

Appendices

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Appendix 1

Accolades and Amateurs¹ – Hostel Governance 1975-1990

A1.1 The role of the Country High School Hostels Authority - A state of flux

When Dennis McKenna was first employed at St Andrew's Hostel, Katanning in September 1975, the Country High School Hostels Authority (Authority) was in a state of flux. In July 1975, under the long-serving Chairman, Mr E O Lange MBE OStJ, the Authority had implemented some significant reforms. By the next meeting in August he was dead, having died suddenly at the age of 65.

At its meeting on 24 July 1975, and for the second time since its establishment in 1960,² the Authority terminated its arrangements with a number of local hostel boards.³ This action followed the report of a sub-committee established at the meeting the month before to investigate local board structures and appointment.⁴ There is no record of what prompted this rather dramatic development, but it appears that the hostel boards involved were “not controlled by an organisation”.⁵ The hostels were in Bunbury, Carnarvon, Katanning, Narrogin and Port Hedland.

In place of existing arrangements, the Authority resolved that from 19 December 1975:

- Boards were to be appointed annually by the Authority's Secretary

¹ See the submission from Ian Parker, quoted in section A1.7.

² A number of agreements with hostel local boards had been terminated previously, in 1969 and late 1970. The dispute was originally with the Country Women's Association (CWA), but subsequently also extended to hostels run under the auspice of the Anglican Diocese of Bunbury, including St Andrew's Hostel, Katanning. The dispute was over how any surplus funds derived from running the hostels were to be used: the CWA believed those funds belonged to the CWA and the Anglican Bishop of Bunbury believed that clergy who were hostel board members or chaplains should receive a fixed honorarium. The Chairman of the Authority, Mr Lange, and the local boards under the auspice of the CWA believed any additional funds should be reinvested in the hostels. The CWA withdrew from the management of any hostels, as the retention of funds by the hostel would be contrary to its constitution, and Mr Lange decided that all hostels, irrespective of the role of the Anglican Church, would be run under a Letter of Arrangement (see section A1.3). The Secretary of the Authority explained that the Anglican Church could still nominate the board to administer the hostel, that control would remain with the Diocese and that the powers of the Authority under the Act would be delegated to the board. However, the Anglican Church would not have the same power as it had previously and the board would be approved by and responsible to the Authority. (CHSHA 1969, Minutes of Meeting, 9 October; Bunbury Diocesan Trustees 1969, Minutes of Meeting, 8 December; Bunbury Diocesan Trustees 1970, Minutes of Meeting, 25 May; CHSHA 1970, Minutes of Meeting, 23 July; Great Southern Herald 1970, *Diocesan Control of Hostel is Revoked*, 11 December, pp. 1-2.)

³ CHSHA 1975, Minutes of Meeting, 24 July, p. 4.

⁴ The sub-committee was established after a decision had been made to terminate the Authority's arrangements with Narrogin hostel (CHSHA 1975, Minutes of Meeting, 26 June).

⁵ CHSHA Secretary 1975, Letter to Secretary Katanning Hostel Board, 29 August.

- Board membership would consist of representatives of the local High School, Country Women's Association (CWA), Local Government, WA Council of State Schools Organisation, Ministers Fraternal, and parents.
- Annual General Meetings were to be held before the 1st June each year and a full report on the hostel to be forwarded to the Secretary of the Authority in July together with the relevant financial statements.
- Boards were to appoint a Chairman, Vice Chairman, a Secretary and Treasurer.
- The warden and matron were to have the right to be present at all ordinary meetings - but to hold no voting powers.
- Meetings were to be held monthly unless otherwise determined.
- No expenditure was to be undertaken by wardens and matrons without authority from the board.
- No administrative staff appointments were to be made without reference to the Secretary of the Authority.

The last of the requirements above was part of another significant reform. At the same meeting, in July 1975, the Authority's Secretary submitted a list of seven individuals who should not be re-employed in school hostels because of events that occurred during their hostel employment. The Minutes record that the Secretary was authorised to advise the Department of Community Welfare of this position and to have the names added to the "forbidden" list held by that Department.⁶ The Authority also decided that the names of persons appointed to administrative (supervisory) positions in hostels should be submitted to the Secretary to the Authority for approval before the appointment was confirmed.⁷

By the next meeting of the Authority, on 28 August 1975, Mr Lange was dead.⁸ He had died suddenly on 13 August 1975,⁹ after serving as the inaugural Chairman of the Authority since its inception in December 1960. Within days of Mr Lange's death, St Andrew's Hostel advertised the housemaster position and, less than two weeks later, gave that position to McKenna.¹⁰

It was not until 30 June the following year that the then Minister for Education, Hon Graham MacKinnon MLC, appointed Colin Philpott as Chairman of the Authority.¹¹ Although the

⁶ The Department of Child Protection has advised that it has no records relating to this "forbidden" list (Senior Legal Officer (Department of Child Protection) 2012, email to Inquiry Executive Officer, 4:11 pm 21 June). Keith Maine, Director General of the then Department of Community Welfare (and its other iterations) from 1968 to 1984 (*Inquiry Transcript of Evidence*, p. 996), advised the Inquiry that he was unaware of the existence of such a list. Mr Maine indicated that he would have had concerns if such a list had been held without due process being followed and questioned the legality of keeping a list like this (Inquiry Investigator 2012, File note of conversation with Mr Keith Maine, 15 May).

⁷ CHSHA 1975, Minutes of Meeting, 24 July, p. 7; see Chapter 13.1.

⁸ CHSHA 1975, Minutes of Meeting, 28 August, p. 1.

⁹ *The West Australian* 1975, *Death Notices* – E O Lange, 14 August.

¹⁰ Job applications retained among St Andrew's Hostel records refer to job advertisements being published on 16 and 17 August 1975 in *The West Australian*. Letters to applicants advising they were unsuccessful for the position, also retained among St Andrew's Hostel records, are dated 25 August 1975.

¹¹ Minister for Education 1976, *Government Gazette WA*, 9 July, p. 2404; Minister for Education 1975, Letter to P Hepper (Secretary, CHSHA), 3 November; see Chapter 15.

paperwork relating to Mr Philpott's appointment is not on the relevant Departmental file,¹² Mr Philpott's background as Chairman of the St Andrew's Hostel Board and committee member of the Student Hostels Association is referred to in the section on the Authority, in the Education Department's 1976 Annual Report.¹³

Mr Philpott was to continue in the role of Chairman of the Authority for the next 23 years. For the majority of this time, Mr Philpott's substantive employment was as a land valuer and auctioneer for Wesfarmers, and his job included auctioning farming properties due to default.¹⁴ Mr Philpott obtained Wesfarmers' permission before agreeing to take the role with the Authority and he was effectively paid by Wesfarmers for his work with the Authority until he retired from Wesfarmers in 1996.¹⁵ When he retired as Chairman of the Authority in 1999¹⁶ Mr Philpott was appointed as its patron; a position that he holds to this day. On 26 January 2003 Mr Philpott was awarded a Medal of the Order of Australia for his service to the rural communities of Western Australia, particularly as Chairman of the Authority, but also citing his role as "Co-Founder, Students Hostels Association".¹⁷

A1.1.1 The Student Hostels Association

The Student Hostels Association of WA(SHA) was established following a meeting of "interested persons" initiated by Mr Philpott in October 1973.¹⁸ At that time, Mr Philpott was the Chairman of the St Andrew's Hostel Board.

Mr Philpott began his career with Wesfarmers as a stockman in Katanning and became a manager there in about 1966.¹⁹ He joined the Hostel Board in about 1967,²⁰ when he accepted the position from the Anglican Church.²¹ Mr Philpott was one of the few members to remain on the Hostel Board after the Authority took ultimate control over the management of the Authority hostels previously managed by the Anglican Diocese of

¹² Education Department 8 January 1962-3 October 1990, File No 184/63, *CHSHA – Appointment of Members*.

¹³ Education Department 1976, *Annual Report 1976*, Education Department, Western Australia, p. 29. No reference is made to Mr Lange's death or his long service with the Authority.

¹⁴ Philpott, C L *Inquiry Transcript of Evidence*, p. 3899-3900.

¹⁵ Philpott, C L *Inquiry Transcript of Evidence*, pp. 3899. Until his retirement Mr Philpott was only reimbursed travelling and other costs by the Authority (approximately \$2,500 p.a. between December 1987 and December 1996). (CHSHA December 1987-December 1992, Minutes of Meeting 'Payments for Ratification Attachments'; CHSHA 2012, 'Payments to Colin Philpott Dec 92-Dec 96'). After he retired from Wesfarmers, the Authority paid Mr Philpott a sitting fee from 1 July 1997, initially of \$250 per day (Acting Chief Executive Officer (Department of Education Services) 1997, Letter to Minister for Education, 8 April) until he resigned in 1999.

¹⁶ Philpott, C L *Inquiry Transcript of Evidence*, p. 2406; Minister for Education 1999, Letter to C Philpott, 29 September; CHSHA 2003, *Annual Report 2003-2004*, CHSHA, Western Australia, p. 14; CHSHA 2011, *Annual Report 2010-2011*, CHSHA, Western Australia, p. 5.

¹⁷ Australian Honours and Awards Secretariat 2012, It's an Honour – Colin Lindsay Philpott, viewed 9 July 2012 www.itsanhonour.gov.au/; Office of the Official Secretary to the Governor-General 2003, Media Release - Mr Colin Lindsay Philpott. The media release also cited Mr Philpott's role as a Delegate of the East Avon Football, among other things.

¹⁸ Stowell, R H LaM 1975, 'The big stirrer', *Develop your potential, Report of the Conference and AGM of the SHA, Albany, 25-26 January 1975*, p. 20; Sibson, Hon J (MLA) 1974, Letter to Minister for Education, 17 October.

¹⁹ Great Southern Herald 1974, *Two well known families leaving*, 11 January, p. 1.

²⁰ Philpott, C 1974, 'The Hostels Authority and its Relationship with the Hostels', *The Needs of the Hostel Student as a Person, Report of the Conference of the SHA, Swanleigh, 18-20 January 1974*, p. 33.

²¹ Philpott, C 2010, Letter to Chairman of Katanning Residential College, 25 May.

Bunbury in 1970.²² He is likely to have become Chairman of the Hostel Board in June 1971 when Reverend Stanley Threlfall, who was the previous Chairman, left Katanning.²³ Mr Philpott remained as Chairman until he left Katanning in January 1974.²⁴

The SHA's first conference was at Swanleigh, an Anglican Church run metropolitan hostel for regional school students,²⁵ and coincided with Mr Philpott's departure from Katanning. Minutes of resolutions passed at the conference record the election of an inaugural committee comprising of Roy Wenlock, Chairman (Warden at St Christopher's Hostel, Northam²⁶); Richard Stowell Secretary/Treasurer (Director (Warden) at Swanleigh²⁷); Mrs Maughan (the CWA representative on the Authority; Mr Philpott (Chairman of St Andrew's Hostel Board, Katanning) and Hon John Sibson MLA (Chairman of Craig House Board, Bunbury²⁸). The SHA described itself as "An association of persons and organizations concerned for students in high-school hostels in WA". Other than Swanleigh, and certain co-opted members, the membership was limited to the staff and board members of the Authority hostels. Mr Philpott gave a presentation at this conference, "The Hostels Authority and its Relationship with the Hostels". The presentation was about the "time tried areas of [concern] Men, Money and Materials" and in the course of it Mr Philpott recommended either Mr Wenlock or Mr Stowell as possible candidates for membership with the Authority.²⁹

The origins of the SHA appear to relate to a 1973 Crown Law opinion that the Authority's hostel employees were "government workers".³⁰ Hostel administrators had concerns about the status of supervisory staff, in particular the financial implications of paying such staff as government workers.³¹ The establishment of SHA coincided with a State election campaign

²² See footnote [2]. See also Great Southern Herald 1970, *Three hostel board members continue in office*, 18 December, p. 2; CHSHA 1971, Minutes of Meeting, 28 January.

²³ Great Southern Herald 1971, *Farewell to Rector*, 4 June, p. 1.

²⁴ Great Southern Herald 1974, *Two well known families leaving*, 11 January, p. 1.

²⁵ Swanleigh was not a CHSHA hostel.

²⁶ On 28 July 2000, Mr Wenlock was awarded the Australian Sports medal for his "Lifelong dedication to junior/country cricket umpiring/involved in creating WA cricket museum" (Australian Honours and Awards Secretariat 2012, *It's an Honour – Roy Wenlock*, viewed 9 July 2012 www.itsanhonour.gov.au/); see Chapter 12.

²⁷ On 26 January 1994, Mr Stowell was awarded a Medal of the Order of Australia for service to youth from isolated areas, particularly as Director of Swanleigh from 1972-1992 (Australian Honours and Awards Secretariat 2012, *It's an Honour – Richard LaMothe Stowell*, viewed 9 July 2012, www.itsanhonour.gov.au/; Office of the Official Secretary to the Governor-General 2003, Media Release - Mr Richard LaMonth Stowell). The media release also refers to Mr Stowell's involvement with the Duke of Edinburgh's Award; his association with the Anglican Church, including as a pastoral Assistant in the Diocese of Perth; and his involvement with Scouting for 43 years including as an Assistant District Commissioner; see Chapter 13.5.

²⁸ SHA 1974, *The Needs of the Hostel Student as a Person, Report of the Conference of the SHA, Swanleigh, 18-20 January 1974*, p. 35; see Chapters 11.7.6 & 11.7.7.

²⁹ Philpott, C 1974, 'The Hostels Authority and its Relationship with the Hostels', *The Needs of the Hostel Student as a Person, Report of the Conference of the SHA, Swanleigh, 18-20 January 1974*, p. 32.

³⁰ Westcott, C 1973, Memo to Acting Chief Industrial Officer, 20 February.

³¹ "Domestic staff" (kitchen, office, grounds and maintenance staff) were already under miscellaneous awards. A piece of correspondence from Mr Stowell as Secretary of the SHA to the Public Service Board in September 1974 states that employees under awards normally work 40 hour weeks but:

"...salaried staff [such as wardens, matrons, housemasters and housemistresses] are working more in the nature of a vocation involving the whole lives of students. Most of these people work a minimum of 60 hours a week; some work an 80 hour week and in some cases it is virtually a '7-day-week, 24-hours-

in which financing of country hostels was an issue. The incumbent State government had withdrawn its subsidy to hostels when the Commonwealth started paying an allowance and it was an Opposition election promise to increase State funding to hostels.³²

After an Opposition victory at the election in April 1974, and an increase in hostel subsidies,³³ SHA began lobbying to be represented on the Authority³⁴ as did a number of other non-government agencies.³⁵ This lobbying resulted in the Minister convening a meeting in May 1975 of nominated persons³⁶ who appear to have been regional State politicians.³⁷ Shortly after the meeting, on 6 June 1975, the Minister wrote to SHA advising that should the membership of the Authority be expanded beyond what was provided for in the exiting legislation, it, and other interested organisations, would be invited to make nominations.³⁸

Shortly after Mr Lange's death in August, an SHA newsletter noted his death as well as his services to the Authority and elsewhere.³⁹ It also reported on the creation of a liaison officer position for the Authority, but, contrary to Mr Lange's intentions, supported the appointment of a person outside the public sector.⁴⁰ It advocated that the services of Mr

a-day' job. If a teenage student knocks on your door at 2 am in the morning because he has acute appendicitis you cannot say 'Go away, I don't start work till 8 am in the morning'... I would like to emphasise that uncertainty in this matter, and divided opinion, is causing a great many enquiries and a great deal of unpleasant speculation. A ruling or an indication from you as to the nature of the real position would greatly assist realistic planning." (Stowell, R H LaM 1974 (Secretary, SHA), Letter to Public Service Board, 5 September 1974).

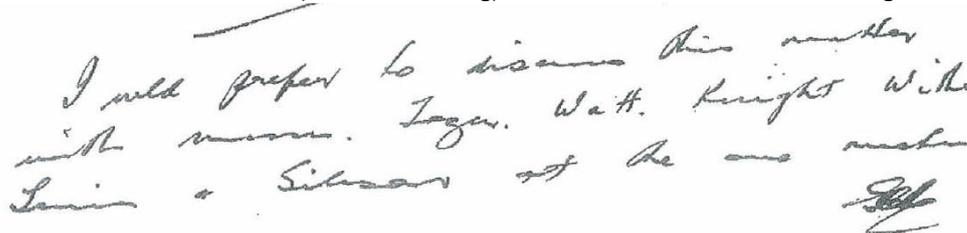
³² The West Australian 1974, *Hostels to get higher subsidies*, [page number not available].

³³ *ibid.*

³⁴ SHA 1975, Minutes of the AGM 26 January 1975 (15(b)), *Develop your potential, Report of the Conference and AGM of the SHA, Albany, 25-26 January 1975*, p. 22.

³⁵ Tozer, Hon J (MLC) 1975, Letter to the Minister of Education, 19 March.

³⁶ MacKinnon, Hon G C (MLC) 1975, Handwritten note, 13 May. The note states "I would prefer to discuss this matter with Messers Tozer, Watt, Knight, Withers, Lewis and Sibson at the one meeting". NB. Initially the reference to Tozer in this note (in cursive writing) was mistaken for a reference to Logan – see below:



I would prefer to discuss this matter with messrs. Logan, Watt, Knight, Withers, Lewis & Sibson at the one meeting

³⁷ Parliamentary Library WA 2010, Legislative Council Members since 1890, 29 March; Parliamentary Library WA 2005, Legislative Assembly Members since 1890, 20 October; Planning Ministry of Western Australia.

³⁸ Minister for Education 1975, Letter to SHA, 6 June.

³⁹ SHA 1975, 'Liaison Officer' SHA Newsletter, August, p. 2.

⁴⁰ In 1974 Mr Lange had proposed that:

"an officer of the Authority [should] regularly visit hostels to advise on hostel management including budgeting and accounting procedures, hostel staffing, supply of equipment, standardisation of accounting methods and to keep members of the Authority fully informed on hostel affairs."

Mr Lange recommended the then Secretary Mr Hepper, with more than 12 years' experience, as ideally suited provided he was relieved of his secretarial tasks (Lange, E O 1974, Letter to the Minister, 17 September).

Wenlock, Mr Stowell and Mr and Mrs Jones⁴¹ be utilised in the short-term, until the position was filled.

By 21 October 1975, two months after Mr Lange's death, the SHA noted that the Authority's Secretary was acting CEO and again writes to the Education Minister:

"The Executive of this Association is aware that the Country High School Hostels Authority, since the death of the late Mr E O Lange, JP, is without a Chairman.

The Executive of this Association sympathetically feels towards the Authority in this period when its members and Executive Officers must be hard-pressed to make up for the gap; but at the same time, has expressed sentiments about that Chairmanship. The Executive of this Association is of the opinion that members of the Authority itself should be allowed to choose their own Chairman and that such a Chairman should be more responsible to parents and public rather than to a government department..."⁴²

The Minister wrote to both the Authority and the SHA on 3 November 1975, advising of his intention to appoint the Education Department representative on the Authority, Mr J A Black, as Chairman.⁴³ For reasons which do not appear in Departmental records, the appointment of Mr Black did not occur and instead, by 30 June 1976, the Minister appointed Mr Philpott as the Chairman.⁴⁴ On the same date, the Minister also appointed Archbishop Michael Challen⁴⁵ as representative of the Anglican Church on the Authority.⁴⁶

The SHA circulated a newsletter to its members in August 1976 advising of Mr Philpott's appointment:

"NEW CHAIRMAN OF THE AUTHORITY 'THE BIG STIRRER'"

It has now been confirmed that the new Chairman of the Authority is Mr Colin Philpott, a member of this Association's executive committee. Mr Philpott was Chairman of St Andrew's Katanning... when he initiated moves to call together Wardens and Committee members of all the hostels. The first meeting was held in October 1973 and this led to the first Conference and General Meeting at Swanleigh in January 1974. At the Albany Conference in 1975 at which the Association adopted its constitution, Colin was presented with a large wooden spoon and dubbed "The Big Stirrer". No longer a member of a particular hostel's committee

⁴¹ Fred Jones and his wife were the warden and matron of Narrogin Hostel. After being appointed as a part time liaison officer for the Authority in 1980, and continuing in his role as Warden, it appears that Mr Jones allegedly embezzled substantial funds from the Narrogin Hostel and absconded (Philpott, C 1979, Letter to CHSHA Member, 5 November; Hon Bill Grayden MLA, Minister for Education, 1981, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 March, p. 260; Dixon, D J *Inquiry Transcript of Evidence*, p. 3800-3801; Philpott, C L *Inquiry Transcript of Evidence*, pp. 3914-3915)

⁴² Quoted in Stowell, R H LaM 1975, 'The Country High School Hostels Authority', *SHA Newsletter*, December, p. 2.

⁴³ Minister for Education 1975, Letter to P Hepper (Secretary, CHSHA), 3 November; Minister for Education 1975, Letter to Mr R H LaM Stowell (Secretary, SHA), 3 November.

⁴⁴ Minister for Education 1976, Government Gazette WA, 9 July, p. 2404; Minister for Education 1975, Letter to P Hepper (Secretary, CHSHA), 3 November.

⁴⁵ On 26 January 1988, Bishop Challen was made a Member of the Order of Australia "In recognition of services to religion" (Australian Honours and Awards Secretariat 2012, [It's an Honour](http://www.itsanhonour.gov.au/) – Michael Boyd Challen, viewed 9 July 2012, www.itsanhonour.gov.au/; Office of the Official Secretary to the Governor-General 1988, Media Release – Right Reverend Michael Boyd Challen). The media release refers to Bishop Challen's then role as Assistant Anglican Bishop of Perth since 1978, his membership of the General Synod Anglican Church of Australia since 1973 and of the General Synod's Social Responsibilities Commission since 1969, among other things.

⁴⁶ Minister for Education 1976, Government Gazette WA, 9 July, p. 2404; see Chapter 12.

Colin has nevertheless remained as a valuable member of the Executive of the Association as a Co-opted member. Colin is Administration Manager of the Rural Division of Wesfarmers, and in this position he manages to travel around the country and so keeps in touch with the needs of isolated and rural communities... The Executive of the Association has unanimously applauded Colin's appointment as chairman of the Authority and wishes him well as he takes on this new responsibility."⁴⁷

Speaking at the first SHA conference following his appointment as Chairman of the Authority, Mr Philpott highlighted the need:

- to shift priorities for the Authority from a "building era" to one of "improving the facilities needed to occupy students' time outside their academic pursuits"
- for equity in the improvements and expenditure allocated to each hostel
- for continuity of competent staff, particularly at Warden-Manager level
- for hostels to become more business-like, in that they are generally "big business", and for board members not "just [to] become rubber stamps".

