes rare in that he is a truthful
22 witness. He gave you evidence of things that could
23 adversely impact on your assessment of him. He didn't try
24 to guild the lily by saying, "Oh, listen, no, I thought he
25 was a bad so and so. I didn't like him very much". He
26 said it very strong, "Listen. I thought he was good". He
27 didn't remember using the term that "he was the guru of
28 boarding", but he accepted that that is probably the way he
29 felt at the time. They are all matters that your Honour
30 must take into account in assessing the credibility and the
31 character of my client in the context of the submissions
32 that are made by my learned friend.
33

34 The other factors that I ask you to take into account
35 in relation to my client's character is the fact that he
36 was involved in the hostel system for 30 years from about
37 1969 to 1999. Clearly it was something that he was very
38 passionate about, otherwise he would not be involved on a
39 voluntary basis for such a long period of time in that
40 system.
41

42 Despite questions that were put to him, he was clearly
43 motivated by assisting children in remote communities by
44 giving them the same education opportunities that those
45 children who lived in the city had. Clearly that was his
46 motivation. It is not the type of activity that you are
47 going to receive much kudos about, given the nature of what

1 it involved, but it is clearly his motivating factor. And
2 that of itself is a very positive factor for your Honour to
3 take into account in assessing credibility and character.
4

5 Twenty-three years he devoted to being Chairman of the
6 Country High School Hostels Authority. The majority of
7 which were voluntary. I do not say that in the sense of
8 what a wonderful bloke he is, in the sense of isn't it
9 great that he did it on a voluntary basis; it just reveals
10 something about his character, in my respectful submission.
11

12 He worked for the same organisation for almost 50
13 years. That certainly says something about the stability
14 of the man and the nature of his character and where he
15 rose to within that particular organisation, which your
16 Honour would be well aware of, because it is a very
17 prominent organisation in the West Australian community.
18 It goes without saying he has no criminal convictions, so
19 you could not draw anything adverse in relation to that.
20

21 He is a married man. He is a father of five, albeit
22 his daughter died. There was a bit of an issue there.
23 Obviously it is a matter that causes Mr Philpott some
24 distress, even though it happened so long ago. On the last
25 occasion he referred to 1 December. It was actually
26 1 November 1990 when his daughter passed away. That was
27 the evidence he gave on the first occasion. It is
28 something that I recall from when he was here last week.
29

30 Ultimately, the contribution he made to country
31 Western Australia was recognised by the Commonwealth in the
32 awarding of an Order of Australia medal. I am not saying
33 that on its own is significant, because clearly there have
34 been people in the past who have received such a
35 recognition when subsequently it was found out they have
36 engaged in improper behaviour. But it is the combination
37 of all the factors that, I respectfully submit, when you
38 put them together, your Honour, are significant in
39 assessing my client's character. He is clearly not the
40 type of person to engage in improper conduct. He was the
41 type of person where every decision he made was in good
42 faith. That is the basis on which he made his decisions.
43

44 Also consider the nature of the position that he held
45 and the actual organisation itself. Clearly on any
46 understanding the Authority was a very small organisation.
47 It was never intended to be anything bigger. When you

1 consider the definition of "Public Service" in the public
2 Sector Management Act, it is not an agency. It is not a
3 department. It forms part of the "senior executive
4 service" by virtue of schedule 2 of the Act, which clearly
5 is the third tier of a government-type organisation, if you
6 were to look at in the context of it being a hierarchy.

7
8 The Act effectively itself delegated the authority to
9 the Boards. Section 9 actually starts that that delegation
10 is to be taken as if the Act had delegated the authority
11 itself, not - when I say, "authority", like my friend said
12 before with the lower case "A", not that the upper case "A"
13 Authority had delegated that authority.

14
15 So, clearly the intention of parliament, in my
16 respectful submission, was for local Boards to have the
17 day-to-day running of the local hostels and for the
18 Authority itself to have some kind of overarching,
19 overriding ability to manage these organisations.

20
21 The Authority was effectively run initially by a
22 secretary - I do not think there is any dispute that that
23 was Mr Hepper and then subsequently by an administrative
24 assistant. Again, there is nothing uncommon about that for
25 a small government - I keep wanting to say, "department",
26 it is not a department - a small government organisation to
27 be run in that way. For that person, again, nothing I say
28 in any way should be construed as suggesting that Mr Lammas
29 has ever done anything wrong. But that is the way it
30 operated in practical terms.

31
32 As my client said, and when you look through the
33 minutes in any detail, the issues always seem to relate to
34 finance. That always seems to be the big ticket item as
35 far as the Authority was concerned, because clearly the
36 funding made available by the government wasn't significant
37 - I am not criticising the decision of the governments of
38 the day - this is not an area which would attract
39 significant funding, and the Authority did as best it could
40 in that context of funding. That always seemed to be the
41 focus. Clearly the consideration of children would also be
42 a factor taken into account, but implicit in that is the
43 fact that the finance was always going to be the issue that
44 would impact on children the most by way of the nature of
45 how they were housed at a hostel.

46
47 When you look at my client - and I am confining this

1 to 1976 to 1990, because what happens after 1990 is
2 irrelevant for your Honour's terms of reference - he is a
3 person who is clearly working full-time at Wesfarmers. He
4 gave evidence as to how often he would have involvement
5 with the Authority. I have referred to that in my written
6 submissions. For your Honour's benefit, I am not going to
7 go through those, by simply reciting no benefit would be
8 drawn from that. Your Honour has had the ability to
9 consider those.