Mr Philpott concluded his presentation by exhorting the Association to "tackle the future with confidence and to enter the field of P.R."⁴⁸

A1.2 The relationship of the Authority with the local boards

At the time that Mr Philpott took over as Chairman of the Authority, the nature of the relationship between the Authority and local hostel boards had changed markedly since its inception in 1960.

High school hostels had been operated by church groups and the CWA long before the establishment of the Authority.⁴⁹ The Authority was established so that additional or improved hostel infrastructure for rural high school students could be funded by government. When the Country High School Hostels Authority Bill (CHSHA Bill) was introduced to Parliament in 1960, Hon Leslie Arthur Logan MLC, Minister for Local Government, made it clear that the intended role of the Authority was to be a means by which government could "go outside of the loan fund":

"It is necessary to consider the original reason for the introduction of this [CHSHA] Bill. Over the years ... the Country Women's Association has requested the Government to establish high school hostels in certain country centres.

Considerable time and thought has been devoted to finding ways and means to meet that request. The reason why the request has not been implemented up to the present is the lack of finance...

The greatest number of new schools and classrooms on record are being provided by the Government. Because there was no finance available after all the money had been allocated,

⁴⁷ SHA 1976, 'New Chairman of the Authority - "The Big Stirrer"', *SHA Newsletter*, August, p. 1.

⁴⁸ SHA 1977, *Interaction and development, Report of the Conference and AGM of the SHA, Bunbury, 21-23 January 1977*, pp. 37, 38.

⁴⁹ For example, Adamson House and St Christopher's House in Northam started as a girls' hostel established in 1938 by the CWA and a boys' hostel established in 1941 by the Anglican Church (Northam Residential College 2012, *A Brief History*, viewed 4 July 2012 at www.northamresidential.com.au/history.htm; Anglican Diocese of Perth 1967, *Report to Synod*, p. 108).

*the Government had to find some other way to finance the establishment of country high school hostels. So it decided to go outside of loan funds and borrow the money; because that money has to be repaid a limit had to be set on the amount borrowed. That amount was fixed at £100,000 for a start.*⁵⁰

With government policy from the 1960s focussing on opening up “a million acres a year” of new land for farming in the south-west,⁵¹ there was a burgeoning increase in farming families with a growing need for their children to have access to higher education.⁵² If families could not afford to board their children at private schools in Perth, the absence of country hostels could have effectively precluded their children from attaining high school and further education. In the second reading speech for the CHSHA Bill, the Minister stated:

*“It is hoped that it will be the means of making it possible for a greater number of our children in the country to attain a higher level of education, which is so readily available to metropolitan children.”*⁵³

As in the past, however, the function of government was understood in terms of the provision of hostel infrastructure; the only change was that this function would be undertaken by the Authority rather than the Education Department. This was reflected in the terms of the “indentures” (agreements) that were entered into by the Authority in the early 1960s:

*“The Authority will initially build (or provide) and equip hostels and will enter into an agreement with an approved organisation which will conduct the hostel on behalf of the Authority.”*⁵⁴

These agreements were drafted on the basis that the Authority would contract with an organisation (a church or the CWA which had a corporate identity), and included the requirement for the organisation to appoint a local board “from its members to supervise the management and control of the hostel”.⁵⁵

⁵⁰ Hon Leslie Arthur Logan MLC, Minister for Local Government, 1960, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 21 September, p. 1282.

⁵¹ Australian Bush Heritage, Making a living off the land - The Charles Darwin Reserve Community History, viewed 3 July 2012, www.bushheritage.org.au/cdr_history/economy/opening_land.html

⁵² Parker, I 2012, *Submission to the Inquiry*, 29 May; Saunders, N and Rijavec, F 2003, *A Million Acres A Year – study guide*, pp. 4, 5:

“Following the success of the War Service schemes [implemented by the Commonwealth for soldiers returning after WWII] the state government of WA expanded its Conditional Purchase Scheme to open up vast tracts of public land to agriculture. Hundreds of farms were allocated to applicants who came predominantly from the eastern states to take up what was the cheapest land in Australia. In Western Australia a million acres of bush was released to agriculture every year during the 1960s. Those who worked the land under these schemes were known as Newland Farmers... After World War Two Western Australia launched one of the heaviest assaults on virgin land in Australian history. More land was released to agriculture in just three decades than in the previous 130 years of white settlement.”

See also www.cultureunplugged.com/play/6479/A-Million-Acres-A-Year, as viewed 3 July 2012.

⁵³ Hon Sir Arthur Frederick Griffith MLC, Minister for Mines, 1960, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 15 September, p. 1162.

⁵⁴ CHSHA [undated], *Rules and Regulations for the Guidance of Hostel Management Committees*, p. 16.

Although undated, these rules and regulations appear to pre-date the legislative amendments made to the *Country High School Hostels Authority Act 1960* [CHSHA Act] in October 1966.

⁵⁵ CHSHA [undated], *Rules and Regulations for the Guidance of Hostel Management Committees*.

The relationship between the Authority and local boards was to change significantly in 1966, precipitated by the successful prosecution of a hostel warden in Merredin for the unlawful assault of students at the hostel.

In September 1965, Alfred Francis Steele and his wife Doreen commenced as Warden and Matron of St Michael's Hostel in Merredin.⁵⁶ They had been employed from Fairbridge Farm, Pinjarra.⁵⁷ After just one term at St Michael's Hostel, Mr Steele was on criminal charges for unlawful assault of two male students.⁵⁸ He was subsequently convicted, but the conviction was not recorded "in view of his previous character and the attending circumstances".⁵⁹

At its meeting on 24 February 1966, and apparently in response to the incident involving Mr Steele, the Authority dealt with a letter that it had received from the St Andrew's Hostel Board, Katanning enquiring about wardens administering corporal punishment. The Minutes record that over the last five years there had been four police actions against staff appointed to hostels.⁶⁰ Subsequently, when the Authority decided to draft regulations about the disciplining of boarders, Crown Law advised that the Act did not allow either for regulations to be made about discipline or for the Authority to direct the enforcement of discipline in the hostels.⁶¹ It was agreed that an enlargement of the Authority's functions under the Act should be developed by Crown Law.

While corporal punishment was allowed in public schools⁶², it appears that the Authority was attempting to rein in the use of corporal punishment in the hostels with regulations on corporal punishment enacted in 1968⁶³, regulation 7 required that "The discipline enforced in a hostel shall be mild but firm and any degrading or injurious punishment shall be avoided". There were also specific restrictions on the use of corporal punishment. Regulation 9 stated:

"(1) Corporal punishment may as a last resort only be inflicted on boys by the Warden of a hostel or by the Principal of the High School or his Deputy, and a person who so inflicts

⁵⁶ St Michael's House Board (Merredin) 1965, Minutes of Meeting, 8 September.

⁵⁷ The Chairman of St Michael's House Board, Archdeacon Bothamley, wrote to the Rector of Merredin stating that he knew:

"from Archdeacon Bronislaw[?], rector of Pinjarra what Christian influence and great support you will receive from the Steels both at St Michaels and in the parish.. God has answered out prayers and I am truly thankful... I trust that the future of St Michael's will be strengthened in the purpose of our life and work for the Church and the parish." (Bothamley, L 1965, Letter to Rector of Merredin, 7 July).

⁵⁸ St Michael's House Board (Merredin) 1966, Minutes of Meeting, 7 February. The Board's "Considered Statement", appended to the minutes and possibly prepared for the court case, states that Board was unanimous in its support of Mr Steele and that he:

"acted correctly in the circumstances and delivered a justly deserved punishment in the best interest of the Hostel and the boys concerned. There is no hesitation in the mind of the Board, that whether Mr Steele be convicted or acquitted of the charge, to continue [sic] to employ him in his position of trust and responsibility as Warden".

It extols Mr Steele's transformation of the Hostel in the one term he had worked there "from a state of dangerous laxity of discipline to a controlled order." After Mr Steele was convicted, the Steeles offered to resign, but remained at the St Michael's Hostel until the end of 1966.

⁵⁹ Ilbery, Toohey & Barblett 1966, Letter to Committee for St Michael's House Merredin, 29 March.

⁶⁰ CHSHA 1966, Minutes of Meeting, 24 February.

⁶¹ CHSHA 1966, Minutes of Meeting, 22 April.

⁶² Corporal punishment in public schools was allowed under the Education Act Regulations 1960 until 24 July 1987 (Minister for Education 1987, Government Gazette WA, 24 July, p. 2829).

⁶³ Lange, E O 1968, 'Country High School Hostels Authority Act Regulations 1962', Government Gazette, 25 June, pp. 1846, 1847.

corporal punishment on a student shall immediately after so doing enter particulars thereof and details of the offence in the hostel punishment book.

(2) Corporal punishment may be inflicted for offences against morality, for gross impertinence, for wilful and persistent disobedience, or for conduct to the prejudice of good order and discipline of a hostel.

(3) Corporal punishment shall only be inflicted with a cane on the palm of the hand but not more than 2 strokes on each hand shall be administered.

(4) No corporal punishment shall be inflicted on girls.”

In comparison to the behaviours prevalent at some hostels at the time, and also much later, the restrictions the Authority sought to impose on corporal punishment in hostels might be regarded as particularly enlightened.⁶⁴ The regulations appear to have been modelled on the Education Act Regulations 1960, gazetted on 26 July 1960, but were more restrictive in limiting the punishment to two strokes on each hand. Regrettably, as the evidence to this Inquiry attests, there is little to indicate that such restrictions were adhered to in a number of Authority hostels, in particular at St Christopher’s Hostel in Northam, where former boarders reported a brutal regime.⁶⁵

Although not altogether successful in controlling physical discipline in the hostels, the amendments giving the Authority the legal power to implement those regulations were to have far reaching consequences. Of particular significance, the amendments for the first time granted the Authority power “to undertake and carry out or cause to be carried out the general management of hostels”, including the power to engage and dismiss staff, to determine their duties and to provide for discipline in hostels. The amendments also expressly enabled the Authority to delegate its powers to boards (committees) without being restricted to members of the Authority as had previously been the case.⁶⁶ Local boards were to exercise “those [delegated] powers in the same manner and with the same effect as if they had been directly conferred on that [board] by this Act”, that is, as if the local board was a government statutory body.⁶⁷ This was subject only to any general or special directions given by the Authority.⁶⁸

Although the legal implications of the amendments were arguably clear, it appeared to take some time before these were fully understood. Many hostels had operated for many years on the basis of a partnership between the government and non-government organisations.

⁶⁴ Croft, I B 2012, *Inquiry Statement*, in possession of the Inquiry, 27 June (Northam 1964-1966); Parker, I 2012, *Submission to the Inquiry*, 29 May; Parker I 2012, Email to Inquiry Investigator, 6:47 pm 3 July (Swanleigh 1977).

⁶⁵ “C” *Inquiry Transcript of Evidence*, pp. 3244-3245 (Northam 1968-1972); Earl, B J *Inquiry Transcript of Evidence*, pp. 3271 (Northam 1969-1972); “W” *Inquiry Transcript of Evidence*, pp. 3283-3285 (Northam 1970); Underwood, G C *Inquiry Transcript of Evidence*, p. 3315 (Northam 1971-1974); Trindall, D J *Inquiry Transcript of Evidence*, p. 3330 (Northam 1972-1976); “P” *Inquiry Transcript of Evidence*, pp. 3340-3343 (Northam 1975-1976); Blee, T S *Inquiry Transcript of Evidence*, pp. 3405-3406 (Northam 1974-1978); “Q” *Inquiry Transcript of Evidence*, pp. 3741-3748 (Northam 1971); see Chapter 12.3.

⁶⁶ CHSHA Act, s.7(ba)(iv). NB. The terminology under the legislation is “committees”, but for the purposes of this Report I have adopted the term “board”.

⁶⁷ CHSHA Act, s.7(ba)(iv), 9.

⁶⁸ *ibid*, s.9(2).

The legislative changes, if acknowledged, had the potential to radically alter the division of responsibilities between the parties to this partnership.⁶⁹

It might have been expected that the issue would have been put beyond doubt in 1973 by the Crown Law legal opinion,⁷⁰ referred to previously, which identified the Authority's hostel employees as "government workers" for industrial relations purposes. However, despite there being no apparent legal basis for it, a distinction between the status of wage (domestic) and salaried (supervisory known as administrative at the time) hostel workers persisted until 1979.⁷¹ Even after that date, although there was apparent clarity in the legal and industrial arrangements, the question of who retained ultimate responsibility and control over the Authority's hostels remained, in practice, ambiguous.

Arguably the ambiguity about just who was responsible for what contributed significantly to the failure to ensure the wellbeing of students residing at hostels that has been demonstrated so strikingly in the evidence before this Inquiry. Moreover, with the last hostel constructed by the Authority in 1974, the question posed by one Inquiry witness, Bernie Mouritz, who described graphic incidents of violence between unsupervised male students at Merredin hostel in the late 1970s, is worth asking:

If [the Authority] say they didn't know we had no one on-site to look after us then what did they exist for? To me they should have made it their business to know what was going on in Merredin during these times.⁷²

A1.3 Guidance for the local boards

The Anglican Church Hostels Statutes provided guidance to local boards about what hostels were to achieve, the composition and appointment of boards and the role of the warden and matron. In particular the Church Hostels Statute 1972-77 (Perth Diocese) and the Church Hostels Statute 1961-1967 (Bunbury Diocese) both clearly articulated that:

"The object of the hostels is to provide for the spiritual, mental, moral and physical well-being of the students admits thereto and for their maintenance under proper discipline and control".

⁶⁹ For example, a letter from the Authority to the Chief Industrial Officer, on 1 August 1973, advises that a scheduled meeting was no longer required as the Anglican Church's representative on the Authority, Bishop Bryant's concern, was about employees not covered by industrial awards (wardens etc) and as the recent ruling did not apply to them it was not necessary; see also CHSHA 1979, Minutes of Special Meeting, 6 February, in which it is noted that Bishop Challen indicated that the Church would withdraw from the administration of hostels if the Authority appointed wardens and matrons as it had proposed. See also Stowell, R H LaM 1974 (Secretary, SHA), Letter to Public Service Board, 5 September 1974, at footnote [31].

⁷⁰ Westcott, C 1973, Memo to Acting Chief Industrial Officer, 20 February.

⁷¹ The Country High School Hostels Award No 7A of 1979 was approved in 1979 and included hostel supervisory staff. Mr Philpott wrote to the Minister in October 1979 arguing that the changes to the Act in 1966 were only directed to bringing in regulations relating to discipline. He was seeking a meeting given what he described as the Public Service Board's "capitulation" over the Award (Chairman (CHSHA) 1979, Letter to the Minister, 2 October). Following this, legislation was drafted to amend the CHSHA Act – it included a provision which made it clear it was the Authority which would determine the terms and conditions of service of officers and servants of the Authority with the approval of the Public Service Board. This was to apply even where the employment of staff was delegated (Notes for Hon Minister for Education for Second Reading Speech – proposed section 10(4), 6 December 1979).

⁷² *Inquiry Transcript of Evidence*, pp. 4216-4217.

Although the Inquiry has not identified any equivalent material from the CWA, it is likely given its long involvement in managing country hostels prior to 1969, that it also had documented guidelines available for those of its members who constituted the boards for country high school hostels.

After the Authority terminated arrangements with a number of hostels in 1969 and 1970, those hostels began to operate with a board constituted largely by community members and without the supervision of a non-government organisation. It seems that, for those boards, the Letter of Arrangement became the primary tool to establish the division of responsibilities between the Authority and the boards. A copy of the Letter Arrangement from 1988 can be seen at Attachment 1.1.⁷³ Significant provisions in the Letter of Arrangement included that the local board were to:

“1. Engage or dismiss staff and pay all accounts incurred in connection with the control and conduct of the Hostel, including the wages and salaries of all members of the staff.

3. Supervise the management and control of the hostel and to be responsible to the Authority for the provision of clean lodgings and wholesome board to the students residing therein.

6. Refer all matters in dispute, or in respect of which the Committee may require a direction, to the Authority for determination or adjudication.

12. Not to make any structural alterations to the hostel nor install therein any fixtures or fittings without the consent in writing of the Authority first had [sic] and obtained.

14. Charge student fees at such rate as the Authority from time to time approves.

15. Endeavour to run the Hostel on a non-profit making basis, any surplus accruing to be used for the benefit of the students either by reducing fees or providing amenities.

16. Submit financial statements to the Authority annually.

The attention of the Committee is drawn to Regulations made pursuant to the Country High School Hostels Authority Act, which deal specifically with the maintenance and enforcement of discipline in hostels.

...

It is MUTUALLY AGREED AND DECLARED by and between the parties that this agreement may be determined by either party giving to the other, three calendar months written notice expiring at the end of the school term of its intention in that behalf and upon the expiration of the period mentioned in such notice, this arrangement shall cease and determine and the Local Committee shall vacate and deliver up the hostel and chattels and leave the hostel in a clean and tidy condition.”

The Letter of Arrangement replaced the far more extensive agreement that had been developed by the Authority in the early 1960s, “Rules and Regulations for the Guidance of Hostel Management Committees”. That previous agreement, to be signed by committee members, appears to draw on guidelines that had been developed by private hostels existing at that time. The document specifically set out:

- that the Authority was the proprietor of the land and hostel, which it furnished, and a schedule listing those furnishings was to be attached

⁷³ Tendered as Exhibit 88 to the Inquiry. This Letter of Arrangement appeared as an Appendix to a Parliamentary Committee’s published report in 1988 (Standing Committee on Government Agencies 1988, *A Review of the County High School Hostels Authority*, Parliament House, Legislative Council, pp. 53, 54).

- that the other party agreed to “conduct and manage the Hostel for the purpose of providing accommodation for the students therein in accordance with the terms and conditions contained in this agreement”
- similar undertakings to those in the “Letter of Arrangement” but with an additional term that:
“If the [local board] shall fail to properly manage and control the Hostel to the satisfaction of the Authority or if any covenant on the Association’s part herein contained shall not be performed or observed then in any of the said cases it shall be lawful for the Authority without notice at any time thereafter to re-enter the Hostel or any part thereof in the name of the whole and there upon this Indenture shall determine but without prejudice to the right of action of the Minister in respect of any breach of the covenants therein contained.”
- a suggested two-page “enrolment form” for students
- that the Authority met the cost of providing and equipping new hostels; subsequent replacement of equipment was to be paid for by the Education Department; and the expectation that parents would make good any damage caused by their children (which was also specified in the suggested enrolment form)
- that the Authority had no legal power to provide finance for running costs, meaning this was the sole responsibility of the board: “For this reason the financial control of a hostel needs careful attention and the position of the Treasurer is a most important one”
- a number of suggested rules for the board on budgeting (including monthly reports to the committee by the treasurer, as well as the tabling of all accounts for approval of payment); cash controls; administrative control; and expulsion of students
- a suggested extensive list of “house rules”
- the powers of the Authority under section 7 of the *Country High School Hostels Authority Act 1960* (CHSHA Act)
- additional Authority policies:
 - requiring that there be no restriction on the admission of students based on religion
 - requiring Authority approval prior to purchases of equipment
 - explaining that the Authority did not provide playing fields or sporting equipment
 - requiring hostel financial statements to be submitted from time to time.

This agreement appears to have predated the amendments to CHSHA Act in 1966 and the issuing of the regulations on discipline, as no reference is made to them. It is likely that these “Rules and Regulations for the Guidance of Hostel Management Committees” had fallen into disuse by 1970 when Mr Lange intervened to cancel the arrangement with the St Andrew’s Hostel Board, Katanning. The Diocese of Bunbury Trustees noted that “the leasing arrangement for the Katanning Hostel would be cancelled on 31st December 1970, and a

Committee set up to manage the Hostel under a Letter of Arrangement from the Authority [underlining added].”⁷⁴

It might be expected that boards would struggle without any supervising organisation. A Letter of Arrangement might be thought to provide scant guidance for board members who did not have the benefit of documentation such as the Anglican Church Statute or CWA’s Constitution, and the continuity and access to institutional support and oversight available through membership of a significantly larger organisation.

It may have been this that prompted the Authority to act on its sub-committee’s report on “the formation of [local boards] controlled by government” in July 1975 by resolving to cancel its arrangements with a number of hostel boards by the end of the year and for the Secretary to appoint new boards. In any event, as described, after an outcry from the existing boards and the death of Mr Lange, the Authority resolved to leave the nomination of members to the hostel boards but for the appointment of members to be by the Authority. It also resolved that all new members of the boards would receive a letter of appointment with guidelines about their functions. The Authority may have contemplated providing new board members with something like the ““Rules and Regulations for the Guidance of Hostel Management Committees” it had issued previously. However, as indicated below, it appears this resolution, if it was ever implemented, soon fell into disuse.”⁷⁵

A1.4 St Andrew’s Hostel Board 1975-1990

It appears from the limited records available that Mr Philpott was the last of the St Andrew’s Hostel Board members to have experience managing that Hostel under the auspices of the Anglican Church. When Mr Philpott departed Katanning in early 1974, the link was broken. Although it seems that a number of practices institutionalised under the Anglican Church Hostels Statute continued, the underpinning rationale was absent. For example, the Hostel ceased to operate as an Anglican run hostel, it continued to have the local Anglican rector on its Board. Reverend Threlfall had agreed to stay as Chairman despite the falling out between the Anglican Diocese of Bunbury and the Authority in 1970, being quoted as stating that “he was most concerned that the children at the hostel did not suffer with the change”.⁷⁶ When Reverend Threlfall left Katanning in early 1971, he was replaced by Reverend Michael Harford. His evidence to the Inquiry was that:

“...I was roped into being a Board member of the St Andrew’s Hostel Board.

This was an ex officio appointment [automatic due to one’s employment] as the St Andrew’s Hostel premises was owned by the Anglican Church at the time.”⁷⁷

It seems that Reverend Harford was mistaken in relation to his obligation to be on the Board given the premises was never owned by the Anglican Church and, as described earlier, the Anglican Church’s management was terminated in 1970.⁷⁸ Reverend Harford in fact suddenly

⁷⁴ Bunbury Diocesan Trustees 1970, Minutes of Meeting, 25 May. Also see footnote [2].

⁷⁵ See Chapter 15.2

⁷⁶ Great Southern Herald 1970, *Diocesan control of Hostel is revoked*, 11 December, p. 1.

⁷⁷ *Inquiry Transcript of Evidence*, p. 3614.