10
11 Ultimately - this is the significant thing - there is
12 no suggestion that he himself was ever provided with any
13 training, any assistance, anything of that nature. He was
14 asked by Mr MacKinnon, I think, the Minister For Education
15 in 1976: "Would you like to be Chairman of the Authority?"
16 Given the fact that he had a passion for that type of thing
17 he agreed to do that. Then it rolled from there. There
18 was never any suggestion that he, himself, was provided
19 with any guidance.

20
21 HIS HONOUR: At that time what was his position at
22 Wesfarmers?

23
24 MR RAFFERTY: He was a manager at Wesfarmers. He was
25 always a manager at Wesfarmers from, I think, the 1960s on.
26 Clearly he had business acumen but by way of - if I was to
27 put this in the context of potential adverse finding 5 -
28 being the type of person he was, and being a person who
29 grew up in the country, your Honour is well aware of people
30 of that type of vintage, who relied on the goodwill of
31 people, as you always do, and he always worked on the basis
32 that people would apply their common sense.

33
34 Now, in the context of 2012, where we seem to have to
35 put signs up to state the bleeding obvious, you think of
36 things like Nattle's case and the Basin at Rottneest and
37 matters of that nature. You have to look at it in the
38 context of the time. You would, in the context of the time
39 - your Honour would have a better memory than me, from the
40 fact that you were an adult at that stage - people did work
41 on that basis. If something comes up you apply your
42 common sense. Think about it. We have a complaint about a
43 hostel warden. If you were in the position of the Chairman
44 of the local Board - I put it in context, let's say Len
45 Wilkinson, who was the head of the local co-op, so he is
46 obviously a prominent businessman in the community.
47 Common sense would always dictate if the person who was

1 being complained about wasn't a protected species - I will
2 come back to that in due course - what are we going to do
3 about this? If we were undecided about it, or we didn't
4 know what to do about it, you would ring someone. Who
5 would you ring in that context? You would ring the
6 Authority. Who would you speak to? You would speak to
7 Lammas, who would then put you on to my client. That is
8 the way things operated at the time. Any failure, any
9 systemic failure for these types of things to be put in
10 place, in my respectful submission, not entirely, but to
11 some extent, would be put on the government of the day. It
12 would be incumbent on the government of the day to make
13 facilities available by way of finance and training and
14 matters of that nature for people involved in authorities
15 of this type. That didn't happen because the buck has to
16 stop somewhere. I am not trying to absolve my client of
17 all responsibility because he accepted in a number of
18 circumstances that he could have done things differently in
19 hindsight. That is not surprising, given what we now know
20 about McKenna. But in the context of at the time I think
21 the submissions I make do have some validity, sir. I do
22 ask you to consider it in those terms.

23
24 I am prefacing everything I am saying now in general
25 terms. Also consider the nature of the relationship
26 between my client and McKenna. That is something your
27 Honour must take into account. We fully acknowledge that.
28 When your Honour pulled me up before and said McKenna is
29 not to be believed on anything, McKenna did give evidence
30 about his relationship with my client. You could hardly
31 refer to it as "a relationship". There does not seem to be
32 any other independent evidence which would suggest or could
33 even give rise to an inference, at its lowest, that there
34 was any kind of improper relationship between my client and
35 Mr McKenna. Certainly he may have held him in high regard,
36 but so did everybody. In the context of being in Perth and
37 seeing what was going on --

38
39 HIS HONOUR: He is no orphan there.

40
41 MR RAFFERTY: Exactly. Putting this in the context of
42 suggested adverse findings, it is important that you
43 consider the nature of that relationship.

44
45 HIS HONOUR: One of the factors why he is able to offend
46 for so long is because everyone believed he was a shiny,
47 clean sort of fellow.

1
2 MR RAFFERTY: No, I think it is more than that. This is
3 the point I was about to move on to. Dennis McKenna was a
4 protected species in Katanning. There is no other way that
5 your Honour should look at it. It is the actions of people
6 - I do not wish to speak ill of the dead - but it is people
7 like Garth Addis, Len Wilkinson, people who lived in that
8 community, and to whom people spoke, as you said, sometimes
9 in code, but in terms which would give rise to a suggestion
10 that the man wasn't doing the right thing - I will put it
11 in those very broad terms. Ian Murray - it is those types
12 of people. Again, not passing the buck but looking at this
13 in the global context of the Inquiry, being mindful of all
14 of the evidence that has been adduced, it is the actions of
15 those people who were on the spot to whom people spoke
16 about McKenna that allowed the behaviour to go on. It is
17 very hard for a person who is in Perth, who is separated
18 from all of that, and is always looking at the veneer, is
19 the way I would submit, to come to any other conclusion
20 that the person was the gurus of hostel management. But it
21 is the people who are on the spot and the people who are
22 charged by virtue of the legislation and the letters of
23 agreement and, with all due respect to those people, such
24 as Mr Hendry, they may not recall now - yes we accept that
25 there is a tyranny of time, 26 years is a long time - but
26 there is clear written evidence that those people were well
27 aware of what their responsibilities were at the time. You
28 could not understand that letter of arrangement in any
29 other terms.

30
31 I accept what your Honour said in the context of the
32 first premise and I appreciate that it is an awkward term
33 to use, but I think it is a way to use it, he was a
34 protected species in Katanning. I am not saying that
35 people necessarily knew exactly what he was up to, but they
36 may have been prepared to forgive him for any misdemeanours
37 because of the global good that appeared he was doing. I
38 do not know. I cannot speak for those people, but that is
39 an inference that your Honour could draw.