⁷⁸ This can be confirmed by the Anglican Diocese of Bunbury Synod Reports which cease to include reports on the Hostel after 1970 (Anglican Diocese of Bunbury, *Submission to the Inquiry*, 28 March).

and angrily terminated his own Board membership in late 1974, in circumstances he does not now recall.⁷⁹ The appointment of a local Anglican rector to the Board appears to have never been re-established.⁸⁰

The high school principal's involvement as a Board member also appeared to be "ex officio", as throughout the period examined the Principal at Katanning Senior High School (KSHS) is recorded as being a member of the Board. This was consistent with the arrangements under the Anglican Church Hostels Statute but the Inquiry has not identified any other formal documentation of this arrangement. It also appears that principals were given no specific notice or advice about their role as a board member by the Education Department. Neil Thomson, Principal at KSHS from 1980 to 1982, gave evidence that:

*"Well, I had no understanding of [my role in relation to the board]. I was just rung by Dennis McKenna and said that "The principal usually comes to the board meeting", and I had no constitution of the board meeting or anything like that."*⁸¹

It is also of note that the duration of the school principals' term on the Board was dependent upon their posting to the high school and generally, in Katanning between 1975 and 1990, this was for one to three years.⁸²

In earlier times, there had also been a number of local bank employees on the Board (three in 1974) and a Department of Community Welfare Officer.⁸³ Over time the involvement of bank personnel reduced and the Departmental officer's role was not filled after 1979.

However one local bank employee, John Renk, was a critical and continuing presence on the Board for many years from 1973.⁸⁴ Mr Renk would have exercised significant influence within a rural community as a Commonwealth Bank regional rural officer whose role was to value properties and make recommendations on loan applications.⁸⁵ He would also have been a significant figure on the Board not only because of his position in the community, but because of his lengthy tenure, his roles as Secretary and, later, as a member of its finance sub-committee. According to a parent representative for the Frankland area on the Board, John Peacock:

"...he was a very intelligent man, that Mr Renk, and he had a fair bit to do with [the Hostel], and Dennis, they'd be into it there and I ... mainly went up there to ... look after my area.

*...they were higher up into the Board with finance and stuff like that and, you know, we'd listen to what they'd have to say and then we'd have to agree. They were higher up the Board than what I was."*⁸⁶

Unfortunately the lapse of time and illness has prevented Mr Renk from assisting the Inquiry in trying to understand the functioning of the Board while McKenna was Warden.⁸⁷

⁷⁹ Harford, M *Inquiry Transcript of Evidence*, p. 3615.

⁸⁰ St Andrew's Hostel Board, Minutes of Meeting 1969-1990 (incomplete).

⁸¹ *Inquiry Transcript of Evidence*, p. 2175. See also Marriott, G E *Inquiry Transcript of Evidence*, p. 2649;

⁸² KSHS 2012, Photograph of KSHS Principals Notice Board from 1950 to 2010, 24 February.

⁸³ Percival, I (Warden, St Andrew's Hostel) 1974, Letter to Parents, 24 November.

⁸⁴ Renk, J A (Secretary, St Andrew's Hostel Board), Letter to CHSHA, 28 July.

⁸⁵ Renk, J A *Inquiry Transcript of Evidence*, p. 1734.

⁸⁶ *Inquiry Transcript of Evidence*, pp. 1140-1141.

⁸⁷ See Chapter 11.5.

Other members of the Board generally were involved on a more ad hoc basis. Based on the Board minutes that were available to the Inquiry, there were 54 members over the 15 years from July 1977.

Minutes for Board meetings from July 1977 until December 1990 show a total of 44 Board members, other than McKenna. Some Board members who have given evidence to the Inquiry had a lengthy involvement:

- Mr Renk, referred to previously
- Alan Parks, for 13 years⁸⁸
- Alice Harris, for a total of five years, but who was also an Authority member and liaison for the Hostel for an additional five years in the interim
- Keith Stephens, for seven years
- Len Wilkinson, for seven years.⁸⁹

However, most had a shorter involvement as a Board member. Between July 1977 and December 1990 most members' terms were two years or less. Two years is a considerable amount of time, of course, but it should be noted that the Board, generally, would only have had ten meetings a year and individual Board members did not always attend every meeting.

Individuals who became Board members, other than McKenna and the school principals, were volunteers in the sense that they were under no obligation to do so. Board members who were self-employed farmers or farm workers (possibly unlike professionals or salaried workers) were also volunteers in the sense that they were unpaid. In addition the parents of the boarders would often have to travel significant distances to attend the monthly Board meetings. Those parents who gave evidence to the Inquiry on this point said that they became members because their children boarded at the Hostel;⁹⁰ they were elected parent representatives;⁹¹ because of dissatisfaction with how the Hostel was run;⁹² or because they enjoyed "being part of the system".⁹³

Many Board members were unlikely to have ever sat on a board before; certainly not a board with serious responsibility for the management of a residential facility for large numbers of students. While arguably longer-term Board members could have been in a position to provide guidance to newer recruits, their capacity to do so would depend on whether they ever acquired knowledge about the Board's proper role and responsibilities in the first place. As already outlined, the Anglican Church stopped managing the Hostel in 1970; in 1974 the last Board member to have been "schooled" in managing the Hostel under the auspice of the Anglican Church, Mr Philpott, left.

⁸⁸ See Chapters 11.6, 11.7, 11.12 and 18.2.

⁸⁹ See Chapters 11.6.4, 11.12 and 11.14.

⁹⁰ Hendry, R L *Inquiry Transcript of Evidence*, p. 1899; Parks, A H *Inquiry Transcript of Evidence*, p. 1392;

Peacock, S J *Inquiry Transcript of Evidence*, p. 1129.

⁹¹ Brown, E *Inquiry Transcript of Evidence*, p. 1048.

⁹² Stephens, L O K *Inquiry Transcript of Evidence*, p. 2825.

⁹³ Parks, A H *Inquiry Transcript of Evidence*, p. 1393.

By 1983, the Board was in dispute with the Authority over its purchase of washing machines without the Authority's prior approval, contrary to term 12 of the Letter of Arrangement.⁹⁴ The Board instructed the Secretary, Mr Renk, to write to the Authority and

*"advise that the "letter of arrangement" had not previously been sighted by our Board, and in that circumstance it seems a bit tough that we should suddenly be bound by it, (past experience suggests that this has not previously been the case)."*⁹⁵

Many of the witnesses who appeared before the Inquiry in 2012, who had been on the Board during McKenna's wardenship, either expressed similar views, or had no recollection,

⁹⁴ The Board had requested payment by letter dated 2 March 1983. At its meeting on 8 March the Authority declined approval because the Board had not sought approval prior to incurring the expenditure; a letter was sent to this effect on 15 March and the Chairman of the Authority visited the Hostel prior to 12 April 1983 (CHSHA 1983, Minutes of Meeting, 8 March; Secretary (CHSHA) 1983, Letter to Secretary St Andrew's Hostel Board, 15 March). The Board considered the Authority's response at its meeting on 20 April; it did not resolve to respond but did resolve to invite the Premier to visit the Hostel when he visited Katanning (St Andrew's Hostel Board 1983, Minutes of Meeting, 20 April). On 14 June the Authority wrote again to the Board drawing its attention to clause 12 of the Letter of Agreement which in fact refers to not making structural alterations or installing fixtures without the approval of the Authority (Secretary (CHSHA) 1983, Letter to Secretary St Andrew's Hostel Board, 14 June). The Minutes of the Board's meeting the next day note that a letter about the washing machines had been sent to each Board member by the Authority but there was no record of any documentation being signed and returned to the Authority (St Andrew's Hostel Board 1983, Minutes of Meeting, 15 June). From examining an internal Authority memorandum, it seems that this letter is a copy of correspondence dated 20 May 1983 from the Chairman of the Authority providing a copy of a speech he presented, the week before at the SHA Annual Meeting, on "the dividing line between the local Committee and Warden roles" with an unsigned copy of the Letter of Arrangement attached. In the letter the Authority Chairman suggested that "the [Board] Chairman may see fit to have this document read at least once a year at a board meeting so that members may become familiar with their responsibilities" ([Secretary (CHSHA) 1983], Memo "Katanning" to CHSHA Chairman) [undated]; Chairman (CHSHA) 1983, Letter to Chairman St Andrew's Hostel Board, 20 May). At that meeting, the Board resolves to respond to the Authority still seeking reimbursement for the expenditure on the washing machines and indicating that the matter is to be raised with the Premier (St Andrew's Hostel Board 1983, Minutes of Meeting, 15 June). A letter from one of the Board members, Mr Len Wilkinson, to the Authority is sent on 20 June pointing out that verbal approval had been adequate in the past and that he would discuss the matter with the Premier when he visited (Wilkinson, L (St Andrew's Hostel Board member) 1983, Letter to CHSHA, 20 June). Four days later the Board wrote to the Authority, as quoted above, and attached a copy of correspondence with the Premier's Parliamentary Secretary (Renk, J (Secretary, St Andrew's Hostel Board) 1983, Letter to Secretary CHSHA, 24 June). By 17 August 1983, after the Authority receives a letter from the Minister about this issue and the Authority Chairman attends a 3 ¼ hour meeting with the St Andrew's Hostel Board, the Authority agrees to pay for the washing machines out of the 1983/4 budget and to advise the Minister the matter was amicably resolved (CHSHA 1983, Minutes of Meeting, 17 August). At this time, and although the Authority specifically notes that local boards are not incorporated (CHSHA 1983, Minutes of Meeting, 21 June), it appears no attempt was made to have Board members endorse or sign the Letter of Arrangement. Although the Authority had been informed of board members' lack of awareness of the Letter of Arrangement it accepted no ongoing responsibility for ensuring new board members were made aware of or endorsed its terms.

⁹⁵ Renk, J A (Secretary, St Andrew's Hostel Board) 1983, Letter to Secretary CHSHA, 24 June.

of a Letter of Arrangement or of any training or guidelines about their role on the Board.⁹⁶ Two of the former Board members believed that the Board had more of an advisory role.⁹⁷

More than three years after the Board's 1983 correspondence, both the Authority's and St Andrew's Hostel Board's meeting Minutes record that the Board entered into a Letter of Arrangement in late 1986.⁹⁸ Within five meetings (over the next seven months) of the Letter of Arrangement being signed, there were only two Board members left who were present at the meeting when it was signed, other than McKenna.⁹⁹

A number of Board members testified that they believed that the Warden was responsible for the hiring and firing of Hostel staff members.¹⁰⁰ This is supported to the extent that the Board Minutes show that the Board was informed by McKenna of staffing changes. This was not only contrary to the Letter of Arrangement but gave McKenna the licence to employ large numbers of his family at the Hostel and to wield control over Hostel staff members. When notifying the Board of the appointment of another sister-in-law to fill a vacancy arising because of a supervisor's departure in 1981, McKenna was sufficiently confident to note in his warden's report: "She has been replaced by Christine McKenna (yes, another one)... Her husband, Graham, is working at the Broomehill Shire, and will help out when required [underlining added]".¹⁰¹ At the time McKenna already had two other relatives employed at the Hostel.

A number of Board members also thought that it was the Warden who had the authority to expel or suspend students from the Hostel, and that the Board's role, at least when McKenna was Warden, was to merely "rubber stamp" his recommendations as to the expulsion or suspension of students.¹⁰² The power to expel or suspend students from the Hostel was such an important one that it had in fact been regulated by the Authority under Mr Lange, through regulation 10 of the CHSHA Act Regulations 1962:

"10. (1) No student shall be expelled from a hostel by a Warden, but if the Warden considers that circumstances so warrant he may suspend a student from the hostel and refer the

⁹⁶ Parks, A H *Inquiry Transcript of Evidence*, pp. 1396-1397; Hendry, R L *Inquiry Transcript of Evidence*, pp. 1899-1907; Thomson, N H *Inquiry Transcript of Evidence*, p. 2176; Murray, I W *Inquiry Transcript of Evidence*, pp. 2212-2213; Marriott, G E *Inquiry Transcript of Evidence*, p. 2649; Stephens, L O K *Inquiry Transcript of Evidence*, p. 2826; Wilkinson, L A *Inquiry Transcript of Evidence*, pp. 3055, 3058, 3124-3125; Laffer, J B *Inquiry Transcript of Evidence*, p. 3207.

⁹⁷ Marriott, G E *Inquiry Transcript of Evidence*, p. 2650; Murray, I W *Inquiry Transcript of Evidence*, p. 2073, 2075. Note that Peter Bachelard-Lammas denies he would have told Ian Murray that the Board was advisory (*Inquiry Transcript of Evidence*, p. 2722). At the same time, however, Mr Bachelard-Lammas' evidence that he would have given Mr Murray a copy of the Act and Letter of Arrangement (*Inquiry Transcript of Evidence*, p. 2723) is not altogether consistent with the views of the Chairman of the Authority, Mr Philpott, that the local boards were responsible to inform new members of their roles and responsibilities (examined later in this section).

⁹⁸ St Andrew's Hostel Board 1986, Minutes of Meeting, 22 October; CHSHA 1986, Minutes of Meeting, 11 November.

⁹⁹ St Andrew's Hostel Board 1987, Minutes of Meeting, 12 June. That Board member is now deceased.

¹⁰⁰ Parks, A H *Inquiry Transcript of Evidence*, pp. 1414, 1416; Hendry, R L *Inquiry Transcript of Evidence*, p. 1901; Stephens, L O K *Inquiry Transcript of Evidence*, p. 2836; Wilkinson, L A *Inquiry Transcript of Evidence*, pp. 3057-3058, 3067.

¹⁰¹ St Andrew's Hostel Board 1981, Minutes of Meeting, 18 February.

¹⁰² Peacock, S J *Inquiry Transcript of Evidence*, pp. 1150, 1152; Parks, A H *Inquiry Transcript of Evidence*, pp. 1410-1411; Hendry, R L *Inquiry Transcript of Evidence*, p. 1906; Murray, I W *Inquiry Transcript of Evidence*, p. 2075; Young, G H *Inquiry Transcript of Evidence*, p. 2617; Stephens, L O K *Inquiry Transcript of Evidence*, p. 2837.

suspension to the committee appointed for the purpose under paragraph (ha) of section 7 of the Act.

(2) The committee to which the suspension of a student is referred may expel the student or confirm or remove the suspension, and if the suspension is removed the Warden shall permit the student to be re-admitted to the hostel.

(3) Where the suspension of a student is confirmed, the Warden of the hostel shall permit the student to be readmitted to the hostel at the expiration.

The Inquiry heard compelling evidence about how the power to expel students was wielded by McKenna to intimidate, control and silence students.¹⁰³ Partial Board records available for 1979-1990, however, show only four instances of “expulsions”.¹⁰⁴ This is likely to be misleading to the extent that on average there were six instances a year of expulsion, suspension, withdrawal or absconding recorded. Nonetheless the data does to an extent corroborate Board members’ recollection that expulsions were rarely brought to the Board.¹⁰⁵ This is interesting given that a number of Board members who gave evidence to the Inquiry in fact had their own children expelled or threatened by McKenna – Mr Stephens,¹⁰⁶ Bob Hendry¹⁰⁷ and Mr Parks;¹⁰⁸ the latter noting that it was done “probably just to keep the other students in line”.

It should be made clear here that these records and the Board members’ evidence do not counter many boarders’ recollections of McKenna’s regime of threats and actual expulsions. Only partial records were available (for example many Warden’s Reports are missing) and also those that are available only record what McKenna wanted the Board to know. As noted by Mr Wilkinson:

“I think there was a fair bit of filtering - obviously, in hindsight, a fair bit of filtering by Dennis McKenna as to what he brought to the board and in what sort of format he brought things to the board.”¹⁰⁹

Moreover, while it is in fact the case that there are few “expulsions” recorded, there was a significantly higher number of what McKenna described as “withdrawals”.¹¹⁰

Compounding this, the impact of the removal of a student from the Hostel was not just confined to the individual student. As has been noted elsewhere, removal from the Hostel had the potential to end a young person’s access to education. When it was implemented by McKenna on the pretext of unfounded and malicious accusations, such as theft or “bullying” or, for females, promiscuity, it could bring even further damage to the student, their

¹⁰³ See for example, Parker, I G *Inquiry Transcript of Evidence*, pp. 82, 93, 103-106; Hilder, M F *Inquiry Transcript of Evidence*, pp. 127-128; Haddow, K J *Inquiry Transcript of Evidence*, pp. 376-377; Williams, A M *Inquiry Transcript of Evidence*, pp. 506, 509-511; Carmichael, B D *Inquiry Transcript of Evidence*, pp. 614-615.

¹⁰⁴ St Andrew’s Hostel Board, Minutes of Meetings and Warden’s Reports [incomplete], 1979-1990.

¹⁰⁵ Parks, A H *Inquiry Transcript of Evidence*, p. 1401; Hendry, R L *Inquiry Transcript of Evidence*, p. 1949;

¹⁰⁶ *Inquiry Transcript of Evidence*, pp. 2836, 2837.

¹⁰⁷ *Inquiry Transcript of Evidence*, p. 1932.

¹⁰⁸ *Inquiry Transcript of Evidence*, pp. 1407- 1410

¹⁰⁹ *Inquiry Transcript of Evidence*, p. 3061.

¹¹⁰ It is difficult to identify any substantive difference between an expulsion and a withdrawal, other than perhaps the level of Board scrutiny. Amongst the Hostel records a letter was located in which McKenna writes to a parent “with deep regret” asking her to withdraw her son from the Hostel. “This decision is not made lightly, but there comes the time when we have to think of the overall situation of all the students.” (McKenna, D (Warden, St Andrew’s Hostel) 1989, Letter to [a parent], 27 September).

relationship with their family and community, and all of the Hostel boarders who were witness to this. For example, one former boarder was expelled by McKenna less than an hour after reporting McKenna for sexually abusing him to the head boy and another prefect. He was immediately driven home to his parents and accused of stealing by McKenna. The boarder wrote to the Inquiry that he subsequently had problems with his relationship with both of his parents “as they were very ashamed that I had been expelled ... as we lived in a small country farming area and everybody knew that I had been expelled from [the] school hostel.” He also began to drink alcohol to excess.¹¹¹

This is the context in which there are 160 recorded references to individual boarders as being in some sense a problem in twelve years of (incomplete) Board Minutes or Warden’s Reports. At Board level, that translates into a reference to approximately every one in ten students out of the Hostel population. These were students who were noted, by others, for their exceptional (and according to some almost unnatural¹¹²) diligence, good manners and reserved manner.¹¹³

Clearly, the failure of Board members to understand and give effect to their role and responsibilities contributed significantly to how McKenna’s offending was able to continue for so long. Mr Philpott, Chairman of the Authority for almost the whole time that McKenna was Warden, gave evidence to the Inquiry on how local board members should have been advised of their role and responsibilities:

“Q. ... can you recall reading evidence from ex-Board members at Katanning... It seems that they - at least the ones that we've called, were quite confused about what the role of the Board was?”

A. Yes, and it's hard to understand why, because ... there isn't any doubt that says that each new Board member should receive the letter of arrangement to know exactly what they ... have been employed to do.

Q. Yes, yes, I think that was an edict that was determined by your predecessor.

A. Probably.

...

Q. -- and I was actually going to ask you... was that a policy that you continued to adopt - or edict rather?

A. Yes, it's a policy I would have had.

...

Q. ... did you believe now, with hindsight, that it would have been appropriate for the Authority, given the fact that the Authority was overseeing the role of hostels, that it ought to have been the Authority that had prepared some guidelines to local board members?”

¹¹¹ [Name withheld] 2012, *Submission to the Inquiry*, 13 March.

¹¹² Dixon, D J *Inquiry Transcript of Evidence*, pp. 3771-3772.

¹¹³ For example: Renton, D R *Inquiry Transcript of Evidence*, p. 348; Peacock, S J *Inquiry Transcript of Evidence*, p. 1135; Lockhart, I R *Inquiry Transcript of Evidence*, p. 2011; Young, G H *Inquiry Transcript of Evidence*, p. 2612; Clayton, B J *Inquiry Transcript of Evidence*, p. 3132; Marriott, G E *Inquiry Transcript of Evidence*, p. 64. Although Gerald Marriott posed the question: “Now is that because they're hostel kids and Dennis's influence, or is that they come from isolated farming areas where they've been to a very small primary school and they've had strong influence from their parents, and brought up in a different atmosphere to town kids in Katanning.”

A. No, I think a properly run board will do that quite capably and I think nearly every other hostel, in fact, does do that.

...

Q. But if this process was confined to the Authority to arrange, it would have been quite easy, though, for the Authority, upon receiving advice of appointment and approving that appointment, that a copy of the letter of arrangement and some sort of guidelines could have been sent to a new board member?

A. It could have but that's not the way we operate. We operate as a fully autonomous board. It [the local board] had all the rights and responsibilities to do things like you are saying.

Q. You see, using Katanning, for example, it might reach a point where the board members have all never received a copy of the letter of arrangement or any guidelines as to what their roles were. Can you see that --

A. It is possible, yes, and I'm alarmed.

Q. Yes. Well it is a cause of some concern, isn't it[?]

A. Well, it would be, yes.

Q. And, in those circumstances, where a voluntary board is not quite aware of its roles or responsibilities, can you, therefore, see the potential for a warden, who has been around for a number of years, of exploiting that situation?

A. ... I wouldn't expect so if there were capable people running the board.

Q. But do you see the potential for that eventuality?

A. There's potential but I don't think that ... a well run board would, in fact, allow a warden to take over.

Q. From what you followed of the evidence ... given at the Inquiry, it looks like that may well have happened at Katanning. I'm not suggesting that you knew back then but from what you have read now of the evidence at the Inquiry?

A. It's possible.¹¹⁴

Mr Philpott was subsequently referred to the CHSHA Minutes of its meeting on 15 May 1984 which record that:

"The chairman advised that Boards generally were not aware of their respective roles and some education was necessary."¹¹⁵

Mr Philpott responded:

"A. Let me make a statement on education ... why I came to the Authority is to - it was just a higgledy-piggledy of 10 or 12 hostels totally divorced from one another and when I came into it I could see that we needed to have education. We raised this issue with the government, saying that if we were in deficit funding we didn't have the funding to be able to train the people that were running these hostels, and it wasn't until the deficit funding came in that now they meet every 12 months for educational purposes.

...

Q. But was some education carried out?

¹¹⁴ *Inquiry Transcript of Evidence*, pp. 2419-2450.

¹¹⁵ CHSHA 1984, Minutes of Meeting, 15 May.

A. No, there was no money for education. It wasn't until a change of financial arrangement that we immediately put in, like today, education's a key element of the Authority.

...

Q. If there wasn't the appropriate funds to educate, could you not have advised the administrative officer just to prepare what I have spoken about before, a booklet setting out some fundamental guidelines of the responsibilities of a hostel board and that that be distributed to the boards?

A. It could have happened but that would have been interfering with the running of every individual hostel, when, in those days, the boards had the total - and basically now, still have the full responsibility to run. So that's their role.

Q. But, Mr Philpott, you are identifying here, in fact you are the chairman ... that the boards generally were not aware of their respective roles?

A. Yes, I don't disagree with that.

Q. So, therefore, a potential way of avoiding that was to at least provide them with some written material from the Authority?

A. I think the only ... accountability to the Authority was a letter of arrangement which everyone should have been given.

Q. But, Mr Philpott, if you're identifying a problem, don't you want to fix it?

A. Yes, I do.

Q. Even if it's not the perfect solution, if you can't undertake an educative process, then there are other options available, and one that I'll identify, which seems to be a pretty obvious one.

A. Yes, but I'm saying that that's not our role. The role ... of the local Board is to make the person coming in welcome, to give him a letter of arrangement and any by-laws or anything they have concerning their hostel.¹¹⁶

Mr Philpott's evidence was that local boards were autonomous and the Authority had no responsibility to advise new board members about their role. As indicated, this view was contrary to the proposals adopted by the Authority prior to Mr Philpott's appointment. It is of note that this view is also contrary to the findings of a Parliamentary Committee in 1988. That Committee did not accept the view of the Authority that local boards themselves should take responsibility for advising new members.¹¹⁷ It found widespread confusion among local boards about what their role was:

*"Given the crucial role which local boards do in fact occupy within the hostel system, this confusion should never have been allowed to develop. In the Committee's opinion this is one of the Authority's major failings."*¹¹⁸

The Committee described a draft management manual which was being developed by the Authority as being "too little too late" and was reliant upon the Act and Letter of Arrangement when neither "is of any great assistance".¹¹⁹

¹¹⁶ *Inquiry Transcript of Evidence*, pp. 2451-2454.

¹¹⁷ Standing Committee on Government Agencies 1988, *A Review of the County High School Hostels Authority*, Parliament House, Legislative Council, p. 18.

¹¹⁸ *ibid*, p. 16.

¹¹⁹ *ibid*, p. 18. In March 1989 there is reference made to the distribution of draft guidelines for the responsibilities for boards of management to Board chairpersons and that it is likely to provoke some

Given Mr Philpott's evidence, the evidence of Hostel Board members to this Inquiry about their lack of understanding about their role and responsibilities is not surprising. The Hostel had ceased to operate as an Anglican Church managed hostel in 1970. In the absence of any institutional support it might be expected that an ad hoc group, predominantly of volunteers who met for a few hours a year, could come to lose any "corporate knowledge" about their roles and responsibilities over time.

With the Authority's *laissez faire* approach after 1975, the only institutional continuity for the Board came from the KSHS, although its representatives had no instructions and were not involved for any extended time, and of course from the Hostel itself through McKenna.

A1.5 McKenna's involvement with the St Andrew's Hostel Board

The Warden of a Hostel was its most senior staff member. The practice of St Andrew's Hostel, and other hostels, was to have the Warden attend board meetings, report to other Board members about the events at the Hostel over the previous month and contribute to discussion, but not to vote. This practice was, again, consistent with the Anglican Church Hostels Statute, and appeared to have been adopted at the Hostel and other hostels generally, irrespective of the role of the Anglican Church.

Mr Stephens was on the Board from 1974 to 1981, including five years as Chairman. His over-riding recollection of the Board is:

"I just remember happy times. I can right now visualise Dennis's smiling faces and all the smiling faces around the Board."¹²⁰

Mr Stephens also described the relationship between the Board and McKenna as follows:

"...they all liked him. They all got on well with him. He was running a brilliant hostel. The kids seemed happy. The town liked him. He had kids going around to the old aged people weeding their gardens and they would give them some money, and that would go into the pot for them to go on a holiday to New Zealand, America, or wherever it was that a group would go. He was well liked, yeah."¹²¹

Both Mr Stephens and Elaine Brown were on the Board at the time of McKenna's appointment as acting, and then substantive Warden at the Hostel, and refer to McKenna as initially lacking in confidence and requiring a significant amount of support.¹²² But over time, it seems, this changed. Mr Stephens refers to McKenna as becoming increasingly confident and initiating "whispering" campaigns with other Board members that eventually led to him finishing as Chairman of the Board.¹²³ Board Minutes indicate that Mr Stephens lost the

discussion at the next meeting (CHSHA 1989, Minutes of Meeting, 14 March). No further reference to the guidelines could be identified in the minutes. It was not until October 1990 that the Authority sought to retain an extra position so that a number of projects could be undertaken one of which was: "Policy/Procedural Manuals for the purpose of providing direction and guidance to new Authority members, especially a new Chairman, local boards of management, Wardens and Supervisors." (CHSHA 1990, Minutes of Meeting – Attachment C, 9 October, pp. 9, 10)

¹²⁰ Stephens, L O K 2012, *Inquiry Interview*, in possession of the Inquiry, 24 April, p. 24.

¹²¹ *Inquiry Transcript of Evidence*, p. 2833.

¹²² Mr Stephens quoted in Fraser, P 1991, *Great Southern Herald McKenna gets seven years – parole in less than three*, 31 July; Brown, E *Inquiry Transcript of Evidence*, p. 1049.

¹²³ Stephens, L O K *Inquiry Transcript of Evidence*, p. 2863; Stephens, L O K 2012, *Inquiry Interview*, in possession of the Inquiry, 24 April, pp. 22, 26, 34, 35; see chapter 11.3.

position of Chairman of the Board in 1979 and attended his last Board meeting on 28 August 1981.

Mrs Brown's evidence was that she and Mr Renk would make McKenna do things "by the book";¹²⁴ however Mrs Brown resigned from the Board in 1980. Although he left the Board in 1981, Mr Stephens believes that over the 15 years that McKenna was Warden "things just got freer and freer as time went on".¹²⁵ This is consistent with the evidence of other Board members who generally were on the Board later than Mr Stephens and Mrs Brown, and who indicated that the Board rarely exerted any control over McKenna.¹²⁶ Even when they tried, this was not always effective.¹²⁷

It is apparent from the records that McKenna maintained close control over the Board. Of the 123 Board meeting minutes which the Inquiry was able to locate for the period from July 1977 until McKenna was charged in September 1990, McKenna was present at 121.¹²⁸ Nevertheless, it does not appear from Board members' recollections that McKenna overtly dominated these meetings. According to Mr Wilkinson, McKenna was not an imposing figure:

"He was very, very defensive. And imposing - no, I wouldn't personally use that term. But he was very ... quite quick to, sort of, defend himself. Whether that ... comes across as "imposing" I'm not sure. But that's the description I would more use, that he was quite quick to defend himself and quite quick to justify situations or whatever..."

It is not as though he came into board meetings and dominated and demanded and sort of stood over."¹²⁹

This is consistent with other's recollections; for example, Graham Young's:

"Q. Can you recall how he [McKenna] conducted himself at those meetings?"

A. I'm not certain of this but I think that he gave a verbal report of any student problems that had arisen and any other problems that had occurred but I think he was generally in the background, apart from that."¹³⁰

McKenna had a number of characteristics that would have distinguished him from an imposing figure such as Roy Wenlock, for example, in terms of the authority he would bring

¹²⁴ *Inquiry Transcript of Evidence*, p. 1049.

¹²⁵ *Inquiry Transcript of Evidence*, p. 2834.

¹²⁶ As indicted previously, two Board members thought it had only an advisory role. See also Parks, A H *Inquiry Transcript of Evidence*, pp. 1393, 1412, 1414; Hendry, R L *Inquiry Transcript of Evidence*, p. 1902; Peacock, S J *Inquiry Transcript of Evidence*, p. 1141; Wilkinson, L A *Inquiry Transcript of Evidence*, pp. 3055-3056.

¹²⁷ Parks, A H *Inquiry Transcript of Evidence*, pp. 1418; Marriott, G 1986, Planner, 28 August (Entry: "Len W discussed with me a concern about financial management of the hostel (e.g. \$6500 to pay for a film projector").) Difficulties in relation to the financial management at the hostel are examined in detail in section A1.6.

¹²⁸ McKenna is absent from a special meeting convened on 28 August 1981 for a lawyer to address the Board on the negligence case brought by Mr Stephens over an incident in which McKenna ran a bus into his son, causing serious injury. The other meeting, on 23 March 1983, is attended by an Authority member and its Administrative Officer, and concerned the Hostel's overspending and "unexpected deficit" (CHSHA 1989, Minutes of Meeting, 10 January).

¹²⁹ *Inquiry Transcript of Evidence*, pp. 3060-3061.

¹³⁰ *Inquiry Transcript of Evidence*, p. 2613.

to his position as Warden.¹³¹ Even someone who at the time was evidently very supportive of McKenna, the Authority's Administrative Officer, Peter Bachelard-Lammas, described McKenna in an official report as follows:

*"Again, visit after visit to Katanning indicates the excellent pastoral work being carried out is not just a one off. The Hostel and the student themselves are a credit to the movement. Such excellent work outweighs hassles that occur from time to time with the erratic and somewhat rash personality of the Warden. Katanning remains a leading Hostel."*¹³²

Physically, McKenna was not an imposing a figure. A former boarder who resided at the hostel in the early 1980s described McKenna as follows:

"I would describe Dennis as balding, dark hair, medium build and in his 40's.

He had a habit of touching himself and always rubbed around his mouth. Dennis had a very peculiar walk and would wear his pants pulled up and ugg boots on his feet.

*Dennis wore a silver chain with a round pendant."*¹³³

Later McKenna had a hair transplant and had "this gunk on his head like he had fallen into Peanut Butter jar to sort of try and keep that going".¹³⁴ McKenna was not athletic.¹³⁵ He had been a salesman in a menswear shop and acting grocery store manager.¹³⁶ While the examples of McKenna's writing that are available to the Inquiry indicate a very good standard of literacy for someone who, as he now states, finished schooling at 13,¹³⁷ it is of a noticeably different standard to the former bank employee's, Wenlock.¹³⁸

It seems that McKenna had other techniques he employed to persuade those not confined to the Hostel to do what he wanted. Gerald Marriott recalls that, probably on first meeting McKenna, McKenna told him about receiving the Citizen of the Year Award; "He wasn't slow in letting people know that he was held in high regard".¹³⁹ Mr Marriott also stated:

*"From my point of view, I thought [McKenna] was rather obsequious and was keen to tell me things that he thought that I might like to hear, "The schoolkids are looking much better dressed this year now that you're principal, Gerry", or, "The hostel kids all respect you, Gerry", and I just didn't feel that he was always as sincere as he could be."*¹⁴⁰

Nevertheless Mr Marriott found McKenna to be a fluent and persuasive speaker. Mrs Brown, and others, recall McKenna as being charismatic. Even those Board members, like Mr

¹³¹ Gillies, G C *Inquiry Transcript of Evidence*, p. 3274; "W" *Inquiry Transcript of Evidence*, p. 3278; Thompson, W E *Inquiry Transcript of Evidence*, p. 3297; Trindall, D J *Inquiry Transcript of Evidence*, p. 3330; "Q" *Inquiry Transcript of Evidence*, pp. 3742, 3751.

¹³² CHSHA 1984, Minutes of Meeting (Attachment CHSHA Administration Officer Report Oct/Nov 1984), 11 December.

¹³³ WA Police 2012, *Response to Summons No. 2* (Investigation files).

¹³⁴ Bourke, A J *Inquiry Transcript of Evidence*, p. 1968;

¹³⁵ Parker, W 2012, *Submission to the Inquiry*, 2 March.

¹³⁶ McKenna, D J 2012, *Inquiry Interview*, in possession of the Inquiry, 19 March; WACA 2007, Obituary – RH (Roy) Wenlock, *The Western Cricketer 2006-2007*, p. 119.

¹³⁷ McKenna, D J 2012, *Inquiry Interview*, in possession of the Inquiry, 19 March. When he was Warden, McKenna informed students that he had a "psychology background" (Parker, S K *Inquiry Transcript of Evidence*, p. 179).

¹³⁸ Wenlock, R 1974-1977, St Christopher's Hostel Northam, Warden's Reports.

¹³⁹ *Inquiry Transcript of Evidence*, p. 2651.

¹⁴⁰ *Inquiry Transcript of Evidence*, p. 2648.

Marriott, who said they did not particularly like McKenna believed that he ran “a tight ship”, a good hostel.¹⁴¹

There were also undoubtedly those Board members who thought very highly of McKenna personally.¹⁴² Highly enough for two of them, Ian Murray and Mr Parks, to give character evidence on McKenna’s behalf at his 1991 trial,¹⁴³ and indeed highly enough for another Board member, Mr Stephens, to continue to praise McKenna’s contribution to the Hostel even after his conviction.¹⁴⁴

But, of course, Board members were not the only ones impressed by McKenna. No less than a Premier of the State, Sir Charles Court, praised McKenna. After first visiting Hostel’s plant nursery, with a bevy of politicians and other officials in April 1977,¹⁴⁵ the Premier returned for the opening in August 1977. The Premier was reported as stating:

“the Warden of the Hostel, Mr Dennis McKenna, had been able to enthuse the students magnificently, and it was largely due to Mr McKenna’s commitment to the welfare and spiritual needs of the students that the hostel had achieved so much.”¹⁴⁶

In 1984, McKenna was made Katanning’s Citizen of the Year. In bestowing the award, the then Shire of Katanning President praised McKenna as bringing to his job as the Hostel Warden the “rare gift of understanding and being able to relate to the teenage group in particular ... It is from the trust and respect of that age group that all his achievements have come”.¹⁴⁷

In 1985, the Hostel was awarded by the then Federal Minister for Education, Hon Kim Beazley MP, for its outstanding community involvement which was described as being “largely ... fostered by its warden McKenna”.¹⁴⁸

In 1988, a multi-party Parliamentary Committee reviewed the Authority.¹⁴⁹ The Committee’s report recommended that the Katanning system of trainee supervisors be extended to other hostels.¹⁵⁰ It also noted:

¹⁴¹ Marriott, G E *Inquiry Transcript of Evidence*, pp. 2647; Wilkinson, L A *Inquiry Transcript of Evidence*, p. 3073.

¹⁴² Peacock, S J *Inquiry Transcript of Evidence*, p. 1135; Thompson, N H *Inquiry Transcript of Evidence*, p. 2178.

¹⁴³ *Queen v Dennis McKenna* 1991, Transcript of Proceedings, 19 June, pp. 231-241,

¹⁴⁴ Quoted in Fraser, P 1991, *Great Southern Herald McKenna gets seven years – parole in less than three*, 31 July.

¹⁴⁵ [Unavailable] 1977, *Sir Charles Court visits St Andrew’s Hostel Katanning*, [circa 16 April].

¹⁴⁶ [Unavailable] 1977, *Sun Shines for Premier’s Visit*, [circa August]; see also *The Gnowangerup Star* 1977, *Premier opens hostel nursery in Katanning*, August 25; [Unavailable] 1977, *Katanning Students stage Premier Event*, 11 August. At the SHA conference in January 1978, the Premier also praised the Hostel for developing its gardening and nursery ventures ([Unavailable] 1978, *Premier praises hostel venture*, [circa January 1978]; SHA 1977, *Programme and Application Form for SHA Residential Conference at Swanleigh, 27-29 January 1978* (Flyer)).

¹⁴⁷ Fraser, P 1991, *Great Southern Herald Deception the paedophile’s forte*, 26 June, p. 1.

¹⁴⁸ *Great Southern Herald* 1985, *Honour for St Andrew’s*, 24 October, p. 1.

¹⁴⁹ Standing Committee on Government Agencies 1988, *A Review of the County High School Hostels Authority*, Parliament House, Legislative Council.

¹⁵⁰ At recommendation 14, the report notes that the Hostel had implemented a system under which: “...some students resident at the hostel are invited to stay on at the conclusion of their high school studies to serve as trainee supervisors. To date, some of these trainees have stayed on to join the hostel staff on a permanent basis...” (ibid, pp. xi, 20).

*"Katanning Hostel is a magnificent example of self help, with many of the facilities being the result of the initiative of the warden and students (an example being the very well set out cinema which serves as a community entertainment facility)."*¹⁵¹

The Parliamentary Report prompted a newspaper article "St Andrew's the State's top hostel". It reports that the Hostel is named as the leader in supervisor training and in the provision of top quality recreation facilities, and cites McKenna "whose work over the past 13 [years] is widely acknowledged as contributing to the hostel's success".¹⁵²

In September 1990, the same month in which McKenna was to be charged with criminal offences, the Authority's Administrative Officer tabled a report which included the following:

*"What can one say about Katanning? It is still the leader in providing a "complete" service to the isolated child. A pastoral care programme has been in existence for years and end product is evidence to this. Such programming should be encouraged by all centres... Dennis McKenna will be acting Warden for Geraldton during [its Warden's] Long Service Leave. This type of movement could be most beneficial to the movement as a whole. To place Dennis at different centres could be one way of developing "programmed pastoral care" in a very positive way..."*¹⁵³

If the accolades were not enough to encourage those beyond the Hostel walls to comply with McKenna's requirements, he had other means of getting what he wanted. Mrs Brown, who was on the Board from the end of 1974 until June 1980 gave evidence that:

"Dennis always wanted to take shortcuts with these things and John Renk and I always told him he had to do things by the book.

Whenever you tried to challenge Dennis he would say 'be careful, I have friends in high places'.

*I would tell him not to threaten me and he was [sic] say "I'm not threatening you little Elaine Brown", which is how he used to refer to me."*¹⁵⁴

Later, in 1985, McKenna was to assert his "friends in high places" in an attempt to coerce Maggie Dawkins out of pursuing concerns about his abuse of boys at the Hostel.¹⁵⁵

There can be no doubt that McKenna had connections with significant people, both locally and more generally. Through his role as Warden he had relationships with key community members such as senior bank officials (like Mr Renk), local businessmen (like Mr Wilkinson) and all of the KSHS Principals. The economic significance of the Hostel and extensive community use of its facilities (described at Chapter 9.5) meant McKenna also had connections with the Shire and its Councillors such as Ainslie Evans. McKenna was able to provide accommodation at the Hostel not just to teachers, who would tutor students, but also to police cadets. More generally the relationship with Mr Philpott, as both a senior manager at Wesfarmers and Chairman of the Authority, who promoted McKenna as a "guru", was of critical importance. Finally McKenna's connections with politicians, likely to have been initially acquired through his involvement with the SHA (see section A1.1.1),

¹⁵¹ Standing Committee on Government Agencies 1988, *A Review of the County High School Hostels Authority*, Parliament House, Legislative Council, p. 33.

¹⁵² Fraser, P 1988, *Great Southern Herald St Andrew's the State's top hostel*, 19 October.

¹⁵³ CHSHA 1999, Minutes of Meeting (Attachment – Administrative Officer's Report September 1990), 11 September.

¹⁵⁴ *Inquiry Transcript of Evidence*, pp. 1049-1050.

¹⁵⁵ Dawkins, M A *Inquiry Transcript of Evidence*, p. 240.

resulted in some highly publicised endorsements by “people in high places”, as already described.

It is evident that McKenna enjoyed, and exploited, his associations with “people in high places”. Again, however, he did not enjoy this patronage to the same extent as Roy Wenlock, who for example, was given a letter of introduction by the then Minister for Education, Mr Graham MacKinnon MLA, in 1975 so he could visit hostels and school on an international tour paid for by St Christopher’s Hostel.¹⁵⁶

Significantly, McKenna was also an “outsider” at that time for a rural community and in particular amongst the hostels network. He was both a Catholic and a man who many simply assumed was, or could have been, homosexual or a “poofter”; someone who struck witnesses as having a mincing way of speaking, being camp or flamboyant.¹⁵⁷

The question therefore arises of how an “outsider” came to exercise such power over the children at the Hostel and, beyond that, anyone including Board members, who sought to question his conduct. Rosemary Cant’s evidence to the Inquiry explained how McKenna was able to groom both the hostel residents and the community.¹⁵⁸ There were also the threats to pursue defamation proceedings.¹⁵⁹ Another significant factor in explaining how McKenna was able to exercise power and influence was that, as Warden, he was in a position to exploit the economic significance of the Hostel in a rural town, its facilities and public monies. As might be expected, McKenna used it all to further his own interests. What is less obvious is how he was allowed to do this.

A1.6 St Andrew’s Hostel finances

The Inquiry received evidence from a number of witnesses which raised questions about McKenna’s mismanagement and possible misappropriation of the Hostel finances.¹⁶⁰ The financial audit materials for the Hostel available from the Authority give no reason to discount that evidence, highlighting numerous deficiencies in the Hostel’s financial accountability. That a significant Board member also had convictions for embezzlement related offences both before and after serving on the Board further heightened the risk that there had been financial mismanagement or worse at the Hostel.

¹⁵⁶ SHA 1975, *Roy Wenlock back from overseas*, *SHA Newsletter*, December, pp. 6, 7; St Christopher’s Hostel Board 1970, Minutes of Meeting, 9 March.

¹⁵⁷ Parkin, N E *Inquiry Transcript of Evidence*, pp. 589, 590, 595, 599, 605; Peacock, S J *Inquiry Transcript of Evidence*, pp. 1154, 1155; Brokenshire, S J *Inquiry Transcript of Evidence*, pp. 1347, 1351; Gill, P A *Inquiry Transcript of Evidence*, pp. 1376, 1385; Bourke, A J *Inquiry Transcript of Evidence*, pp. 1968, 1994; Lockhart, I R *Inquiry Transcript of Evidence*, p. 2012; Murray, I W *Inquiry Transcript of Evidence*, pp. 2271, 2272, 2281; Young, G H *Inquiry Transcript of Evidence*, p. 2612; Galluccio, J L *Inquiry Transcript of Evidence*, p. 2399; Trezise, C *Inquiry Transcript of Evidence*, p. 2401; Laffer, J B *Inquiry Transcript of Evidence*, p. 3200; Shiner, R A *Inquiry Transcript of Evidence*, p. 3642; WL & KJ Everett (representing Mr Alan Parks) 2012, Letter to the Special Inquirer, 22 June. See Chapter 18 for a discussion of the anti-homosexual legal and social environment at the time and the law’s approach to homosexuality and paedophilia involving male children.

¹⁵⁸ *Inquiry Transcript of Evidence*, pp. 862-897; see also Chapter 9.

¹⁵⁹ See Chapters 16.4.3 and 18.2.

¹⁶⁰ McKenna, D J *Inquiry Transcript of Evidence*, pp. 1297-1298; Stephens, L O K *Inquiry Transcript of Evidence*, p. 2863-2864. Groves, B *Inquiry Transcript of Evidence*, pp. 666-670.

What was identified by numerous audits at the time, however, were clear deficiencies in the Hostel's financial systems. Although the auditors who reviewed the Hostel's financial records in 1984 were able to say they found no evidence of misappropriation,¹⁶¹ in the absence of records of income and expenditure for a range of activities, it seems to be equally the case that there was no evidence that misappropriation was not occurring.

Auditors did identify overspending by the Hostel time and time again. Arguably the almost profligate expenditure on operating the Hostel and expanding its facilities advantaged both the Hostel, and also the broader Katanning community which was able to gain access as a result of McKenna's apparent community mindedness – another word for which might be McKenna's patronage. Nevertheless any such advantage came at the cost of further entrenching McKenna as part of the Katanning community and deflecting any scrutiny of his conduct.