40
41 When the people on the spot are not doing the right
42 thing, it is very hard for the person who is up the chain
43 to be aware of what is going on.

44
45 They are the only general submissions I wish to make.
46 Unless there are any other matters --

47

1 HIS HONOUR: No. Thank you.

2

3 MR RAFFERTY: I appreciate that. I think I have gone
4 through everything by way of reply in my outline of written
5 submissions. Hopefully they have been of some assistance
6 to your Honour. I will just deal with them in a global
7 sense, each particular recommended finding.

8

9 It is really interesting - your Honour picked up on
10 the point earlier - the "suspicious suggestions" letter is
11 dated 22 August 1985. The first thing, in my respectful
12 submission, your Honour, you cannot disassociate that
13 letter from the issue that presented itself at the time.
14 The Trezise' issue was a fees issue. It was not a
15 complaint issue as to McKenna's conduct at any stage.
16 Mr Trezise gave some evidence about that.

17

18 HIS HONOUR: Trezise's evidence is to the effect that
19 really it all started up about fees.

20

21 MR RAFFERTY: Yes.

22

23 HIS HONOUR: At some point the penny dropped and he
24 realised that this letter he had been circulating was
25 referring to sexual abuse. That became a parallel concern
26 of his. That is the effect of his evidence.

27

28 MR RAFFERTY: Exactly. Your Honour may recall my
29 cross-examination of him; him being an ex-soldier and
30 working the chain of command. That is clearly what he did
31 in the fees issue, but that did not seem to happen in
32 relation to the secondary issue. There is no suggestion to
33 an adverse finding in relation to anything that is alleged
34 to have happened in Lake Grace in 1986. I am going to
35 leave that issue alone. You cannot disassociate the two
36 issues. It is one issue. It was a fees issue and that is
37 what it was. That letter was in support of the fees issue.

38

39 HIS HONOUR: What is of significance, of course, is by the
40 time the solicitors sent out the letters clearly that was
41 addressing an allegation of sexual abuse. There is no
42 other --

43

44 MR RAFFERTY: Can I refer to that issue? I am trying to
45 work through this in a chronological order.

46

47 HIS HONOUR: Yes, by all means. Go ahead.

1
2 MR RAFFERTY: The Minister for Education had that letter -
3 maybe not him personally - his department had that letter.
4 The Ombudsman, the organisation that is responsible for
5 overseeing all departments, ensuring that everything was
6 done properly, again in layman's terms, had that letter.
7 The first person to do anything about that letter, when it
8 was received, was my client. The first person. No-one
9 higher up the chain ever did anything, to your Honour's
10 knowledge, ever did anything about that letter.

11
12 HIS HONOUR: I agree with you.

13
14 MR RAFFERTY: The criticism is - this is the adverse
15 finding, because we have to be specific about these things
16 - my learned friend is asking you to make an adverse
17 finding that at that point he did not refer the matter on
18 to the Industrial Relations Department or section of the
19 Education Department. Difficulty with that is that he gave
20 evidence on oath - again I suggest you should accept it -
21 he ultimately said, well, listen, I didn't give it that
22 meaning at that time. Your Honour has already said it
23 could have been equivocal at that time, September 1986.
24 You can almost see it unfolding, because Lammas goes to
25 that meeting on 22 October 1986. There appears to be no
26 other reason for him to be at that particular Board
27 meeting.

28
29 HIS HONOUR: I was going to ask you that. You are
30 essentially saying I should draw the inference he went to
31 that meeting because of the letter?

32
33 MR RAFFERTY: Yes. I know Mr Lammas used to ghost
34 meetings, but there does not appear to be any other good
35 reason why he went to that particular meeting, given what
36 had been received by the Authority less than a month before
37 from Mrs Coral Trezise. You would not, in my respectful
38 submission, in the context draw a finding or an inference
39 favourable to my client that he has gone down there.

40
41 Mr Lammas could not remember the meeting. Again
42 tyranny of time, 26 years. However, he is a good person.
43 I do not think your Honour is going to make any findings
44 that he is a person of improper character or anything like
45 that. As he said in his evidence - I have referred to the
46 transcript pages - if I would have felt something was
47 wrong, if I would have felt that something improper was

1 being done I would have done something about it. After that
2 meeting my learned friend makes submissions about my client
3 not having received a response, but clearly Lammas would
4 have gone back to him and said, "Boss, it is okay. It's
5 been sorted". You can see from the prism of 26 years down
6 the track that's probably the way it unfolded, by virtue of
7 the objective things that you can see by way of what is in
8 writing.
9

10 In my respectful submission, that is the inference you
11 should draw. If you draw that inference my client has done
12 it, to put it in the context of how it referred to adverse
13 finding earlier, he has done nothing wrong.
14

15 HIS HONOUR: The area in issue here is that according to
16 Mr Philpott he directed the Chairman of the Board to
17 conduct an investigation and that didn't happen. I suggest
18 Mr Lammas must have known it did not happen.
19

20 MR RAFFERTY: That is the problem. My client would be
21 reliant on what Lammas brought back to him from the meeting
22 of 22 October 1986. That is his representative.
23

24 HIS HONOUR: Instead of conducting an investigation what
25 happened was essentially an attack upon what might be
26 called the whistle blowers.
27

28 MR RAFFERTY: That seems to be more constituted.
29

30 HIS HONOUR: The issue in my mind is whether that was
31 directed by the Authority.
32

33 MR RAFFERTY: I understand that. My client gave evidence
34 on oath that the use of the term "lawyer" on his first
35 occasion was incorrect. Can I ask your Honour to clearly
36 look at the second question, because it almost seemed that
37 my learned friend was surprised by that answer.
38

39 HIS HONOUR: I think that wasn't picked up at the time. I
40 did not hear that. I asked the audio to check that he did
41 say that. The way it was said was missed.
42

43 MR RAFFERTY: Can I say this: If you look at the follow-up
44 question from my learned friend, quite properly, he says:
45 Who was the instruction to? He says he gave the
46 instruction to the lawyer - I am paraphrasing here, and the
47 answer before - and then my learned friend comes straight

1 back and said: Who was the instruction to? Chairman of the
2 Board. He never gave any instructions to any lawyers. He
3 also refers to something being put in a box - I am pretty
4 sure he was put in his box. How my client would know
5 anything about Taylor Nott & Murray's postal arrangements
6 is beyond me. In any event, the subsequent answers given
7 by my client do not bear out any suggestion that he,
8 himself, made an instruction that lawyers become involved.
9 It is not one of those types of matters that you would
10 forget.

11
12 To make that finding, sir, you would have to draw an
13 adverse inference against his credibility. I go back to
14 all the matters that I have already suggested before. This
15 was a matter that was being dealt with locally. That is
16 the inference your Honour could draw.

17
18 HIS HONOUR: Why was the Authority paying costs for that?

19
20 MR RAFFERTY: Why?

21
22 HIS HONOUR: By way of background, the Authority had gone
23 through a long process over a few years trying to get the
24 Hostel Board to be financially responsible. This was
25 clearly a matter that was an area of his responsibility.
26 Why would the Authority pay the costs of what the
27 solicitors did?

28
29 MR RAFFERTY: Because a person who is in a voluntary
30 position, that being the Chairman, and the warden - I put
31 this in the neutral terms of the time, the warden being the
32 person who is undertaking legal action - had embarked on
33 that process as a result of the employment of Mr McKenna,
34 who ultimately was an Authority employee; and, secondly, a
35 person who was in a voluntary capacity. It is not unheard
36 of. It is not uncommon for people who are in those types
37 of capacities to have their legal fees paid for by the
38 government instrumentality in circumstances where the legal
39 action has arisen by virtue of their, in Wilkinson's case,
40 voluntary position within the Board and in relation to
41 Mr McKenna, his position as warden.

42
43 HIS HONOUR: When you say "Wilkinson, as a volunteer", now
44 the letter was sent out on behalf of the Board as a whole
45 and McKenna.

46
47 MR RAFFERTY: When I say "the Board" - okay, I use "the

1 Chairman".
2
3 HIS HONOUR: It is the Board that pays McKenna's salary.
4 It is the Board that pays all of the costs incurred. I
5 have to search, but there may be other instances where the
6 board arranged for solicitors to do things. I think there
7 were, and paid the costs. Ordinarily it is the type of
8 expenditure which would have been the Board's
9 responsibility. That is why I do not understand why, in
10 this instance, unusually the Authority paid the fees, and
11 after considering it too.
12
13 MR RAFFERTY: Two things arise from that. It may be a
14 question that I simply cannot answer. At the end of the
15 day there are sometimes issues that simply cannot, because
16 of the passage of time, be determined one way or the other.
17 I do not believe your Honour should be at that point. This
18 had gone outside the Board's authority by this stage. It
19 had gone up a cog as far as the Trezise issue is concerned.
20 This all arose by virtue of the Trezise issue. You cannot
21 separate the McPharlin/Flanigan letter from the Trezise
22 issue. It is all part of one. By that stage it had gone
23 past the Board. It had got to the Authority. It had got
24 to the Minister of Education. It had gone to the
25 Ombudsman. It wasn't at that stage simply the local
26 Board's responsibility, it was something - it got a lot
27 bigger than that.
28
29 HIS HONOUR: Now, do you think I can draw the inference
30 that the Authority must have known that Mr Wilkinson was
31 going to the solicitors?
32
33 MR RAFFERTY: As at which time? Sorry, sir, I don't mean
34 to --
35
36 HIS HONOUR: At the time that it happened because, you
37 know, he - you would think that before going to solicitors,
38 if the Authority was going to pay the bill, he'd consult
39 with the Authority.
40
41 MR RAFFERTY: I can't answer that question, sir, because I
42 think this whole process involves a certain amount of
43 speculation.
44
45 HIS HONOUR: Well, it could either go into the realm of
46 speculation, but it's a matter of what inferences can be
47 drawn; but, I mean, a fair inference ordinarily would be

1 that if the Authority paid the bill, they instructed the
2 solicitor, or they were the ultimate instructors of the
3 solicitor.
4

5 MR RAFFERTY: The problem with that is the letters always
6 say, "We act for Mr McKenna". None of the letters - you
7 know, the legal context, if they were acting for the Board,
8 they'd say, "We're acting for the Board on behalf of Mr
9 McKenna", but they all say, the letters - and I can't
10 remember the exhibit numbers now, but your Honour's clearly
11 familiar with them --
12

13 HIS HONOUR: Yes.
14

15 MR RAFFERTY: -- "We act for Mr McKenna". Why the Board
16 paid it - again, it may well have been a very silly
17 decision in retrospect.
18

19 HIS HONOUR: The Authority, you mean?
20

21 MR RAFFERTY: Sorry, the Authority.
22

23 HIS HONOUR: Authority, yes.
24

25 MR RAFFERTY: May have been an ill-conceived decision.
26

27 HIS HONOUR: Or it was a considered decision, because they
28 considered the bill the meeting after the event and then
29 asked for further information about the bill and then paid
30 it.
31

32 MR RAFFERTY: Yes. And what information they were given,
33 we don't know, but the difficulty is the Board may have
34 felt a responsibility at that stage, given the fact that
35 the Trezise issue had gone past the local Board level and
36 become an Authority issue and become an administrative
37 issue.
38

39 Again, my answers are all based on speculation, and as
40 I said, gets back to that point where sometimes those
41 questions can't be answered, but what I'm suggesting though
42 is that the mere fact that the bills were paid - if just
43 McKenna's bill had been paid, then there would be an issue,
44 but because Wilkinson/the Board's bill was paid as well,
45 it's clear that the Authority felt some form of obligation
46 in relation to the issue in a global sense, not just some
47 support for McKenna.