While it is clear that the Hostel as a business would have had significant economic impact on the economy of Katanning it is important to be cautious of uncritically adopting the assessment of those who were supporters of McKenna at the time, such as Mrs Evans.

Mrs Evans' evidence to the Inquiry was as follows:

"Q. Am I right in saying, Mrs Evans, that the economic benefits of a large and successful hostel were considerable for the town?"

A. Oh, they certainly were and the town was appreciative of that.

Q. Was that a view you held of the hostel at a time during the 1980s?"

A. It's a view I hold about any commercial venture in Katanning. We need them.

Q. Yes. Is it fair to say that the success of the hostel was largely attributable to its warden, Dennis McKenna?"

A. Yes, I believe that."¹⁶²

Later Mrs Evans stated that "Dennis was the epitome of the hostel, [and] I saw the hostel being under threat if Dennis wasn't part of it."¹⁶³

The economic significance of the Hostel was recognised before McKenna's time. When the Authority revoked its arrangements with the Anglican Diocese of Bunbury in 1970, the *Great Southern Herald* reported that the operation of the hostel at Katanning is "a great economic boost for the town and the parents of children at the hostel", with 96 students attending in 1969 and 103 expected in 1971.¹⁶⁴ In 1974, the *Great Southern Herald* reported on a walkathon by Hostel students to raise monies for the bare common room. Jim Gilmour is quoted referring to the Hostel being a good customer in Katanning – with the hostel patronising local businesses, students spending their pocket money and parents shopping when visiting the Hostel.¹⁶⁵ As Mr Philpott noted in his inaugural speech to the SHA as Chairman of the Authority in January 1977, "Hostels are generally big business" and he cites

¹⁶¹ Clerk in Charge (Internal Audit) 1984, Audit Report, 11 May.

¹⁶² *Inquiry Transcript of Evidence*, p. 1673.

¹⁶³ *Inquiry Transcript of Evidence*, p. 1713.

¹⁶⁴ *Great Southern Herald* 1970, *Diocesan Control of Hostel is Revoked*, 11 December, pp. 1, 2.

¹⁶⁵ *Great Southern Herald* 1974, *Hostel Students Walk for Funds*, 30 August, p. 1.

one as turning over in excess of \$1 million per annum,¹⁶⁶ a very considerable sum at the time.

Contrary to those who claim McKenna contributed to Katanning's economy, however, Peter Potter's evidence as a long-term resident of Katanning was that in fact McKenna:

"...actually destroyed a lot of the town's business and community spirit...

Before Dennis came you couldn't get a park on Friday night or a Monday morning/Friday afternoon. People would come to pick up their kids from the out centres ... as far as out as Corrigin, Flat Rocks, Cranbrook, Darkin, Kojonup, Frankland - they would ... come and pick their kids up, take them home for the weekend...

HIS HONOUR: Q. That was obviously good for business though, was it?

A. Yes.

Q. So they'd do their shopping while they come to pick up the kids?

A. Yes, but also the machinery places and all that stuff. They were quite flourishing, but when Dennis come, the kids seemed to be kept in the hostel and parents were encouraged to stay away, so [there wasn't] that influx on the weekends and start of the week coming and going.

Q. And you noticed that at the time, did you?

A. I noticed it suddenly stopped.

Q. And this was what, starting from the mid '70s onwards?

A. Yes, is the late '70s or mid '70s.¹⁶⁷

A similar degree of caution needs to be exercised in attributing high student enrolments wholly to McKenna's capability as the Warden and to the reputation of the Hostel, although these were undoubtedly factors.¹⁶⁸ Interestingly, the turnaround of fortunes at the Hostel was not quite as remarkable as many thought. For example, Mr Marriott's evidence was that:

"They really thought that he [McKenna] was the reason why the hostel numbers have grown from maybe 50 or 60 when he first came, up to 120, which was very good for the town, and his reputation was such that ... there was often a waiting list to get into the hostel, so keen local citizens thought that that was great."¹⁶⁹

While these numbers were accurate (61 enrolled in 1976 and 119 in 1984¹⁷⁰), it should be noted that there had been 100 students enrolled in 1970.¹⁷¹ As Ian Parker pointed out in a

¹⁶⁶ SHA 1977, *Interaction and development, Report of the Conference and AGM of the SHA, Bunbury, 21-23 January 1977*, p. 38.

¹⁶⁷ *Inquiry Transcript of Evidence*, pp. 3606-3607.

¹⁶⁸ Stephens, K R *Inquiry Transcript of Evidence*, pp. 18-20; Haddow, K J *Inquiry Transcript of Evidence*, pp. 356, 357; Brown, J A *Inquiry Transcript of Evidence*, p. 385; Parker, D M *Inquiry Transcript of Evidence*, p. 630; Edwards, T M *Inquiry Transcript of Evidence*, p. 709; Smart, D N *Inquiry Transcript of Evidence*, p. 1035; Gill, P A *Inquiry Transcript of Evidence*, p. 1370; Evans, A V *Inquiry Transcript of Evidence*, p. 1671; Gatti, M J *Inquiry Transcript of Evidence*, pp. 1815, 1816, 1818; Jones, S M *Inquiry Transcript of Evidence*, p. 2046; Murray, I W *Inquiry Transcript of Evidence*, p. 2075; Young, G H *Inquiry Transcript of Evidence*, p. 2611; Marriott, G E *Inquiry Transcript of Evidence*, pp. 2647, 2649; Bachelard-Lammas, P *Inquiry Transcript of Evidence*, p. 2710.

¹⁶⁹ *Inquiry Transcript of Evidence*, p. 2649.

¹⁷⁰ Beecham, A 1984, *Investigation into Country High School Hostels provided by the State of Western Australia*, p. 10.

¹⁷¹ Anglican Diocese of Bunbury 1970, *Year Book 1970*, p. 49.

submission to the Inquiry, there were much broader factors at play in the increasing Hostel numbers over McKenna's time as Warden, such as the "One million acres a year" policy for new farming land from the 1960s referred to previously.¹⁷² Much has also been said elsewhere on the volatility of factors affecting farming life (weather conditions, market prices, economic recession) and this clearly would have had a flow on effect for Hostel enrolments.

Furthermore, by June 1977, the Hostel was chastised for charging fees that were too low in an attempt to attract students from other hostels and accruing a deficit of \$3,577 in 1976 as a result:

*"The Secretary advised that a hostel with 78 students should be self-supporting and that Katanning's problems stemmed from charging unrealistic fees (\$325) in an effort to attract students. Their main competitors were Albany (\$350) and Narrogin (\$375)."*¹⁷³

It would seem that the deficit was not only the result of charging fees lower than was required to cover its costs. Almost immediately upon his appointment as Acting Warden, McKenna began implementing some significant initiatives, particularly in the development of recreational activities for boarders at the Hostel.

By 12 March 1976 the *Great Southern Herald* reported that the Hostel had purchased its own bus for the first time, and that students were going on a camping trip to King River.¹⁷⁴ According to a newspaper report of Sir Charles Court's visit in the following year, "the Hostels Authority had paid half the cost of the bus and the students were left to raise \$4,800. To date \$1,400 had been raised."¹⁷⁵

By 25 June 1976 the newspaper reported that a swimming pool was being constructed at the Hostel, with funds raised by the students, and it was to be opened by Lady Kyle, the Governor's wife.¹⁷⁶ This appeared odd, because according to various other newspaper reports, the building of a Shire swimming pool had been a community project for some years – funding being raised through the Shire, Rotary etc.¹⁷⁷

Nevertheless, this shift of priorities for the Authority from a "building era" to one of "improving the facilities needed to occupy students' time outside their academic pursuits" had been strongly promoted by Mr Philpott upon his appointment as Chairman of the Authority as indicated earlier.

Indeed after visiting the Hostel, Mr Philpott reported to the Authority on 24 March 1977 that the "transformation he witnessed was remarkable".¹⁷⁸ But like so much associated with McKenna, the reality was quite different to appearances. Since July 1976 the Authority had in fact spent almost \$41,000 on the Hostel – providing amongst other things, new carpets, heating, structural additions and half the cost of the bus.

¹⁷² Parker, I 2012, *Submission to the Inquiry*, 29 May.

¹⁷³ Secretary CHSHA 1984, Letter to Chairman of the St Andrew's Hostel Board and Attachment, 22 March.

¹⁷⁴ *Great Southern Herald* 1976, *Camping Trip*, 12 March, p. 4. Appallingly, as is now well known, McKenna was to exploit the opportunities provided on trips of these kinds to abuse students in his care.

¹⁷⁵ [Unavailable] 1977, *Sir Charles Court visits St Andrew's Hostel Katanning*, [circa 16 April].

¹⁷⁶ *Great Southern Herald* 1976, *Lady Kyle will open pool*, 25 June, p. 3.

¹⁷⁷ For example, articles appearing in the *Great Southern Herald* report: 'Referendum for New Pool' (19 October 1973); 'We are starting a pool fund' (21 December 1973); 'Quiz Night for Pool Fund' (13 March 1974); 'Swimming pool to be new' (22 March 1974); and 'Work starts on new Shire pool' (2 April 1976).

¹⁷⁸ CHSHA 1977, Minutes of Meeting, 24 March.

Despite this, however, the Hostel's finances were in deficit, and in April it sought deficit funding from the Authority for \$3,577.¹⁷⁹ This prompted the Secretary of the Authority to write to Treasury pointing out that he was "concerned that a Committee which has been treated generously by the Authority is endeavouring to extract further funds from the State Government."¹⁸⁰

It appears that the \$3,577 deficit was (slightly more than) the balance that the Hostel was supposed to contribute towards the cost of the bus (\$4,800 less \$1,400 raised by the students). The Secretary noted in his letter to Treasury:

*"If the deficit is as stated the Committee should not have entered into an arrangement to purchase a bus and it is clear that in future the Authority will have to obtain specific evidence that sufficient funds are available and that the application will not result in a deficit at the end of the year."*¹⁸¹

Nevertheless by 1978, the Authority had allowed the recouping of half of the Hostel's deficit for 1976 and 1977 – effectively paying the full cost of the Hostel bus.

A significant component of the Authority's \$41,000 expenditure on the Hostel was on the construction of the recreation shed. In November 1977, the Authority had approved payment of \$27,500 for its construction.¹⁸² By May 1978, the Authority had spent \$30,000 on the Hostel's shed and a quote for a further \$7,000 was tabled for construction of the shed floor.¹⁸³ A month later another quote for almost \$2,000 for electrical work on the shed was considered by the Authority.¹⁸⁴ By January 1980, the Authority received a letter from the Shire stating that there was such wide community use of the Hostel's recreation shed that toilets needed to be constructed. The Authority wrote requesting that half funding be provided by the Shire.¹⁸⁵ By March, the Shire advised that it could not afford to pay and the Authority's Minutes note that this was now an urgent project for the Public Works Department.¹⁸⁶

As for the swimming pool, by 1979, the Authority approved installation of a 50x20 concrete swimming pool at the Hostel to replace the fibreglass pool which had "given considerable trouble". This was, again, supposed to be paid for by the Board but with the on-going deficits accrued by the Hostel (examined below) the extent of the Hostel's contribution to the cost cannot be confirmed.

It seems evident that the "transformation" of the Hostel that was associated with McKenna was in fact largely publicly funded. That is not to doubt the enormous amount of work that the boarders of the Hostel put into fund-raising and improving the Hostel facilities – indeed so much that, together with the demands for providing services to the community it adversely impacted upon students' ability to study.¹⁸⁷ However, contrary to the public

¹⁷⁹ CHSHA 1977, Minutes of Meeting, 28 April.

¹⁸⁰ Secretary CHSHA 1978, Letter to State Treasury, 12 May.

¹⁸¹ Secretary CHSHA 1978, Letter to State Treasury, 12 May.

¹⁸² CHSHA 1977, Minutes of Meeting, 24 November. Narrogin had already had a recreation shed constructed, largely from Authority funding, however that was on the basis that it was a restricted site with 232 students (CHSHA 1975, Minutes of Meeting, 24 July).

¹⁸³ CHSHA 1978, Minutes of Meeting, 25 May.

¹⁸⁴ CHSHA 1978, Minutes of Meeting, 23 June.

¹⁸⁵ CHSHA 1980, Minutes of Meeting, 29 January.

¹⁸⁶ CHSHA 1980, Minutes of Meeting, 4 March.

¹⁸⁷ For example, see Parker, S K *Inquiry Transcript of Evidence*, pp. 186, 192.

image, public funding for many improvements was not being matched by the Hostel. It is somewhat ironic that when he returned to the Hostel in August 1977 the Premier was to remark on the self-help efforts of the students at St Andrew's, stating:

*"Too often these days people sit back and wait for government, or perhaps I should say the tax payer, to supply everything. But this is a wonderful example of young people getting out and raising money for the things they want."*¹⁸⁸

As briefly outlined below, the state of the Hostel finances throughout the years of McKenna's wardenship was to continue as it had started:

- An audit report for the Hostel dated 11 December 1980 advised that vouchers were not available for expenditure totalling \$15,740.88 and that no records were available in respect of postage and petty cash.¹⁸⁹
- By the end of 1981 the Hostel was seeking funding for a total operating deficit of \$32,467.68. The Authority advised that it had made no provision in its budget for the reimbursement of the deficit and in any case the Hostel was expected to run at a break-even point with 100 students in residence.¹⁹⁰
- An audit in 1984 identified that "In 1982 the Hostel figures revealed an operating profit of \$29,005.92, this surplus was decreased by a bus A/C variance of \$18,392.81 and amenities of \$17,839.03 resulting in an overall deficit of \$6,908.47 for the period." It also identified that an operating loss of \$43,128.00 would have resulted in a \$78,264 deficit in 1983 if not for a \$35,000 loan.¹⁹¹
- Another audit conducted that year because of the large deficit initially identified, calculated the real deficit for the Hostel as being \$84,827. Although the Auditor found no evidence of misappropriation he did find overspending on non-operational activities: bus, cinema, building and canteen.¹⁹²
- In 1987, a further audit identifies: "As a result of this investigation a number of procedural and accounting anomalies were detected. In addition, a number of items of a significant capital nature were found to have been purchased which require comments or explanation from the Board of Management." The year to date food costs at Katanning was \$245.84 [per student] compared to Northam \$128.73 (which was a similar size hostel). "According to the Warden, the long term viability of the Cinema and Indoor Cricket programmes is in jeopardy because of the lack of sustained interest in the town ... I am of the opinion that the Warden has come to the realization that large scale project undertaken contribute substantially to the financial difficulties."¹⁹³

¹⁸⁸ [Unavailable] 1977, *Katanning Students Stage Premier Event*, 11 August.

¹⁸⁹ Secretary CHSHA 1984, Letter to Chairman of the St Andrew's Hostel Board and Attachment, 22 March.

¹⁹⁰ *ibid.* Within two weeks, the Minister for Education wrote to McKenna stating: "I must say that I have heard nothing but praise for the efficient manner in which the Hostel is administered and I congratulate you for your efforts in developing what is the most impressive hostel in Western Australia." (Clarko, Hon J G (MLA), Minister for Education 1982, Letter to D McKenna, 30 November).

¹⁹¹ Clerk in Charge (Internal Audit) 1984, *Katanning Hostel Audit of Accounts*, March 22.

¹⁹² Clerk in Charge (Internal Audit) 1984, *Audit Report*, 11 May.

¹⁹³ Acting Administrative Assistant (CHSHA) [undated], *Report on Expenditure Items 1986-87, St Andrew's Hostel Katanning*.

- In October 1988, following the positive assessment of the Hostel by the Parliamentary Committee, the newspaper article identifying it as “St Andrew’s the State’s Top Hostel” quotes McKenna “listing the swimming pool, recreation shed, buses, canoes and front additions to the recreation shed as just some of the facilities which had relied on hostel self-funding and not government hand-outs”. McKenna went on to state: “At St Andrew’s we break even but if put the numbers up another 20 [students] we would make a profit.”¹⁹⁴ By January 1989, however, the Authority noted that the Hostel “appears to be overspending” and has an “unexpected deficit”.¹⁹⁵
- On 11 April 1989 the Authority noted that the Hostel’s 1988 deficit of \$67,403 would need to be traded out of that year, as no funding would be available from Head Office.¹⁹⁶
- By the end of 1989, the Hostel Board issued a notice advising of a change in policy. It stated that:
“Students have fund-raised all the amenities and equipment, internal furnishings, buses, pool etc without Government or outside help. It will be extremely hard to replace many of these in the future, with so much use by outsiders, many items are being damaged... Catering, hire of buses, equipment, canoes, halls, Cinema, buildings for camps can no longer be available [for free].”
Charges were implemented for the hire of some of those facilities.¹⁹⁷
- The Authority’s Administrative Officer has a meeting with St Andrew’s warden and others in February 1990 about the Hostel’s \$109,503 overdraft; at the time the total food costs for Katanning were higher than the total food costs for Narrogin which had an additional 100 students in residence.¹⁹⁸

Witnesses representing the Authority were asked at Inquiry hearings about the management of the Hostel finances while McKenna was Warden. Mr Bachelard-Lammas was the Authority’s Liaison Officer from 1982 until 1990. When interviewed by Inquiry investigators his recollection, quite startlingly, was as follows:

“... when I was appointed, that was one of my chief concerns ... monitoring the deficit funding ... Katanning was never in deficit.”¹⁹⁹

When Mr Philpott was examined about the continuing deficit funding of the Hostel he indicated that many hostels had problems operating within their budget. He was rather unperturbed about McKenna’s expenditure in the face of the mounting deficit:

“Q. ... he [McKenna] wasn't managing it very well, was he?”

A. It doesn't appear to be so, except he wasn't putting it away. It didn't seem that he was ever putting it away.

¹⁹⁴ Fraser, P 1988, Great Southern Herald ‘St Andrew’s the State’s top hostel’, 19 October.

¹⁹⁵ CHSHA 1989, Minutes of Meeting, 10 January.

¹⁹⁶ *ibid.*

¹⁹⁷ St Andrew’s Hostel Board 1989, Minutes of Meeting, 14 December; Chairman (St Andrews Hostel) 1989, Notice ‘To Whom It May Concern’, 14 December; St Andrew’s Hostel 1989, *1990 Policy Proposal*; St Andrew’s Hostel 1989, *For Katanning Senior High School Only*.

¹⁹⁸ CHSHA 1990, Minutes of Meeting (Attachment - Administrative Officer report February 1990) 23 April.

¹⁹⁹ Bachelard-Lammas, P 2012, *Inquiry Interview*, in possession of the Inquiry, 11 April, p. 8.

*He was doing it for the benefit of the children.*²⁰⁰

As it turned out, what McKenna was doing with government funding was far from being “for the benefit of the children”.

It is true that the facilities were made available for the broader Katanning community, apparently for much of the time without charge. However, there are many examples of how this placed McKenna in a position where he could leverage a great deal of good will from the community. In that respect, Mr Marriott's planner for 1985, when he was a new Principal at KSHS, records numerous meetings with McKenna – over cricket equipment, the buses, the recreation shed and the pool; this was in addition to his involvement with McKenna through McKenna's role as Warden and as President of the Parents and Citizens Association for KSHS.²⁰¹

Another insight into the position McKenna was able to secure in the community as a result of this largely unchecked expenditure can be seen when he organised a band at the Hostel's recreation shed, which played to about 600 people.²⁰² McKenna provided the Hostel bus to the school for sporting activities,²⁰³ he provided canoes free of charge to the community, the cinema provided new release movies (prior to their availability for commercial theatres) at reduced prices,²⁰⁴ he provided the Hostel cinema to the school nurse to host health seminars,²⁰⁵ and the police had use of the Hostel to conduct defensive driving seminars.²⁰⁶

Through his control over the Hostel's facilities and its economic resources, McKenna had another means by which he could exert influence and control over people beyond the confines of the Hostel. At times this was perhaps a more subtle influence over those who were beholden to him for the use of the facilities or the apparent economic success of the Hostel.

Andrew Bourke, a teacher at KSHS recalled:

*“the phys. ed. department for the school ... would often use buses and they could get them from the hostel and I think they were told, you know, “Don't sort of upset him because he might change his mind” or something like that.*²⁰⁷

Ian Lockhart, the physical education teacher at KSHS, elaborated further at his interview with Inquiry investigators, saying he:

“always saw him [McKenna] as a person that you didn't sort of mess around with ... I don't know if I was personally intimidated by him but he ... maybe manipulative -- no maybe that's not even the right word. Here's a scenario ... the hostel had a bus, like a coaster bus. I worked in phys ed and there was this kind of arrangement where the school could use the hostel bus ... to transport kids to various things, you know, we're going to some sort of sporting thing, or we're going down town to do something... but it was sort of like you could have it today but on a whim tomorrow, Dennis wouldn't let you have it ... it was like a power thing, controlling sort of thing ... I used to find that extremely frustrating because you sort of never knew where

²⁰⁰ *Inquiry Transcript of Evidence*, p. 2465.

²⁰¹ Marriott, G 1985, Yearly planner – 1985.

²⁰² Great Southern Herald 1985, *Warm welcome for Ice*, 7 August, p. 4.

²⁰³ Bourke, A J *Inquiry Transcript of Evidence*, p. 1967.

²⁰⁴ [Not available] 1986, Letter to Fox-Columbia Film Distributors, 12 May.

²⁰⁵ Inquiry Investigator 2012, Inquiry file note of conversation with S Marshall, 13 February.

²⁰⁶ WA Police 1985, Occurrence Book – Katanning, 14 November.

²⁰⁷ *Inquiry Transcript of Evidence*, p. 1967.

you stood. I didn't actually have much to do with Dennis specifically but there was always this sense that if you stuffed around with him, if you pissed him off, then ... he had the capacity to make life difficult for you ... in probably a number of ways.”²⁰⁸

However, there are also clear examples of McKenna blatantly exerting his power if he believed it was necessary to get what he wanted or to protect his reputation. For example, in August 1990 McKenna wrote to K J Elwin, the proprietor of an electrical repair shop in Katanning. McKenna claims that Mr Elwin made a comment to parents who visited his shop that a student was withdrawn from the Hostel because of the “poor way in which the Hostel is run”. He continues “We are all very upset with your mannerism [sic] and certainly you will not benefit from any business from us or the 135 families associated with the Hostel”.²⁰⁹

Interestingly Mr Elwin has a very different recollection of events:

“My recollection around this incident is that I feel this letter was a bit of a “put up” and not really true.

From memory Dennis wasn't really threatening me about an “alleged comment” [which Mr Elwin denies making] but rather he was angry with me about not getting his own way with regards to how I wanted payment for the repairs I was doing.

Dennis came to me and asked me to invoice the St Andrews Hostel for all repairs, however I told him that unless he had an official order number which he could give me he would have to pay cash.

This was something he did not like, because he did not get his own way on this point.