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And what I'm simply saying is this particular issue on its own - and this is what we're looking at in a solitary context - does not evidence some improper support on behalf of my client as an individual, for Dennis McKenna. It couldn't on its own, and it runs contrary to all of the other evidence.

HIS HONOUR: I wouldn't characterise it as improper support, but it's a question of whether or not there was to be an investigation. That's the way I see it.

MR RAFFERTY: Whether there was to be an investigation.

HIS HONOUR: I mean, why, if instructed to investigate this allegation - why would Wilkinson immediately go to solicitors and instruct them to do what they did?

MR RAFFERTY: That was - maybe that was his way of dealing with it.

HIS HONOUR: It's contrary to such an instruction.

MR RAFFERTY: Again --

HIS HONOUR: That begs the question whether that instruction's there in the first place.

MR RAFFERTY: We go on the basis that people will do - as far as there being an instruction, I think Lammas going to that matter on 22 October 1986 is significant, otherwise if there hadn't been any instruction, then there was no need for him to be there. There had to have been something from higher above for Lammas to go there and be present at the meeting, and clearly in those circumstances he didn't feel anything improper was being done. He may well have been told - and going back to this concept of McKenna being a protected species in Katanning - he may well have not been told the truth. Again, we're embarking on --

HIS HONOUR: I think I can draw the inference that Lammas must have known there'd been no investigation.

MR RAFFERTY: Or that he was - no, there's two inferences - or that he was told there was an investigation, and there hadn't been. So he was misled. That is entirely plausible, sir, particularly given the conduct of some of

1 the people in Katanning. I suggest to you, you could draw
2 that inference.

3
4 HIS HONOUR: All right. Well, I can understand that
5 submission.

6
7 MR RAFFERTY: Thank you, sir. And, remember, if you are
8 dealing with people in good faith and they tell you
9 something, and there's no other reason to believe that
10 something improper is being done, then why would you - what
11 need is there for you to go to any further steps. And
12 that's effectively the basis of my submission in relation
13 to this particular grant, proposed grant. Sir, anything
14 else in relation to that first --

15
16 HIS HONOUR: No. Thank you for that.

17
18 MR RAFFERTY: Thank you, sir. In relation to the second
19 proposed adverse finding - again, I've gone through in
20 detail in our outline of written submissions what was done
21 in relation to that. I think there's actually a bit of
22 crossover from what I've already made submissions in
23 respect of the questions your Honour's raised in relation
24 to proposed adverse finding one. In fact, I think I raised
25 all the issues already in my previous submissions. Again,
26 sir, if there's anything - unless --

27
28 HIS HONOUR: No, no.

29
30 MR RAFFERTY: -- there's anything specific, thank you,
31 sir.

32
33 Does your Honour - given the questions you had of
34 counsel before, do you want me to address the Lynley Day
35 issue?

36
37 HIS HONOUR: The which one?

38
39 MR RAFFERTY: The Lynley Day issue.

40
41 HIS HONOUR: Probably not. I understand the issues there,
42 and I know what you say about that, so --

43
44 MR RAFFERTY: The only issue I say is this: there has been
45 an interchange between the use of the word "charge" and the
46 making of a complaint, but it doesn't matter, because I
47 actually put to Lynley Day by that stage, because that was

1 my understanding - I think it was my misunderstanding,
2 because I actually - when my client gave evidence I tried
3 to clarify with you when he was charged, so that was my
4 misunderstanding, and that's my fault. I put to her that
5 by the time of 15 October 1990, he had been charged with
6 the offences relating to her son, she said, "Yes".

7
8 HIS HONOUR: She was wrong.

9
10 MR RAFFERTY: She was clearly wrong, but clearly there was
11 investigation into that matter, and the initial complaint
12 had already been made prior to that time. So going back to
13 those - I raised these in my outline of written
14 submissions. Those two notes were instructive because it
15 seems incongruous that a man could be so proactive in the
16 context of his full-time employment in relation to this
17 issue two weeks before the meeting, and then two weeks
18 later simply says, "Well, no, I'm just going to ignore" --

19
20 HIS HONOUR: Well, I think the only reasonable inference
21 if he spoke to the Child Abuse Squad, which obviously he
22 did, he must have at least had the same information as Tom
23 Fisher, who was informed that there were other charges
24 pending.

25
26 MR RAFFERTY: I agree with that, sir. And just in that -
27 finally, in relation to that particular suggestion, my
28 learned friend has made - has said, "Even if you put that
29 to one side, there were other allegations made by Lynley
30 Day at that meeting, which required further investigation".

31
32 My ultimate submission is that those particular
33 matters paled into insignificance as opposed to sexual
34 abuse of the child, and that was in the hands of the
35 police. It would have been improper in those circumstances
36 for there to be - and in the context where he had been
37 suspended from Katanning, for there to be some dual
38 investigation going on. Clearly the police investigation
39 and the dealing with any sexual complaints was the
40 priority. And clearly that's what my client was aware of
41 at that particular time, based on an inferential reasoning.

42
43 Your Honour, in relation to potential adverse finding
44 4, it's outside your terms of reference. I have
45 considered that particular issue, and I haven't dealt with
46 it specifically in my outline of written submissions. Your
47 Honour is right. You can consider my client's conduct

1 authorised Mr McKenna post-charge in the context of
2 assessing the nature of the relationship and how that falls
3 within the terms of reference your Honour's already
4 referred to, but it doesn't fall specifically within any
5 term of reference, and no adverse finding should be made in
6 that regard, but can I just say this, because this is where
7 it is always difficult to dissociate what we now know about
8 this man McKenna from 1990.
9

10 I think it was the year after your Honour became a
11 judge, and every trial you would have directed a jury that
12 the man who's standing trial before you is presumed to be
13 innocent, and he's innocent until he is proven guilty -
14 that being all 12 of you unanimously agreeing that you are
15 satisfied behind a reasonable doubt that he is guilty of
16 each and every element of the offence. At the time my
17 client did this, at law he was presumed to be an innocent
18 man.
19

20 My learned friend says that he has been charged with
21 sexual abuse issues of children. It didn't matter what he
22 was charged with. He was innocent at that stage. And
23 that's the issue. And as my client said, "Well, we have to
24 find something for him to do", and that's what they gave,
25 and it was not meant to involve any interaction with
26 children, and there is no suggestion that there was any
27 interaction with children.
28

29 Ultimately, in my respectful submission, sir, if you
30 were to find that it fell within your term of reference, my
31 client did nothing wrong because he applied the advice he
32 was given by the Industrial Relations section, and implied
33 basic principles of law. I don't think I can take that
34 particular issue any further.
35

36 In relation to final matters, sir, the most - I think
37 there is an issue here that a lot of blame's been heaped on
38 my client as an individual because he was Chair, and if
39 there are to be adverse findings then they should be - in a
40 number of these regards, then they should be adverse
41 findings in relation to the Authority, but I'm going back
42 to what I was talking to you about before time, place and
43 circumstance, the way things existed at the time, and the
44 fact that you would always work on the basis that people
45 operate in good faith and with common sense.
46

47 So I'm not saying that your Honour should make an

1 adverse finding in relation to 5 against the Authority,
2 I'm simply saying there is a distinction between the two.
3

4 HIS HONOUR: Well, I would have thought that if the
5 Authority, up until 1975, considered it necessary to have a
6 forbidden list or to have a system operating where if
7 anyone was suspected of sexually abusing a child they
8 wouldn't get re-employed, there's a concern, which was
9 thought to be a valid one at that time, one would have
10 thought there would need to be a system or a place
11 subsequently to address that issue. Now, it seems that for
12 whatever reason the system, the pre-existing system, failed
13 to - wasn't used, and nothing replaced it.
14

15 MR RAFFERTY: You'll pick up from 137, sir, exhibit 137,
16 the list was actually held by the Department of Community
17 Welfare. It was actually not held by the Authority. It's
18 actually specifically stated in the minutes of that
19 particular meeting from 1975.
20

21 HIS HONOUR: Inquiries in that direction denied that
22 anything like that ever existed.
23

24 MR RAFFERTY: Which is interesting.
25

26 HIS HONOUR: It seems that no one wanted to know about it,
27 which raises the possibility, perhaps, that at some stage
28 it was thought to be an unwise thing to keep, whatever
29 might be the reason. There was obviously a concern in the
30 mid '70s as to dealing with these situation, and that
31 concern seems to have later evaporated.
32

33 MR RAFFERTY: It's an interesting point your Honour raises
34 in the context of the fact that nobody wants to know about,
35 or the investigations - no one wants to know about it. As
36 your Honour is probably now well aware as to an inquiry of
37 this nature, people tend to head for the hills.
38

39 HIS HONOUR: I've noticed that. Prior to 1990 people were
40 very content to bask in the reflected sunlight of McKenna,
41 but now they claim not to know him.
42

43 MR RAFFERTY: That's right. But not my client. That's
44 the point, I think. That's important. My client admitted
45 a number of things that were adverse, or potentially
46 adverse to his interests, about his views of McKenna, and I
47 think that's an important point, your Honour, to consider

1 in a global context to his credibility and character, is
2 that he was one of those few people who didn't head for the
3 hills.

4
5 He came here three times. He gave evidence at length
6 three times. Your Honour would no doubt have formed an
7 impression of him by virtue of his demeanour, and obviously
8 all sorts of things. Ultimately, your Honour, I submit
9 that he is a truthful witness, and that when it was put to
10 him by my learned friend that in hindsight things could
11 have been done, he wasn't one of those types of people who
12 tried to justify necessarily what was done.

13
14 He accepted the inevitable truth, but that's in
15 hindsight and not in the context of what your Honour's
16 having to make assessments of at the time. The point that
17 needs to be made in relation to that, was as a matter of
18 best practice I accept what your Honour says, but the
19 important thing is that there is no evidence before this
20 Inquiry that anything ever happened as a result of the
21 absence of this list. The only thing I'm aware of is
22 somebody from Swanleigh, which was outside the Authority's
23 control, something that happened I think at Narrogin, but
24 as far as there being - and my learned friend has to put
25 this finding, this proposed finding in the context of the
26 Authority and hostels under the Authority's control.