Even back then it appeared to me that Dennis usually got what he wanted around town and as I reflect back on my dealings with him I always found him to be a bit “cocky”.”²¹⁰

Whether the letter had the intended impact on Mr Elwin was probably not the issue for McKenna. The “Elwin Affair” was noted in the Board Minutes of 23 August 1990 and no doubt served its purpose in convincing the Board that McKenna was ever vigilant of the good name of the Hostel.²¹¹ At the same time it would provide a pretext should Mr Elwin complain about McKenna’s conduct in the future.²¹²

Of course, perhaps the clearest example of how McKenna was able to exercise his “economic” power beyond the Hostel is in the events associated with Westrek. The Authority took up a lease over Kartanup (St Rita’s Convent premises), despite the objections of McKenna and the Hostel Board.²¹³ Indeed, despite these objections, the Authority went on to give the use of Kartanup to the Hostel, with the Authority’s Administrative Officer writing to the Board:

²⁰⁸ Lockhart, I 2012, *Inquiry Interview*, in possession of the Inquiry, 4 April, pp. 8, 9.

²⁰⁹ McKenna, D (Warden, St Andrew’s Hostel) 1990, Letter to K J Elwin, 1 August.

²¹⁰ Elwin, K J *Inquiry Transcript of Evidence*, pp. 4315.

²¹¹ St Andrew’s Hostel Board 1990, Minutes of Meeting, 23 August.

²¹² Mr Hendry’s evidence was that he had never received a letter addressed to him from McKenna in which McKenna made serious allegations of bullying by Mr Hendry’s son. Mr Hendry was withdrawing his son from the Hostel at the time. He speculated that the letter had been fabricated by McKenna to deflect any criticism of his conduct should Hendry complain at a later date (*Inquiry Transcript of Evidence*, pp. 1932-1933).

²¹³ CHSHA 1984, Minutes of Meeting, 11 December.

*"After discussion with Dennis it may be feasible to use Kartanup as and when you see fit as an extra facility for students and staff alike. Therefore the Authority offers your Board the use of Kartanup for 1985 to utilize to the best advantage for all concerned."*²¹⁴

Kartanup was leased to Westrek for the six month pilot project in Katanning.²¹⁵ Mrs Maggie Dawkins recalls that after she raised concerns about the allegations of a former resident at the Hostel that:

*"I remember her [Elizabeth Stroud] directing me to pack up and move to the Westrek project at Bunbury. I was given 48 hours to do so. Ms Stroud informed me that Dennis McKenna had threatened to withdraw the accommodation of Kartanup from Westrek. This would have put an end to the project I had worked so hard to set up."*²¹⁶

A1.7 Conclusion

There is no more apt conclusion for this chapter on the governance of the Hostel between 1975 and 1990 than to adopt the words of Mr Parker, a former resident at the Hostel:

"a situation was allowed to develop in Katanning where an almost exclusive focus was placed on the reputation and attendance of the Hostel. The local board [was] allowed deficit funding despite a clear and proven long term inability to manage the income and expenditure of the facility. The board were never given training or instruction as to how to address the situation or given a set of instructions as to what their primary focus was. No long term planning was every conducted and the Authority had tenuous control at best, seemingly leaving any management to untrained amateurs.

*Yet the accolades kept coming. Some generated internally by the Board, the Authority and the Warden. Others, from the local community which benefitted from aspects of the Hostel's operation. The salient point is that this reputation was not built in any way on fact."*²¹⁷

²¹⁴ Administrative Officer (CHSHA) 1984, Letter to Chairman St Andrew's Hostel Board, 19 December.

²¹⁵ See Chapter 11.13.

²¹⁶ *Inquiry Transcript of Evidence*, p. 240. Other than Peter Sherlock, all of the Westrek management witnesses who gave evidence to the Inquiry claim that Mrs Dawkins was moved due to her poor performance and not because of McKenna. Importantly however, Mrs Dawkins' account is corroborated by the Hostel Board minutes, which record both the termination of Westrek's lease of Kartanup and its reinstatement. (See Stroud, E J *Inquiry Transcript of Evidence*, pp. 1469-1538, 3709-3738, 4251-4259; Sherlock, P *Inquiry Transcript of Evidence*, pp. 1541-1618, 4245-4251; Carter, I L *Inquiry Transcript of Evidence*, pp. 1618-1661, 4232-4237; Kenyon, P R *Inquiry Transcript of Evidence*, pp. 2294-2394, 4237-4244; Holmes a Court, J L *Inquiry Transcript of Evidence*, pp. 4219-4225; St Andrew's Hostel Board 1985, Minutes of Meeting, 30 October; St Andrew's Hostel Board 1985, Minutes of Meeting, 20 November.)

²¹⁷ Parker, I 2012, *Submission to the Inquiry*, 29 May, pp. 2, 3.

Attachment 1.1

{Ex 88}

APPENDIX 5

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY

LETTER OF ARRANGEMENT

The Local Committee to:

1. Engage or dismiss staff and pay all accounts incurred in connection with the control and conduct of the Hostel, including the wages and salaries of all members of the staff.
2. Purchase or dispose of all stores.
3. Supervise the management and control of the hostel and to be responsible to the Authority for the provision of clean lodgings and wholesome board to the students residing therein.
4. Keep and maintain in good order such chattels which are and shall remain the property of the Authority for the use of the Local Committee on the premises.
5. Comply with the Health Act 1911 and the Local Government Act 1960.
6. Refer all matters in dispute, or in respect of which the Committee may require a direction, to the Authority for determination or adjudication.
7. Not to do anything whereby any policy of insurance against loss or damage by fire on the hostel or the contents may become void or whereby the premiums payable in this respect may be increased.
8. To pay all charges in respect of electricity and fuel, telephone rental and calls, sanitary charges, removal of rubbish, water and fire brigade charges.
9. Permit the agents and servants of the Authority at all reasonable times to enter and view the state of cleanliness of the hostel and chattels and to inspect the nature and quality of the accommodation being provided by the Local Committee.
10. Remedy any defects for which the Committee is liable and of which written notice shall be given by the Authority to the Local Committee.
11. Use the Hostel and the chattels for the purpose of providing accommodation for students and for no other purpose except for the duration of school vacations, during which periods, if the hostel is not required for educational purposes, the Local Committee may use the hostel and chattels for such other purpose as the Authority shall have in writing first approved.
12. Not to make any structural alterations to the hostel nor instal therein any fixtures or fittings without the consent in writing of the Authority first had and obtained.
13. Insure and keep insured all members of the staff employed at the hostel or in connection therewith during the terms of this arrangement, against all claims that may be made upon the Local Committee for or in respect of personal injury or death happening or occurring to any person in or about the Hostel or in the course of working thereof whether such claim shall arise or be made under the Workers' Compensation Act 1912-64 or any other statute or common law.
14. Charge student fees at such rate as the Authority from time to time approves.
15. Endeavour to run the Hostel on a non-profit making basis, any surplus accruing to be used for the benefit of the students either by reducing fees or providing amenities.



| | | | |
|-------------|-----------------|-------------|----|
| Date. | 3 May 12 | Exhibit No. | 88 |
| File No. | | | |
| Tendered By | Seamus Rafferty | | |

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16. Submit financial statements to the Authority annually.
17. Build up a fund or make other provision for the payment of long service leave or pro-rata long service leave for the staff.

The attention of the Committee is drawn to Regulations made pursuant to the Country High School Hostels Authority Act, which deal specifically with the maintenance and enforcement of discipline in hostels.

The Authority to:

1. Keep and maintain or cause to be kept and maintained the hostel in good and substantial repair and condition with the exception of damage caused other than by fair wear and tear.
2. Arrange to replace chattels that may become worn or damaged beyond repair in the normal use thereof.

It is MUTUALLY AGREED AND DECLARED by and between the parties that this agreement may be determined by either party giving to the other, three calendar months written notice expiring at the end of the school term of its intention in that behalf and upon the expiration of the period mentioned in such notice, this arrangement shall cease and determine and the Local Committee shall vacate and deliver up the hostel and chattels and leave the hostel in a clean and tidy condition. Any funds accruing at the expiration to be transferred to the incoming Committee or the Authority.

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY

LOCAL COMMITTEE

.....Chairman

.....Chairman

.....Member

.....Member

| | |
|---------------------|-----------------------|
| Date. <u>3/5/12</u> | Exhibit No. <u>88</u> |
| File No. _____ | _____ |
| Tendered By _____ | _____ |

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Appendix 2



SOLICITOR GENERAL
WESTERN AUSTRALIA

13 February, 2012

Hon Peter Blaxell
Special Inquirer
St Andrews Hostel Inquiry

JURISDICTION OF THE ST ANDREWS HOSTEL INQUIRY WITH RESPECT TO PUBLIC OFFICIALS

1. On 8 February 2012 you wrote to the State Solicitor seeking advice as to the scope of your Inquiry's terms of reference. The State Solicitor has referred that request to me.

The Inquiry and its Terms of Reference

2. The Inquiry is established under s. 24H(1) of the *Public Sector Management Act 1994* (WA) ("PSM Act"). The Public Sector Commissioner ("Commissioner") has appointed you to conduct a special inquiry into the conduct and response of relevant public officials and government agencies in relation to allegations of sexual abuse at St Andrews Hostel in Katanning ("Hostel"). The terms of reference provide that, among other things, in examining this matter the Inquiry is to report on "any disciplinary action that should be taken against any public official as a consequence of the findings" which the Inquiry makes.

Request for Advice

3. You have sought advice as to the scope of the phrases "public official" and "disciplinary action", which appear in the Inquiry's terms of reference, and as to whether the jurisdiction of the Inquiry extends to:
 - (a) investigating the conduct and response of certain categories of officer, and
 - (b) recommending that disciplinary action be taken against certain categories of officer.

Advice

4. In my opinion, the phrase "public official" in the terms of reference comprehends persons who, at the time of the relevant conduct, were working in or performing the functions of an entity which is currently, or which would be if it still existed be, a "public sector body" as that term is defined in the PSM Act. That includes persons who

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were, at the time of the relevant conduct, either

- (a) the Chairman and other members of the Country High School Hostels Authority (“**Authority**”), appointed under s. 4 of the *Country High School Hostels Authority Act 1960* (WA) (“**the Authority Act**”);
- (b) members of a committee in respect of a hostel, appointed by the Authority under s. 7(1)(ba)(iv) of the Authority Act;
- (c) the staff of hostels, engaged under s. 7(1)(ba)(iii) of the Authority Act;
- (d) officers and servants of the Authority, appointed under s. 10(1) of the Authority Act;
- (e) the secretary or other officers of the Authority, whose services were co-opted under s. 10 of the Authority Act; and
- (f) school teachers and nurses employed in the Department currently designated the Department of Education.

It is, therefore, within the jurisdiction of the Inquiry to investigate the conduct and responses of persons holding those positions at the relevant time.

5. In my opinion, the reference to “public officials” does not comprehend police officers or councillors or employees of a local government. However, the Inquiry may receive evidence and make findings about:
- (a) allegations about sexual abuse made to the police or local government;
 - (b) the action taken in relation to such allegations; and
 - (c) the reasons why action was or was not taken,

where that evidence or those findings are relevant to the investigation of the conduct and responses of public officials (in the sense explained above) to the same or similar allegations.

6. In my opinion the phrase “disciplinary action” in the terms of reference comprehends such action which the employer or appointer of a public official may lawfully take against an employee or office holder for substandard performance or misconduct by that employee or officer. It includes, but is not limited to, disciplinary action under Part 5 of the PSM Act. However, the terms of reference do not contemplate the Inquiry making recommendations that disciplinary action be taken against persons who are not “public officials” in the sense explained above.
7. My reasons for these conclusions are set out below.

“Public Official”

8. As you have noted, the term “public official” is not defined by the Authority Act. In its ordinary meaning, the term is capable of referring to any person who holds an office of a public nature established by a law of the State or Commonwealth, or who is employed

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by a governmental body. Like the term "government agencies", the term "public official" is of potentially broad application. It seems likely that those who drew the terms of reference sought to use language which would give the Inquiry as wide a scope as possible to investigate the official response to allegations of abuse at the Hostel.

9. However, in construing the phrase "public official" as it appears in the Inquiry's terms of reference it is, in my opinion, important to have regard to the statutory context in which the Inquiry is established. In particular, it is important to have regard to the limits on the authority of the Commissioner to arrange for the holding of a special inquiry.
10. Section 24H(1) of the PSM Act authorises the conduct of an inquiry "into a matter related to the Public Sector". Section 24H was introduced by s. 23 of the *Public Sector Reform Act 2010* (WA). It was largely a re-enactment of the former s. 11 of the PSM Act, which authorised the Minister to direct a suitably qualified person to "hold a special inquiry into a matter related to the Public Sector". Prior to the 2010 amendments the functions of the Commissioner, noted below, were vested in the Minister. While the original s. 11 of the PSM Act was the subject of contentious debate in the Legislative Assembly (Hansard 7 June 1994 pages 1103-8), I have not found anything in the Parliamentary materials which assists in the construction of either the former s. 11 or the current s. 24H(1) of the PSM Act.
11. Section 24H(1) of the PSM Act, in referring to a "matter related to the Public Sector", imposes a limitation on the authority of the Commissioner to arrange for the holding of a special inquiry under that section. The terms of reference should be construed in a manner which has regard to that jurisdictional limitation on the permissible scope of a special inquiry under s.24H. That factor counts in favour of construing the terms of reference in a manner which does not exceed those limits, so that the "matter" which is identified by the terms of reference as the subject of the Inquiry can be characterised as one which is "related to the Public Sector".
12. Section 3 of the PSM Act defines the "Public Sector" to mean all "agencies", "ministerial offices" and "non-SES organisations".
13. "Agencies" are, by definition:
 - (a) Departments; and
 - (b) "SES organisations", which are the public bodies and officers specified in Schedule 2 to the PSM Act and persons employed by or for the purposes of those bodies and officers.
14. The Authority is specified in item 4 of Schedule 2 to the PSM Act. The Authority, and persons employed by or for the purposes of the Authority, therefore constitute a SES organisation, an agency and part of the Public Sector for the purposes of the PSM Act.
15. The phrase "ministerial officers" is defined to mean a person appointed under s. 68 of the PSM Act, which relates to the appointment of the staff of Ministers.
16. The phrase "non-SES organisation" is defined in s. 3 of the PSM Act to mean bodies and offices established for a public purpose under a written law, and persons employed

by or for the purposes of that body or office holder, which are neither SES organisations nor specified in Schedule 1 to the PSM Act. Some of the bodies identified in Schedule 1 to the PSM Act are presently relevant. Item 5 of Schedule 1 specifies “the Police Force within the meaning of the *Police Act 1892*”. Item 15 of Schedule 1 specifies “any local government or regional local government or the council of a local government or regional local government”. Those bodies and their employees will not be “non-SES organisations” or part of the Public Sector for the purposes of the PSM Act.

17. For the Inquiry to be validly constituted, it is therefore necessary that the subject matter of the Inquiry be characterised as being a matter related to the “Public Sector”, as that phrase is explained above. The phrase “related to” is itself one of indeterminate reference. The question which then arises is what kind of connection is necessary for the subject matter of a special inquiry to be characterised as one which is related to the Public Sector? In answering that question it is also necessary to consider the purpose for which the power to arrange for the holding of a special inquiry is conferred. The exercise of the power to arrange for the holding of an inquiry for an unauthorised purpose would be invalid: *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 105-7; *Re Minister for Environment; ex parte Elwood* (2007) 154 LGERA 366 at 408; [2007] WASCA 137 at 173; *Mandurah Enterprises v Western Australian Planning Commission* (2010) 240 CLR 409.
18. That purpose is suggested by the long title to the PSM Act, which is relevantly an “Act to provide for the administration of the Public Sector of Western Australia and the management of the Public Service and other Public Sector employment”. Sections 7 and 8 of the PSM Act establish principles “to be observed in and in relation to the Public Sector”, while s. 9 provides for principles of conduct that are to be observed by “all public sector bodies and employees”.
19. Part 3A of the PSM Act, in which s. 24H is found, establishes the office of the Commissioner. The functions of the Commissioner are set out in ss. 21A-22F of the PSM Act. The Commissioner’s general functions, set out in s. 21A, are concerned with the efficiency and effectiveness of the Public Sector (s. 21A(a) and (b)) and planning for the future management and operation of the Public Sector (s. 21A(c)). Section 21 is concerned with the making, and monitoring of compliance with, public sector standards “of merit, equity and probity to be complied with in the Public Sector” (s. 21(1)(a)). Section 22A provides for the Commissioner to issue written instructions in relation to certain matters, the most broadly stated of which is the “management and administration of public sector bodies” (s. 22A(1)(a)). Section 22B empowers the Commissioner to deal with the replacement or amalgamation of Departments, organisations and bodies which, by definition, are part of the Public Sector. Sections 22C-22E provide for the Commissioner’s reporting function concerning compliance by public sector bodies and employees with certain requirements and “the State of administration of and management of the Public Sector” (s. 22D(1)(a)).
20. Later parts of the PSM Act are also exclusively concerned with the management and administration of the Public Sector.
 - (a) Part 3 of the PSM Act provides for the constitution of the Public Service as a subset of the Public Sector.

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- (b) Part 4 deals with the provision of assistance to political office-holders, either by ministerial officers who form part of the Public Sector or by special officers in a Department which forms part of the Public Sector.
 - (c) Part 5 is concerned with disciplinary matters in relation to public service officers, ministerial officers and such employees in the Public Sector as are prescribed (see s. 76(1) of the PSM Act, read with the definitions of "public service officer", "ministerial officer" and "employee" in s. 3 of that Act).
 - (d) Part 6 is concerned with the redeployment and redundancy of employees in departments and organisations, which are by definition part of the Public Sector.
 - (e) Part 7 is concerned with breach of public sector standards; and
 - (f) Part 8 is concerned with miscellaneous matters concerning the Public Sector.
21. It can be seen from these provisions that the whole concern of the PSM Act and the functions of the Commissioner is with the management and administration of the Public Sector. In my opinion, the purpose for which the power to arrange for the holding of a special inquiry is conferred must be considered against the limits of the objects and subject matter of the Act. In my opinion, the power to arrange for the holding of a special inquiry is to be exercised for the purposes of the Commissioner's functions. That is, a proper purpose for holding a special inquiry will be to promote the efficiency and effectiveness of the Public Sector; to advise and report on the state of management and administration of the Public Sector; to consider whether public sector standards have been complied with by the Public Sector; or to enable the Commissioner to plan for the future management and operation of the Public Sector.
22. An inquiry into the conduct and response of bodies and officers within the Public Sector to allegations of sexual abuse occurring at the Hostel is clearly concerned with the management and administration of the Public Sector, both past and future. As to the past, it is concerned with identifying deficiencies in the management and administration of those parts of the Public Sector which may have failed to respond adequately or at all to those allegations. The examination to be conducted by the Inquiry will inform the Commissioner, and enable the Commissioner through his reports to inform others, as to how the management and administration of the Public Sector can be reformed to improve the Public Sector's response to any similar allegations made in the future.
23. However, I do not consider that a special inquiry into the response of bodies and officers outside the Public Sector to allegations of sexual abuse at the Hostel would be authorised by the PSM Act. That is because the subject matter of such an inquiry would not be concerned with the administration and management of Public Sector bodies, and would have only a remote and tangential connection to the Public Sector. The only connection of such an inquiry to the Public Sector would be that the offending behaviour was committed by officers in the Public Sector. However, the subject matter of the Inquiry is not the offending behaviour but the reaction of public officials to allegations about that behaviour. In my opinion, a special inquiry into the reaction of persons outside the public sector to offending conduct within the public sector could not be characterised as a matter related to the Public Sector. It would be in substance an inquiry into the management and administration of a body over which the

Commissioner had no responsibility. Further, the purposes of such an inquiry would be divorced from any matter of concern to the management and administration of the Public Sector. It would not be a purpose for which the exercise of the power to hold a special inquiry could lawfully be exercised.

24. In my opinion, construed against that statutory background, the references to “public official” in the terms of reference are to officers and employees within the Public Sector; ie persons working in or performing the functions of a “public sector body” as that term is defined in the PSM Act. Such a construction of the terms of reference would be consistent with the extent of the Commissioner’s power to arrange for the holding of a special inquiry. In my opinion, there is nothing in the language of the terms of reference which demands a different view, and a valid construction of the terms of reference is to be preferred to one which is, at least in part, invalid.
25. I note that the opening statement of counsel assisting the Inquiry at the preliminary hearing held on 15 December 2011 indicated that the timeframe for the events with which the Inquiry is concerned began in or about 1975 and ended in 1990. That timeframe predates the commencement of the PSM Act. The concept of the “Public Sector” is, of course, a creature of the PSM Act. However, I do not consider there to be anything in the PSM Act which precludes a special inquiry from being established to consider the conduct of officers in bodies which are now, or which would if they still existed be, part of the Public Sector.
26. The Authority, established under the Authority Act in 1972, has a continuous existence and currently forms part of the Public Sector. An examination of the conduct of officers and employees of the Authority can, in my view, be characterised as being concerned with the management and administration of a body within the Public Sector for the purposes of the PSM Act.
27. Similarly, the Department of Education has, so far as I am aware, continued in existence as a Department since 1975 although its designation has been altered from time to time. (I discuss the history of the Department of Education in greater detail below). However, even if the Department had been abolished and re-established, I consider that, as a Department is necessarily part of the Public Sector, an examination of the conduct of officers in a former Department would still be into a matter related to the Public Sector, particularly as an examination of that conduct may inform the future management and administration of existing Departments.
28. The term “public sector body” is defined in s. 3 of the PSM Act to mean an agency (ie a department or SES organisation), ministerial office or non-SES organisation. The effect of the above analysis is that the reference to “public official” is to be taken as a reference to public sector bodies (including their officers and employees). The subject matter of the Inquiry is relevantly the conduct and response of public sector bodies (including their officers and employees) to allegations of abuse at the Hostel. The conduct and response to the allegations of persons outside the Public Sector, such as police or local government officers, is not itself a subject matter of the Inquiry.
29. That is not to say that the making of complaints to police and local government officers, who stand outside the Public Sector, is entirely irrelevant to the Inquiry. The Inquiry will be able to examine allegations made to police or local government so far as the making of those allegations informs the examination of the conduct and response of

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public sector bodies (including their officers and employees) to allegations of sexual abuse at the Hostel. Whether, and to what extent, this is the case will depend on the evidence to be led before the Inquiry. However, the conduct and reaction of police or local government officers is not itself a subject matter of the Inquiry.