27
28 Not once did any former employee become re-employed
29 and then do something wrong. And as Don Dixon said in his
30 record of interview, which is at transcript page 73, which
31 your Honour doesn't have in his exhibit, but it's before
32 you, he said, "Listen, we knew what was going on. Somebody
33 left another hostel, we knew why they left", and far from
34 my client not wanting there to be dissemination between
35 hostels, your Honour will recall what he said was involved
36 in the setting up of the Student Hostels Authority, because
37 prior to that time everything was run separately.

38
39 He wanted there to be the sharing of information. So
40 ultimately, your Honour, if you were to make an adverse
41 finding in that regard, it should be against the Authority.
42 It certainly should not be against my client. And I'd
43 still maintain that in circumstances where nothing wrong
44 happened as a result of this, putting it in the context of
45 an adverse finding, there would be no point in making such
46 a finding. Your Honour, I haven't gone through everything
47 in detail.

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HIS HONOUR: Yes, thank you.

MR RAFFERTY: Unless there's anything else, those are my submissions.

HIS HONOUR: No, thank you very much. Anything in response?

MR URQUHART: Yes, just briefly, sir. Just on that last point, and in my submission, the Inquiry doesn't need to find or, indeed, prove that any re-employed staff sexually abused or offended with respect to the hostel that he or she subsequently went to. There's always that potential. And, indeed, this is a clear example of the fact that complaints of sexual abuse are often not made until decades after they've occurred. And we know that in this particular case.

Sir, as may come a point - my learned friend said by way of general remarks - now, he said that his client made every decision in good faith. That might not necessarily be favourable to Mr Philpott if he made the decisions he did regarding Dennis McKenna because he blindly believed that the guru of wardens could do no wrong. And my learned friend then went on to say that he says that Dennis McKenna was a protected species at Katanning.

I don't take issue with that, but that is all the more reason that when any suggestion of inappropriate behaviour that has come to the attention of those outside Katanning, there's a pressing obligation upon those people to deal with those matters objectively and impartially, and not coming to the same conclusions that those who are closer to the hostel might have come to.

I only want to make some remarks regarding my learned friend's submissions on proposed or the recommendations 1 and 2. When Mr Rafferty says that Mr Lammas went to that meeting on 22 October of 1986 because of that letter, it might really have been so, but the question is what was his role there, what was he trying to oversee, is Mr Lammas's evidence. And I was trying to find the passage here, and I couldn't.

As I recall his evidence, he says the role played by the Authority was to - and if he used this word or not, it

1 was a word to that effect, to "protect the Minister of
2 Education, to look after his interests". And he also - I
3 can specifically refer to this, and that is that memo that
4 he wrote following the resolution of the Northam Hostel
5 matter involving the female supervisor. He actually stated
6 in that memo that he took action in order "to avoid
7 unpleasantness."
8

9 Now, if he was trying to assume the same role here,
10 whether on his own initiative or by direction from someone
11 at the Authority, it is clear that the Authority would have
12 favoured a resolution of this "suspicious suggestions"
13 matter, a resolution that would cause minimal embarrassment
14 to the Board and therefore logically the Authority. And
15 then that one step further, to the Minister for Education
16 and planning.
17

18 And the letters from the solicitors that predated that
19 meeting achieved just that. And this is clearly a case
20 that it was regarded that attack was the best form of
21 defence. And the question for your Honour is whether Mr
22 Philpott played a role in that attack or not. My learned
23 friend submits that he did not. In my submission, there is
24 evidence that he shows that he did.
25

26 And that's all the remarks in address I wish to make,
27 thank you, sir.
28

29 HIS HONOUR: Yes, very well. I shall adjourn until
30 tomorrow at 9.30, is that right?
31

32 MR URQUHART: Unless, sir, I know my learned friend has an
33 extremely important meeting to attend to in Melbourne. He
34 could be excused now, because I can read in, if your Honour
35 has --
36

37 HIS HONOUR: I'm happy with that. So you're excused,
38 thank you, Mr Rafferty. Thank you very much.
39

40 MR RAFFERTY: Thank you, sir, and can I tell Mr Philpott
41 he won't be required again, sir.
42

43 HIS HONOUR: You can certainly do that.
44

45 MR RAFFERTY: Thank you for that, sir.
46

47 HIS HONOUR: As far as we know.

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MR RAFFERTY: I won't say anything then, sir.

HIS HONOUR: Yes. I will be very surprised if he was required again. But the investigators are still doing a few things, and if something unusual comes up which affects him, then you'll be notified.

MR RAFFERTY: And I can contact him and deal with things as they arise.

HIS HONOUR: Right.

MR RAFFERTY: Thank you, sir.

MR URQUHART: Yes, sir. These are just two statements that have been obtained by the Inquiry just this week, and that's why they haven't been read into evidence prior to now. They are just two. The first one is Michael Joseph Schuts. I think that's how he pronounces his surname. It might be Schuts. My apologies to this witness. It's spelt S-C-H-U-T-S, so it's probably Schuts:

Michael Joseph Schuts

states

I am currently the manager of Albany Residential College (Amity House).

Spelt A-M-I-T-Y:

In 1990 I was a housemaster/sports coordinator at Swanleigh Residential College. I remained in this position for about 18 months.

I was there when --

And I will just simply refer to this person as "S", and he was the supervisor that Mr Dixon referred to in his evidence last week, as distinct from the witness "S", who was an ex-student at the Katanning Hostel. So I'll read paragraph 3 again:

I was there when "S" was also a supervisor, and the director was a man named Richard

1 Stowell.
2
3 I remember that "S" had a complaint made
4 against him by a boy's parents.
5
6 The complaint was that "S" indecently dealt
7 with the boy whilst driving him home to his
8 family farm.
9
10 I cannot remember the name of the family
11 that made that complaint against "S".
12
13 Unfortunately, Richard Stowell is now dead
14 and cannot verify the facts this case.
15
16 I'm not exactly sure how we (the staff)
17 came to know that "S" was offered a deal by
18 Richard Stowell that if he (that is "S")
19 resigned then he "S" would --
20
21 Sorry, I should read that again:
22
23 I'm not exactly sure how we (the staff)
24 came to know that "S" was offered a deal by
25 Richard Stowell that if he (S) resigned
26 then he (Stowell) would write him a glowing
27 reference.
28
29 I have a sense that "S" actually told staff
30 that he was offered the deal by Stowell.
31
32 I think Stowell spoke with the family of
33 the boy and negotiated the deal so
34 Swanleigh would not get a bad name.
35
36 I remember "S" left very quickly from
37 Swanleigh and I heard he had got a job at
38 Narrogin Hostel, which surprised us all.
39
40 I remember a few weeks after "S" left
41 Swanleigh under a cloud, I saw him back
42 there looking at some doors.
43
44 When I saw him back at Swanleigh, I was
45 quite angry and said to him, "What the hell
46 are you doing back here?"
47

1 He told me he was --

2

3 "Looking at" - sorry, I'll start again:

4

5 He told me he was working at Narrogin and
6 he was just looking at our doors.

7

8 I heard he got into some more trouble at
9 Narrogin. I am sure that when he left
10 Narrogin he gained employment at Rocky Bay.

11

12

13 This statement is true to the best of my
14 knowledge and belief. I have made this
15 statement knowing that if it is tendered in
16 evidence I will be guilty of a crime if I
17 have wilfully included in the statement
18 anything that I know to be false or that I
19 do not believe is true.

20

21 Mr Schuts then has written beneath that:

22

23 I have read the attached statement on
24 Monday, 25 June 2012 at 9.25am, And it is
25 true and correct to the best of my --

26

27 It reads "your", but it should be "my" "knowledge and
28 belief." So it hasn't been signed sir, but it's been
29 endorsed by Mr Schuts by email as being true and correct.

30

31 The second statement, sir, is from Patricia Adele de
32 Freyne Gill:

33

34 I previously provided a statement to the St
35 Andrew's Hostel Inquiry dated 27 March
36 2012. I also provided oral testimony at
37 the Inquiry on Monday, 2 April 2012.

38

39 As previously stated I worked as a
40 journalist at the Great Southern Herald,
41 Katanning's local newspaper, from 1982 to
42 1993. I arrived in Katanning in 1976.

43

44 I wrote an article in the Great Southern
45 Herald which was published on Wednesday, 26
46 June 1991, in relation to Dennis McKenna.
47 The article appeared on page 3 of the

1 newspaper and was titled, "Court reveals
2 dark secret of a Katanning Citizen of the
3 Year."
4

5 In column five, paragraph 5, I wrote, "But
6 authorities involved say that although they
7 believed Ms Maruff, they were anxious to
8 keep the program, which was in its pilot
9 stage, running smoothly." The program
10 referred to was the Westrek project.
11

12 I do not recall how I obtained this
13 information or who the authorities were
14 that I referred to.
15

16 The most likely course of events would have
17 been when the newspaper obtained Ms
18 Maruff's letter about her departure from
19 Katanning. I then attempted to get an
20 explanation about this from Westrek.
21

22 I would have had to refer my questions
23 through the State Government media office
24 which then obtained a statement from the
25 Department of Education and Training, which
26 ran the Westrek project. This is a
27 standard practice in journalism, but I do
28 not recall making the inquiry.
29

30 I do not recall speaking to anyone in
31 person from the Westrek project. Maybe I
32 didn't talk to anyone from Westrek because
33 no one from that organisation would have
34 been eligible to speak to me on the record
35 about this matter.
36

37 Telephone calls to relevant people in
38 Katanning indicate my notebooks and other
39 material concerning this matter may still
40 be stored in a shed at the rear of the
41 Great Southern Herald building. These
42 would be rough notes, and it would take at
43 least a day of my time to travel there and
44 find them.
45

46 I declare that this statement is true and
47 correct to the best of my knowledge and

1 belief, and that I have made this statement
2 knowing that if is tendered in evidence I
3 will be guilty of a crime if I have
4 wilfully included in the statement anything
5 which I know to be false or that I do not
6 believe to be true.

7

8 It's then been signed by Ms Gill and it's dated 21 June
9 this year.

10

11 And, sir, I just add that that article that she refers
12 to having written in the Great Southern Herald, published
13 on 26 June 1991 is an exhibit in this matter.

14

15 HIS HONOUR: Yes, thank you for that.

16

17 MR URQUHART: Thank you are, sir. Now, if we could
18 adjourn to 10 o'clock tomorrow in which closing addresses
19 will continue. And I anticipate that will go for most of,
20 if not the entire day.

21

22 HIS HONOUR: Definitely 10 o'clock?

23

24 MR URQUHART: No, I've just been told, sir, by the person
25 who always knows about dates, apart from Mr Jenkin, is your
26 Honour's associate. It is, in fact, 9.30 tomorrow.

27

28 HIS HONOUR: 9.30 tomorrow. All right, we'll adjourn
29 until 9.30 tomorrow. Thank you.

30

31 AT 11.29AM THE HEARING ADJOURNED TO
32 FRIDAY, 29 JUNE 2012 AT 9.30AM

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