30. The point I make in the previous paragraph can be illustrated by example, which is entirely hypothetical. Suppose that an allegation of sexual abuse at the Hostel was made to an officer of the Department of Education and that officer passed on the allegation to the police, who took no action. The passing on of that allegation to police, and any subsequent police response, may be relevant in assessing the conduct of the Departmental officer and the manner in which that part of the Public Sector was managed and administered. It may be relevant to the question of why the Departmental officer did not take any further action in relation to that particular allegation (eg, he thought it was in the hands of the police). Further, if a complaint was made to police and no action was taken, that may be relevant to understanding why, on a subsequent occasion, the Departmental officer did not forward similar information on to the police. Whether or not the reference of allegations to the police and any subsequent police action justified the conduct of the Departmental officer, those matters would inform the Inquiry as to the Departmental officer's state of mind and the reasons why he acted as he did. It may also be the case that the manner in which the allegation was passed on to police contributed to a failure by the police to investigate. In that case it would be relevant for the Inquiry to consider how public sector bodies might better convey allegations of that kind to the police. In this hypothetical example, although the conduct and response of the police is not itself the subject matter of the Inquiry, it would be relevant for the Inquiry to receive evidence and make findings about the fact that the allegation was passed on to the police, the fact that the allegation was not acted upon by the police and the reasons why the allegation was not acted upon.
31. It may well be the case that the circumstances which the Inquiry is investigating are such that it is practically impossible to divorce the conduct and response of the police from the conduct and response of public sector bodies to the same or similar allegations. In that case the Inquiry would appropriately receive evidence and make findings about allegations made or passed on to police, the response (if any) of the police to those allegations and the reasons for that response or lack thereof. However, even in that case, it will be necessary to bear in mind that the subject of the Inquiry is the conduct and response of public sector bodies, rather than the conduct and response of the police. The relevance of the evidence and findings will be to the assessment of the conduct and response of public sector bodies. It would not, for example, be within the terms of reference to make recommendations of disciplinary action against police officers.

Officers of the Authority

32. The Authority was established by the Authority Act as a body corporate with the public functions specified in s. 7 of the Authority Act. It is an incorporated body established for a public purpose under a written law. It is specified in Schedule 2 to the PSM Act. Therefore, the Authority is an SES organisation under paragraph (a) of the definition of that phrase, and is therefore a public sector body for the purposes of the PSM Act.
33. Paragraph (b) of the definition of "SES organisation" includes "person employed by or for the purposes of" the Authority under the Authority Act or another written law.

34. At all material times s. 4(2) of the Authority Act has provided that the Authority consists of members appointed by the Governor, one of whom is appointed by the Governor as Chairman of the Authority. While there have been changes to aspects of the appointment procedure and the number of members, none of those changes are presently material. As constituent members of the Authority, the Chairman and other members fall within paragraph (a) of the definition of “SES organisation” and are part of a public sector body. The terms of reference of the Inquiry therefore extend to examining the conduct and response of the Chairman and other members of the Authority to allegations of sexual abuse at the Hostel.
35. Section 10(1) of the Authority Act, as originally enacted, provided that, by agreement with the Public Service Commissioner, the Authority may for the purposes of the Authority Act co-opt the services of any officer within the meaning of the *Public Service Act 1904 (WA)* (“1904 Act”) as secretary or as an officer of the Authority. Persons whose services were so co-opted would be employed “for the purposes of” the Authority under the Authority Act within the meaning of paragraph (b) of the definition of “SES organisation”.
36. Section 10 of the Authority Act was repealed and substituted by s. 5 of the *Country High School Hostels Authority Act Amendment Act 1979 (WA)*. That amendment introduced the power, which continues to be contained in s. 10(1) of the Authority Act, of the Authority to appoint its own officers and servants. Subject to one possible qualification, those persons would be persons employed by the Authority under the Authority Act within the meaning of paragraph (b) of the definition of “SES organisation”.
37. The qualification referred to in the previous paragraph is that the reference to “officers and servants” in s. 10(1) of the Authority Act suggests that it is possible for the Authority to appoint an officer otherwise than by contract of employment. Officers who were not themselves specified in Schedule 2 of the PSM Act, and who therefore did not fall within paragraph (a) of the definition of “SES organisation”, and who were not employees, and therefore did not fall within paragraph (b) of the definition of “SES organisation”, may not themselves fall within the definition of “public sector body”. However, as officers of the Authority they would be performing the functions of the Authority and constitute the agents by which the Authority exercised those public functions. The conduct of those persons clearly has a direct impact on the management and administration of the Authority. The investigation of their conduct as officers of a public sector body would, in my opinion, clearly be “related to the Public Sector” in the sense described above. The expression “public official” is apt to include such officers.
38. The 1979 Amendment to the Authority Act also continued the provision for the Authority to co-opt public servants for its purposes. Since 1979 that provision has been contained in s. 10(3) of the Authority Act.
39. There have been other amendments to s. 10 of the Authority Act, which I do not consider to be material for present purposes.
40. It is also relevant to note the provisions of s. 7(1)(ba) of the Authority Act, which was introduced by s. 2 of the *Country High School Hostels Authority Act Amendment Act 1966 (WA)*. This provision provided that it was a function of the Authority:

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"to undertake and carry out or cause to be carried out the general management of hostels, and in relation thereto but without limiting the generality thereof. ...

- (iii) to engage and dismiss members of the staff of hostels and to determine their powers and duties;
- (iv) to appoint committees in respect of hostels and to delegate to any such committee all or any of the powers of the Authority under this paragraph, in which case the provisions of section 9 shall apply in relation to that delegation as though the committee were a committee appointed pursuant to that section."

Section 9 of the Authority Act has, at all material times, enabled the Authority to establish, and delegate powers to, sub-committees of its members.

41. I understand that members of committees referred to in s. 7(1)(ba)(iv) of the Authority Act were the "local board members" referred to in your request for advice. I am instructed by those assisting your Inquiry that these committee members were generally part-time community volunteers who were not engaged under a contract of employment. Notwithstanding the manner and terms of their engagement, members of these hostel committees were able, under delegation, to exercise the public functions of the Authority. I am instructed by those assisting your Inquiry that preliminary investigations indicate that many of the Authority's functions were in fact performed by these committees of "local board members". In my opinion, as persons performing the functions of the Authority, members of these committees are "public officials" within the meaning of the terms of reference.
42. Your request for advice refers to "hostel staff (including wardens and supervisors) considered by the Authority to be 'government officers'". If these staff were appointed by the Authority, either itself or by one of its committees exercising delegated powers, they will fall within paragraph (b) of the definition of "SES organisation" and themselves be part of a public sector body.
43. In my opinion, therefore, members of the Authority and its committees, persons appointed or engaged by the Authority under ss. 7(1)(ba)(iii) and 10(1) of the Authority Act, and public service officers whose services were co-opted by the Authority, are all "public officials" within the scope of your terms of reference.

Officers of the Department of Education

44. Prior to 16 May 1979 the regulation of the Public Service was effected by the 1904 Act. At all material times s. 77 of the 1904 Act authorised the Governor, on the recommendation of the Public Service Board, to make regulations for the establishment, alteration and abolition of any Department or sub-department. Regulation 99 of the *Public Service Regulations* provided that the Governor could, on the recommendation of the Public Service Commissioner, establish any part of the State Services (as defined in s. 5(1) of the 1904 Act) to be a Department of the Public Service, and abolish any Department so established.
45. The establishment of the Department of Education appears to predate even the 1904 Act. Section 13 of the *Public Education Act 1899* (WA) refers to the Department, while s. 4 of the *Public Education Amendment Act 1905* (WA), s. 6 of the *Public Education Acts Amendment Act 1926* and s. 4 of the *Education Act 1928* (WA) ("the 1928 Act")

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refer to the “Education Department”. Records of the Department of the Premier and Cabinet (“DPC”) indicate that the Department was in existence in 1964.

46. On 16 May 1979 the *Public Service Act 1978* (WA) (“the 1978 Act”) was proclaimed into operation. Section 21 of that Act provided for the Governor, on the recommendation of the Public Service Board, to establish, amalgamate and divide, abolish and alter the designation of Departments. Section 63(c) of the 1978 Act provided for the continuation of Departments established under the 1904 Act as Departments established under s. 21 of the 1978 Act.
47. Notwithstanding that transitional provision, on 4 April 1979 the Governor in Executive Council, acting on the recommendation of the Public Service Board, established the various Departments of the State under s. 21 of the 1978 Act. The power to establish Departments under s. 21 in advance of the Proclamation of the 1978 Act was conferred by s. 11 of the *Interpretation Act 1918* (WA). One of the Departments established at this time was the “Education Department”. However, the Governor’s decision did not abolish the existing Education Department, which was continued by s. 63(c) of the 1978 Act. The better view would appear to be that this decision of the Governor merely confirmed the effect of s. 63(c) of the 1978 Act and continued the Education Department established under the 1904 Act without abolishing that Department.
48. I am advised by DPC that the designation of the Education Department was altered to the “Ministry of Education” on 19 July 1988. That designation of the Department was altered to “the Education Department of Western Australia” on 1 January 1994.
49. The Education Department of Western Australia was continued in existence as a Department under the PSM Act by clause 6 of Schedule 5 to the PSM Act.
50. The designation of the Department was again altered to the “Department of Education and Training” in 2003 (see Gazette 31/1/03 at p 288) before being altered to the Department of Education in 2009 (see Gazette 30/10/09 at p 4338).
51. The above history discloses that what is now designated the Department of Education was in existence prior to 1975, although its designation has been altered on several occasions.
52. The employment of teaching and other staff of the Department was, at the time of the events of interest to your Inquiry, dealt with by the 1928 Act. At all material times s. 4 of that Act vested the administration of that Act, and the control of the Education Department, in the “Minister for Education”, established as a body corporate by s. 5 of the 1928 Act.
53. In 1975 s. 7(1) of the 1928 Act provided for the Governor to appoint a Director General of Education and such other officers as were deemed necessary for the administration of the Act, and to appoint, or delegate to the Minister the appointment of, “teachers and other officers”. A “teacher” was defined to include any member of the educational staff of a school. Teachers were generally not subject to the 1904 Act.
54. The 1928 Act was amended in 1979. From that time, s. 7 of the 1928 Act provided for the appointment, under and subject to the 1978 Act, of a Director General of Education and such other officers as were deemed necessary for the administration of the Act. The

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Minister was empowered to appoint teachers and employees, other than officers, of the Department. The 1978 Act did not apply to teachers.

55. The appointment, assignment, promotion and disciplining of teaching staff was dealt with by the *Education Act Regulations* as they existed from time to time.
56. Currently, the categories of staff in the Department of Education are identified in s. 235 of the *School Education Act 1999* (WA).
57. While the legislation has, over the relevant time, distinguished between teaching and other staff, the provision has been for all staff to be employed in the Department of Education. Teachers and school nurses employed under those provisions have been part of the Department of Education, and therefore part of the Public Sector, at all material times. They will, therefore, be public officials whose conduct the Inquiry is to investigate.

“Disciplinary action”

58. The term “disciplinary action” is defined by ss. 3(1) and 80A of the PSM Act in relation to a breach of discipline by a public sector employee. The list of possible disciplinary action identified in s. 80A extends beyond the two permissible means of disciplining an employee at common law, being reprimand and dismissal.
59. However, the definition in s. 80A applies only in relation to a “breach of discipline”, a term defined in s. 80 of the PSM Act. In general terms, the PSM Act distinguishes between substandard performance, dealt with in Division 2 of Part 5, and breaches of discipline, dealt with in Division 3 of Part 5.
60. Further, Part 5 of the PSM Act, in which s. 80A is located, does not apply to all public sector employees. By s. 76(1) of the PSM Act, Part 5 applies to all public service officers and ministerial officers and other public sector employees as are prescribed. Regulation 14 of the *Public Sector Management (General) Regulations 1994* prescribes a limited class of public sector employees, including some persons employed under the 1928 Act.
61. As the Authority is not part of the Public Service, Part 5 of the Act does not apply to members of the Authority, its committees or employees and officers engaged by the Authority.
62. The question which then arises is whether the Inquiry can make recommendations as to disciplinary action against public officials who are not public service employees or prescribed public sector employees to whom Part 5 of the PSM Act applies? If the phrase “disciplinary action” were used in the terms of reference in the sense in which that phrase is defined by s. 80A of the PSM Act, the answer to this question would be “no”. The definition in s. 80A applies only for the purposes of Part 5 of the PSM Act, and then only in relation to breaches of discipline and not substandard performance.
63. However, in my opinion the terms of reference do not use the phrase “disciplinary action” in a sense confined by the provisions of s. 80A of the PSM Act. As I have noted, the Inquiry is concerned with a broader range of public sector officers and employees than are subject to Part 5 of the PSM Act. The focus of the Inquiry must

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include officers and employees of the Authority, who are not subject to Part 5 of the PSM Act. In that context it would be illogical for the terms of reference to confine recommendations as to disciplinary action to only some of the public officials whose conduct the Inquiry is to investigate, and to exclude disciplinary recommendations in relation to officers of the public sector body which is of principal concern to the Inquiry. In that context the reference to “disciplinary action” should, in my opinion, be read in its colloquial sense as referring to the action which an employer may lawfully take to discipline their employee. That will include, but not be confined to, disciplinary action under Part 5 of the PSM Act.

Use of this Advice

64. I have, in this opinion, expressed my views on the questions which I was asked to address. I am, of course, happy to provide such advice as you require in order to assist you in the conduct of the Inquiry. However, as special inquirer it is, subject to the supervisory jurisdiction of the Supreme Court, ultimately a matter for you to determine the extent of your authority to investigate and report. In that context it is obviously open to you to disagree with the conclusions I have expressed and to prefer a different view.
65. To the extent that you do rely on this advice, you may need to consider whether procedural fairness requires you to disclose the advice, or at least the substance of my reasoning, to interested parties who may appear before your Inquiry. You may consider that one or more of those parties should be given an opportunity to persuade you that the views I have expressed should not be adopted. If you consider it to be appropriate, I do not have any objection to you providing a copy of this advice to those parties for that purpose.
66. Because this advice addresses the scope of the Commissioner’s powers to arrange for the holding of a special inquiry, I have provided a copy of the advice to him. I have not provided a copy to the State Solicitor (who acts for some interested parties) or any other person. I shall leave it to you to consider whether a copy of this advice should be provided to the State Solicitor.
67. Please feel free to contact me should you have any further queries or require any clarification of the above.



**ROBERT MITCHELL SC
ACTING SOLICITOR GENERAL**

Appendix 3

Records received by the Special Inquiry

A3.1 SUMMARY OF RECORDS HELD BY OTHER ORGANISATIONS ACCESSED BY THE ST ANDREW'S HOSTEL INQUIRY

| ORGANISATIONS | RECORDS |
|---|--|
| Legislative Council | <ul style="list-style-type: none"> • Various transcripts and submissions relating to the Twentieth Report of the then Standing Committee on Government Agencies' <i>Review of the Country High School Hostels Authority</i> published in 1988. |
| National Archives of Australia | <ul style="list-style-type: none"> • Documents ranging from 1983 to 1987, including <ul style="list-style-type: none"> ○ Westrek or related Commonwealth Employment Programs ○ Private Papers of Kim Beazley – HR records, Electoral Officer . |
| State Library of Western Australia | <ul style="list-style-type: none"> • Hansard from 1975 to 1987. • The Great Southern Herald Newspaper ranging from 1963 to 1987. • The West Australian from 1985 to 1986, and 2007. |
| State Records Office | <ul style="list-style-type: none"> • CHSHA Board meeting agendas from January 1983 to December 1992. • CHSHA Board meeting minutes from November 1960 to December 1987. • Katanning occurrence books ranging from December 1978 to December 1986. • Ongerup occurrence books ranging from November 1979 to January 1984. |

A3.2 SUMMARY OF RECORDS RECEIVED BY THE ST ANDREW'S HOSTEL INQUIRY

Please note that despite the indicative timeframes stated below, not all records received were complete.

A3.2.1 Records received from organisations

| ORGANISATIONS | RECORDS |
|--|--|
| Anglican Diocese of Bunbury | <ul style="list-style-type: none"> • Yearbook extracts ranging from 1964 to 1978. • Bunbury Diocesan Council meeting minutes ranging from 1963 to 1970. |
| Anglican Diocese of Perth | <ul style="list-style-type: none"> • Anglican Diocese of Perth Yearbook and Synod extracts from 1957 to 1964, and 1967 to 1982 relating to St Christopher's and Adamson House Northam, St Michael's House Merredin, St Andrew's Hostel Esperance and St James Hostel Moora. • Professional Standards documents from 2004 to 2005. |
| Anglicare | <ul style="list-style-type: none"> • Documents relating to Westrek/Creative Links Foundations. |
| Australian Broadcasting Corporation | <ul style="list-style-type: none"> • Records of interview. |
| Country High School Hostels Authority (CHSHA) | <ul style="list-style-type: none"> • Documents relating to St Andrew's Hostel (SAH) Katanning ranging from 1975 to 1993, including: <ul style="list-style-type: none"> ○ Board and other correspondence in & out ○ Board meeting minutes and agendas ○ Employment records ○ Financial documents and reports ○ Newspaper clippings ○ SAH Parent's Association meeting minutes ○ Photos ○ SAH staff meeting minutes ○ Student achievement record cards ○ Student enrolment details ○ Student Hostels Association documents ○ Student records ○ Wage and salary records ○ Warden's reports. |

| ORGANISATIONS | RECORDS |
|-------------------------------|---|
| <p>CHSHA continued</p> | <ul style="list-style-type: none"> • Documents relating to St Christopher's and Adamson House Northam ranging from 1940 to 2002, including: <ul style="list-style-type: none"> ○ Board meeting minutes ○ Correspondence in and out ○ Employment records ○ Financial documents ○ Hostel daily events journals ○ Hostel newsletters ○ Hostel staff meeting minutes ○ Parents and Friends Association documents ○ Photos ○ Student achievement and disciplinary records ○ Student enrolment details ○ Wage and salary records ○ Warden's and matron's reports • Documents relating to St Michael's House Merredin ranging from 1950 to 1986, including: <ul style="list-style-type: none"> ○ Board meeting minutes (1954 to 1977 and 1980 to 1984) ○ Correspondence in and out ○ Hostel reunion documents ○ Past hostel student contact details ○ Student enrolment details. • CHSHA documents ranging from 1962 to 2003, including: <ul style="list-style-type: none"> ○ Annual reports ○ Hostel audit reports ○ CHSHA Reviews ○ Corporate planning documents ○ Board and other correspondence in & out ○ Hostel reviews ○ Hostel and Authority staff duty statements ○ CHSHA Board meeting minutes from January 1988 to December 1992 ○ Pastoral care documents ○ Guidelines, manuals, policies and procedures |

| ORGANISATIONS | RECORDS |
|--|---|
| CHSHA continued | <ul style="list-style-type: none"> ○ Reports and operations documents ○ Wardens meeting minutes. ● Personnel records of relevant CHSHA staff. ● Other miscellaneous records relating to various hostels and the CHSHA. |
| Department for Child Protection (DCP) | <ul style="list-style-type: none"> ● Documents relating to the Child Protection Services Register. ● Departmental guidelines, policies and procedures ranging from 1987 to 2012. ● Personnel records of relevant DCP staff. |
| Department for Communities | <ul style="list-style-type: none"> ● Redress claim records. |
| Department of Commerce | <ul style="list-style-type: none"> ● Records relating to registered business names. ● CHSHA industrial relations files ranging from 1972 to 1994. |
| Department of Corrective Services | <ul style="list-style-type: none"> ● Prisoner files and records of calls/visits. |
| Department of Education (Department) | <ul style="list-style-type: none"> ● Documents ranging from 1970 to 2012, including <ul style="list-style-type: none"> ○ Departmental guidelines, policies and procedures ○ Files and documents relating to Westrek ○ Katanning PS and SHS employment records ○ Personnel records of relevant Katanning SHS staff ○ Other miscellaneous records. |
| Department of Health | <ul style="list-style-type: none"> ● Departmental guidelines, policies and procedures from 1982 to 2011. ● Medical records. ● Other miscellaneous records. |

| ORGANISATIONS | RECORDS |
|---|---|
| Department of Training and Workforce Development¹ | <ul style="list-style-type: none"> • Westrek files. • Personnel records of Westrek staff. |
| Director of Public Prosecutions | <ul style="list-style-type: none"> • Trial transcripts, records of proceedings and case files of relevant cases. |
| Freemasons | <ul style="list-style-type: none"> • Membership records. |
| Royal Perth Hospital | <ul style="list-style-type: none"> • Medical records. |
| Scouts WA | <ul style="list-style-type: none"> • Membership records. • Other miscellaneous records. |
| State Solicitors Office | <ul style="list-style-type: none"> • SSO advice to the CHSHA ranging from 1960 to 1992. • Other miscellaneous records. |
| WAIRC | <ul style="list-style-type: none"> • Hearing transcripts and case files of relevant cases. |
| WA Police | <ul style="list-style-type: none"> • Departmental policies and procedures ranging from 1987 to 2012. • Case and investigation files and incident reports ranging from 1984 to 2011. • Katanning police occurrence books from December 1988 to January 1992. • Broomehill police occurrence books from January 1988 February 1989 and May 1991 to February 1992. • Other miscellaneous records. |

¹ These records were limited. Refer to Chapter 4.5

A3.2.2 Records received from the public

| NAME | RECORDS |
|--|---|
| Name withheld | <ul style="list-style-type: none"> • St Andrew's Hostel (SAH) Student Handbook. • SAH Annual Magazine 1987. • SAH Annual Magazine 1988. • Katanning Senior High School (SHS) Magazine 1987. |
| Name withheld | <ul style="list-style-type: none"> • Letter from the Western Australian Cricket Association. |
| Name withheld | <ul style="list-style-type: none"> • Assorted photos relating to SAH. |
| BOURKE, Andrew | <ul style="list-style-type: none"> • Minutes of Katanning SHS senior staff meeting. |
| BROWN, Graeme | <ul style="list-style-type: none"> • Assorted photos relevant to SAH. |
| BUDISELIK, Bill Dr | <ul style="list-style-type: none"> • Thesis regarding protective/preventative education and mandatory curriculum. |
| COX, David | <ul style="list-style-type: none"> • Documents relating to Craig House Bunbury from 1972 to 1979, including: <ul style="list-style-type: none"> • Board meeting minutes • Correspondence in and out • Financial documents • Hostel staff time and wages • Hostel operations records • Hostel policies and procedures • Newspaper clippings • Student enrolment details • Student Hostels Association documents • Student reports. |
| DAVIES, Karen | <ul style="list-style-type: none"> • Diary extract regarding SAH. |
| GROVES, Barbara | <ul style="list-style-type: none"> • Miscellaneous records, including: <ul style="list-style-type: none"> ○ Correspondence from SAH ○ Newspaper clippings. |
| GUIDERA, Liz | <ul style="list-style-type: none"> • Extracts of Shire of Katanning minutes. |
| HADDOW, Kylie | <ul style="list-style-type: none"> • Miscellaneous documents relating to the CHSHA, SAH, and Katanning SHS. |
| HADLOW, Belinda (formerly REDDINGTON) | <ul style="list-style-type: none"> • SAH Annual Magazine 1994. |

| NAME | RECORDS |
|------------------------------------|---|
| JACKSON, Hal | <ul style="list-style-type: none"> • Miscellaneous materials relating to children in the court process. |
| KALAIZIC, Mr and Mrs | <ul style="list-style-type: none"> • Northam SHS yearbook 1978. |
| MACLENNAN, Nikola | <ul style="list-style-type: none"> • Miscellaneous correspondence relating to her employment. |
| MARRIOTT, Gerald | <ul style="list-style-type: none"> • Daily planners for 1985 to 1986 containing information relevant to SAH. |
| PHILPOTT, Colin | <ul style="list-style-type: none"> • CHSHA records, including <ul style="list-style-type: none"> ○ Correspondence in out ○ Financial documents ○ Newspaper clippings ○ Policies and circulars ○ Publications and working documents |
| RENTON, Diane (formerly PASCOE) | <ul style="list-style-type: none"> • Katanning SHS yearbook 1986. |
| TAYLOR, Rev John | <ul style="list-style-type: none"> • Correspondence relevant to SAH. |
| WASLEY, Graeme | <ul style="list-style-type: none"> • Newspaper clippings. |
| WELLSTEAD, Gwendoline | <ul style="list-style-type: none"> • SAH Board meeting minutes and warden's reports from 1979 to 1980. • Other miscellaneous records regarding SAH. |
| WENLOCK, Kevin | <ul style="list-style-type: none"> • Wenlock family tree. |

Appendix 4



Traumatic Amnesia

Traumatic amnesia and delayed memory retrieval of traumatic events has been widely documented for almost one hundred years, and was scientifically accepted in the context of war, accident or disasters.ⁱ The concept only became controversial when it referred to child sexual abuse.

Given that this issue has recently been resurrected in the media Adults Surviving Child Abuse (ASCA) and the NSW Mental Health Coordinating Council have developed this brief literature review to inform our members, the community and the media of the extensive research evidence on traumatic amnesia (also referred to as recovered memory) which exists.

Amnesia

Both short and long-term traumatic amnesia have been observed following a range of aversive events such as: war, natural disasters, adult rape and child physical, emotional and sexual abuse, incest and witnessing or experiencing extreme violence.

When considering combat and war related trauma, as far back as 1941 a study on those with severe stress e.g. soldiers engaged in prolonged fighting in the battle of Dunkirk, established 35% experienced amnesia.ⁱⁱ In studying the Holocaust, 3.8% of concentration camp survivors and 10% of tattooed survivors of Auschwitz were found to display psychogenic amnesia.ⁱⁱⁱ

Judith Herman explored the impact of trauma on the human psyche regardless of its origin, drawing parallels between trauma as a result of a natural disaster, political terror, captivity, combat and that in the private domain - domestic abuse, incest and rape. Her views on the posttraumatic stress disorder (PTSD) and complex PTSD changed the way those in the psychiatric fields diagnosed and perceived trauma (1997, 2002).^{iv}

Controversy surrounding the concept of 'repressed memory' peaked in the 1990's with opponents questioning its validity, despite an abundance of claims supporting the recovery of memory from counsellors and therapists working with survivors. The clinical experience of therapists supporting the validity of the existence of delayed recall of abuse memories has now been upheld by innumerable prospective and retrospective studies in the field. While it should be noted that every instance of recall involves some degree of reconstruction^v the possibility that false memories can occur does not negate the fact that other recalled memories are true.

- Study: A random sample of 724 individuals from across the United States was mailed a questionnaire regarding memory for traumatic events. Among respondents who reported some form of trauma (72%), delayed recall of the event was reported by 32%. This phenomenon was most common among individuals who observed the murder or suicide of a family member, sexual abuse survivors, and combat veterans (Elliot, 1997).^{vi}
- Study: The most definitive study on delayed recall was a non-clinical sample of adult survivors whose sexual histories had been documented at the time of the abuse (Williams, 1995).^{vii} Between 1973 and 1975, 206 girls aged ten months to twelve years had been examined after a report of sexual abuse. Seventeen years later, 38% of 129 of the 206 subjects (i.e. those who could be located) had not recalled the abuse when interviewed.^{viii}

View of professionals

In a survey of psychologists, 73% stated that they had personally seen a case they classified as 'recovered memory'.^{ix} Less than 10% of experimental psychologists and less than 5% of clinical psychologists hold the point of view that accurate recovered memory is not possible.^x

The American Psychological Association's Working Group on Investigation of Memories of childhood abuse agreed that: "...it is possible for memories of abuse that have been forgotten for a long time to be remembered" (p. 993). The International Society for Traumatic Stress Studies (1998) found that there was a consensus across scientists of North America, Europe, Australia and New Zealand that:

- 1) traumatic memories are usually remembered in part or in whole
- 2) traumatic memories may be forgotten, then remembered at some time; and
- 3) illusory memories can also occur.^{xi}

In considering allegations of sexual assault, the literature indicates that false allegations constitute a small proportion of cases and are not a common occurrence. A review of false allegations of sexual abuse in the Family Court in South Australia concluded that approximately nine per cent of allegations were false. Brown, (2003), (cited in Crime and Misconduct Commission, 2003)^{xii} suggests that the commonness of traumatic amnesia is expressed not only by those in the therapeutic community, but also by legal scholars arguing for amendment to legislation.

It is important to consider the source of the report of false memory, especially of CSA, e.g. when the source of the report is the person accused of abuse, a perpetrator might deny the charges for a range of reasons.^{xiii} It is also possible that perpetrators 'forget' or block out the abuse just like victims of CSA can.^{xiv}

- Study: A national sample of psychologists was asked whether they had been abused as children and, if so, whether they had ever forgotten some or all of the abuse. Almost a quarter of the sample (23.9%) reported childhood abuse, and of those, approximately 40% reported a period of forgetting some or all of the abuse (Feldman-Summers et al., 1994).^{xv}

Dissociation

Dissociation is the mechanism most commonly used to explain traumatic amnesia followed by recovered memory. The DSM-IV- TR (American Psychiatric Association, 2005) asserts that dissociation is normal, particularly in highly traumatic circumstances, and defines dissociative disorders as "a disruption of the usually integrated functions of consciousness, memory, identity or perception of the environment," (p.519).

Dissociation describes the disconnection or lack of connection between things usually associated to one another. Dissociated experiences are not integrated into the psyche of the individual, resulting in discontinuities in conscious awareness (The International Society for the Study of Dissociation, 2004). Acute dissociative responses have been identified in survivors of overwhelming traumas such as combat, sexual abuse, accidents and natural disasters.^{xvi xvii}

Dissociation occurring at the time of the trauma theoretically leads to a fragmentation of memory. The memory fragmentation then leads to the individual's difficulty in memory retrieval at a later date. Frequently retrieval is triggered by a similar set of circumstances which resemble the emotional state and/ or physical circumstances to the original trauma.^{xviii}

Louis Cozolino, professor of psychology at the Pepperdine University in the USA; author of several articles and books on neuroscience, psychotherapy and the rebuilding of the human brain after trauma, describes reaction to trauma as predictable and connected to well understood biological processes (2002). In the absence of a supportive context, creating the neurobiological conditions for the reestablishment of neural coherence through integration of cognition, affect, sensation and behaviours, an abused child or traumatised individual may remain dissociated from the trauma forever.^{xix}

- Study: A prospective study of six people with different types of trauma. All reported gaps in their memory which occurred at the moment of their greatest fear (Yovell et al., 2003).^{xx}

Dissociation is a key concept in a range of disorders such as PTSD and dissociative identity disorder. Key components to an acute dissociative response: derealisation (alteration in sense one's perceptions), depersonalisation (alteration in one's sense of self and connection to one's own body), and memory disturbances (van de Kolk et al., 2005).^{xxi}

Dissociative Amnesia

In the DSM-IV TR dissociative amnesia is "characterized by an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness," (American Psychiatric Association, 2005, p. 519). Dissociative amnesia is suspected if there are gaps or blank periods in a person's autobiographical memories.

During a traumatic experience such as an accident, disaster, or crime victimization, dissociation can help a person continue to function and tolerate what might otherwise be too difficult to bear. A person may dissociate the memory of the place, circumstances, or feelings about the overwhelming event; mentally escaping from the fear, pain, and horror. This may make it difficult to later remember details of the experience, as reported by many disaster and accident survivors.

For people repeatedly exposed to traumatic events, especially in childhood, dissociation is an extremely effective coping 'skill' which characteristically becomes reinforced and conditioned. It can protect them from awareness of the pain in the short-term. However, over time, frequent dissociation affects a person's sense of their history and who they are. More frequent dissociation results in serious dysfunction in school, work, social, and daily activities, especially when under stress.

- Study: A prospective study of 129 reported cases of child sexual abuse in a community sample of women, 17 years after sexual abuse and evaluated in a hospital emergency room found one in 10 women (16% of those who recalled the abuse) reported that at some time in the past they had forgotten about the abuse. There is no evidence from this study that recovery of memories was fostered by therapy or therapists. The study looked at the accuracy of the recall and concluded that recovered memories of child sexual abuse reported by adults can be quite consistent with contemporaneous documentation of the abuse.^{xxii}

Traumatic amnesia may last for hours, weeks or years and recall can be triggered by sensory or affective stimuli reminiscent of the original event. This phenomenon logically occurs outside of the victim's ability to, "*consciously will a memory into existence*," (Cossins, 1999).^{xxiii}

Traumatic memories

Traumatic memories are encoded in a particular way and stored as implicit memories. Implicit (sensory) memory refers to the behavioural knowledge of an experience and features the recording of sensory, kinaesthetic and emotional aspects of an event but without conscious recall. People who have been traumatized may live with implicit memories of the terror, anger, and sadness generated but with few or no explicit memories to explain the feelings.

People who have experienced trauma relive their traumatic memories as flashbacks or in nightmares and over time the recalled memories are stored as narrative or explicit memory. Over time the traumatised individual develops a narrative of his/her past laying down explicit (narrative) memory which includes the traumatic past and with it the ability to consciously recall facts or events related to it.^{xxiv}

Trauma causes arousal of the autonomic nervous system, producing a flight/fight response, with increased activation of the limbic system, which controls emotion and the inactivation of Brocca's Area, the area related to language. The amygdala, in the limbic system regulates fear, anger and aggression as well as memory, while the hippocampus, which is very sensitive to stress, is also involved in memory and emotion. Trauma stored in the limbic system processes emotions and sensations, but not language or speech. Neurological research on dissociation^{xxv} shows that trauma leads to fragmented, emotional and sensory memories without an awareness of the actual events, and no verbal component to the memory.

Acute dissociative states which are more likely to occur when in a state of terror or high stress lead to poor encoding of a traumatic event. When in such a state, individuals undergo a shift from explicit memory to implicit formation, in which access to conceptual-linguistic thought processes is severely restricted, and involves actual neurological changes in the limbic system.^{xxvi} This means that during trauma, sensations and perceptions fail to be integrated as a conscious memory.^{xxvii},^{xxviii} Rather they are encoded as implicit memories - images, smells and sounds, sensorimotor modalities and somatic sensations.^{xxix},^{xxx}

When individuals encounter similar sounds, smells and sensations to the original trauma (i.e. when the encoding and retrieval contexts match), feelings of terror can re-emerge and trigger the memories.

Electroencephalograms (EEG) and MRIs show that physically, sexually and psychologically abused children and adults and combat veterans have reduced left-sided hippocampal size. As previously stated the hippocampus is very important for learning and memory and is very sensitive to stress activation. Additionally, danger or threat affects the hippocampus and connected cortical areas ability to store certain types of information (such as verbal), while effectively storing others (such as non-verbal) ^{xxxii}

When people recover traumatic memories they are often left reliving fragments of the original trauma but are unable to articulate what is happening, as they are often overwhelmed by the terror of what is happening. An autobiographical narrative is developed when an individual has a sense of personal ownership of the memory and the events the memories convey.

The narrative memory, which can be intentionally retrieved and does not depend on situational triggers to be brought to mind adds cohesion to personality over time and establishes context. This enables a narrative to be conveyed to a listener, which is verbal and time-condensed - they become stories which are flexible and adapted to a particular audience. They are not like a videotape of the memory but reconstructive in nature – condensed and symbolised.

- Study: A study of 17 patients who reported both continuous and recovered memories for abuse in therapy provided sources of evidence for the validity of memories and indicated that details of continuous and recovered memories were equally accurate. More than 1/3 of the alleged perpetrators confessed to at least one act of abuse contained within a recovered memory (Dalenburg, 1996). ^{xxxiii}

Traumatic Amnesia –research

Animal and human participant research has documented impairment of memory after periods of great stress or fear. Stress interferes with the encoding of memory. The science of memory has always supported the existence of impaired memory and recovery of memory for aversive or traumatic events. If memory can be undermined and rendered less available by high stress, and if important facets of trauma memory can be lost even days after an event, it follows that a portion of child sexual abuse survivors would have poor memory of their childhood traumas, especially years later. By telling stories, individuals reinforce aspects of their narrative memory but with traumatic memory, which is not accessible to recall, less rehearsal and avoidance will produce poorer memory.

- Study: A sample of 450 adult clinical subjects reporting sexual abuse histories were studied regarding their repression of sexual abuse incidents. A total of 267 subjects (59.3%) identified some period in their lives, before age 18, when they had no memory of their abuse (Briere & Comte, 1993). ^{xxxiii}

Effects of cortisol on memory impairment appear with greater magnitude in delayed rather than in immediate tests, suggesting interference of stress with encoding of trauma material. ^{xxxiv} Similarly, low dose epinephrine injected directly into the amygdala of animals facilitates memory function, whereas higher doses impair memory for the same task. ^{xxxv}

- Study: A study of Posttraumatic stress associated with delayed recall of sexual abuse in the general population reported that 42% of participants with a history of sexual abuse, described some period of time when they had less memory of the abuse than they did at the time of data collection (Elliot & Briere, 1995).^{xxxvi}

False Memory Debate:

The debate on "recovered memories" and "false memories" dominated media coverage on child abuse for much of the 1990s. Science has increasingly affirmed the existence of traumatic amnesia and the reality of "recovered memories".

- Study: In one retrospective study approximately half of those who reported memory loss also reported corroboration for the abuse (Feldman-Summers & Pope, 1994).^{xxxvii}

False Memory Syndrome:

The term False Memory Syndrome was created in 1992 by the False Memory Syndrome Foundation (FMSF). It is "a pseudoscientific syndrome" that was developed by individuals and families to defend against claims of child abuse. The primary purpose of the syndrome was to discredit the testimony of people alleging child sexual abuse in court. No empirical validation has been offered for the syndrome, nor have the symptoms been described and studied.

Questions surrounding therapeutic techniques:

The FMSF claims that "False Memory Syndrome" is caused by "Recovered Memory Therapy". There is no psychological therapy called "Recovered Memory Therapy", and the term was invented by the Foundation in 1992. However some therapeutic techniques have been called into question when associated with recovered memories of child sexual abuse.^{xxxviii} The most controversial of these techniques include hypnotism, guided imagery / visualisation, dream interpretation and interpretation of body memories.

The Royal College of Psychiatrists in Britain has officially banned its members from using therapies designed to recover repressed memories of childhood abuse. The British Psychological Society, in a 1995 report urged therapists to "avoid drawing premature conclusions about memories recovered during therapy." The report also denied that there is any evidence suggesting that therapists are creating false memories of abuse in their patients, a charge levied by members of the False Memory Syndrome Foundation.

Researchers caution that both hypnosis and guided imagery can induce dissociative states and therefore may increase the risk of suggestibility and the recovery of false memories.^{xxxix} In Australia, clinical standards and guidelines state that clinicians should not initiate searches for memories of abuse or engage in any "memory recovery techniques" designed to elicit memories of abuse about which the client has no memory.^{xl} However, it is important to recognise that whatever memories individuals recall, whether traumatic or pleasant, every instance of recall is a process of individual reconstruction, and therefore involves some degree of distortion (Hopper, 2008.)^{xli}

The additional issue is whether a therapist's questions or comments are excessively suggestive or directive.^{xlii} It is important to ensure that the client is the one leading any process in which memories are being recovered including the interpretation of that material, rather than suggesting any particular interpretation of the material which arises – i.e. to follow the principles of non-directive practice.

Critics of recovered memory also report that some therapists tell patients who report no history of CSA, that their symptoms indicate repressed memories of CSA, that many patients cannot recollect their abuse, but that healing depends upon recovering memories of abuse, (in: Lindsay, 1994).^{xliii}

The issue has been stated as the need to distinguish between (1) those cases in which someone knows and has always known that he or she was abused, from (2) those cases in which someone independently remembers forgotten memories, from (3) those cases in which a therapist facilitates recall of forgotten memories, from (4) those cases in which a therapist suggests memories of abuse.^{xliv} Unprofessional practice, it has been suggested should be classed in the latter phenomenon.

- **Study:** Two prospective studies in which participants had been abused 16 to 18 years earlier and the abuse had been corroborated by medical or social services. One study 26% of participants were either unable to clearly remember details of the abuse or could not recall the verified abuse.^{xlv} In the other study 38% did not recall abuse or chose not to disclose it (Williams, 1992).^{xlvi}

In 1997, Herman & Harvey reported that the data from their clinical study suggested that "delayed recall of childhood trauma is often a process that unfolds over time rather than a single event, and that it occurs most commonly in the context of a life crisis or developmental milestone, with a trauma-specific reminder serving as a proximal cue to new recall." Psychotherapy was not implicated in the early stages of delayed recall in most cases. However, "retrieval of memories, once begun, proved to be a powerful incentive for entering psychotherapy." Herman and Harvey found that patients usually did not seek therapy in order to recover more memories, rather they sought to gain more control over intrusive, involuntary re-experiencing of the trauma and wanted to make sense of the fragmented, often confusing and disturbing recollections they already had (p.567).^{xlvii}

Furthermore Herman and Harvey (1997) wrote that the proper role of psychotherapy is to provide confidential environment that is empathic and non-judgemental, and where uncertainty, complexity and ambivalence are tolerated. A stance of open-minded, reflective curiosity should prevail. Within such an environment, with careful pacing, exploration of abusive childhood experiences may be carried out safely. The purpose of such exploration is not the forensic documentation of facts, but the construction of an integrated, personally meaningful narrative that helps free the patient from the persistent noxious effects of traumatic events in the distant past" (pp.568-569).^{xlviii}

Summary:

Complete or partial memory loss is a frequently reported consequence of trauma, particularly childhood trauma and most commonly, child sexual abuse. Traumatic amnesia refers to the full or partial recovery of such memories after a gap of some years. Amid the controversy surrounding the existence of the concept and therapeutic treatments associated with the recovery of traumatic memories, professional associations such as the Australian Psychological Society (APS, 2000) and Psychotherapists and Counsellors Federation of Australia (PACFA) have developed or are developing ethical standards and guidelines for practice related to recovered memory to protect clients and assist in dealing with reports of recovered memories in therapeutic, forensic and scientific contexts.^{xlix}

These guidelines support the evidence outlined in this paper, regarding the possibility of complete or partial memory loss as a result of trauma. There is general agreement that memories of such experiences may be incessant, intrusive, complete, selective, fragmented, distorted or absent depending on the context and nature of the abuse and the survival strategies available to the individual as a child or as an adult in later in life; that all memories are susceptible to revision and influence from the time of encoding up to and including the time and context of retrieval, as well as in the disclosure and reporting process; and that the percentage of child sexual abuse experiences that (a) are recalled for the first time during therapy and (b) are the subject of litigation, is very small in comparison to those that are remembered but unreported, and whose effects may or may not require treatment.¹

For further information contact:

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ⁱⁱ Sargant, W., & Slater, E. (1941). *Amnesic syndromes in war*. Proceedings of the Royal Society of Medicine, 34, 757-764.

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Appendix 5 Child sexual abuse offences under the Criminal Code in 1975

The following tables outline offences applicable to child sexual abuse in 1975.¹ The tables categorise offences available when the complainant was female, when the complainant was either male or female and when the complainant was male. The offences shaded in blue indicate when a lack of consent by the complainant does not need to be proved.

¹ Significant changes to key offences took effect on 1 April 1986 as a result of the *Acts Amendment (Sexual Assaults) Act 1985* coming into effect. Sections 314, 315, 325 and 328 were repealed and replaced by non-gender specific provisions making sexual penetration (s.324D) (including vaginal, anal and oral sex s.324F) and indecent assault (s. 324B) new offences. It was a circumstance of aggravation (leading to a higher penalty) if the victim was under the age of 16 (ss. 324C, 324E). To successfully prosecute charges of either sexual penetration or indecent assault, the prosecution was required to prove there was no consent. The *Acts Amendment (Sexual Assaults) Act 1985* also resulted in significant changes to the *Evidence Act 1906* restricting the use that could be made of evidence about a complainant's sexual history or reputation (ss. 36B, 36BA, 36BC,) but only for the new offences referred to above. It also required judges to warn the jury that a delayed complaint did not necessarily mean that it was false (s. 36BD) and removed the requirement for a judge to warn a jury about uncorroborated evidence in sexual assault charges (36BE). Other changes were implemented on 23 March 1990 when the *Law Reform (Decriminalization of Sodomy) Act 1989* came into effect (see Chapter 18). It is this Act which raised the age of consent for females to 17 years or older when the accused person was a guardian, employer, teacher, or school teacher of the complainant (s. 189). Neil McKenna was charged with a number of offences under this section of the Code in 2012. However, because his work as a hostel supervisor/warden did not fall within the definition of a "school teacher" he was acquitted on those charges (*The State of Western Australia –v- McKenna* [2012] WADC 50). It was not until 1992, with the enactment of the *Acts Amendment (Sexual Offences) Act 1992*, that the offence was redefined to apply to any offenders who had children (up to the age of 18) under their "care, supervision, or authority" (ss. 321, 321A, 322).

Table 1 - Sexual offences against females

| SECTION | OFFENCE | SPECIFIED OFFENCE PROVISIONS | PUNISHMENT |
|---------|--|--|--|
| s 185 | Defilement (carnal knowledge ²) of girls under 13 [Consent not an issue] | A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness. | Imprisonment with hard labour for life, with or without whipping. |
| s 186 | Householder permitting defilement (carnal knowledge) of young girls on his premises: - Girls under 16 years - Girls under 13 years [Consent not an issue] | It is a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years. | Imprisonment with hard labour for two years, with or without whipping Imprisonment with hard labour for life, with or without whipping. |
| s 187 | Defilement (carnal knowledge) or attempted defilement of girls under 16 [Consent not an issue] | It is a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of 16. A prosecution for having unlawful carnal knowledge must be begun within six months, and for attempting to within three months, after the offence has been committed. A person cannot be convicted upon the uncorroborated testimony of one witness. | Imprisonment with hard labour for five years with or without whipping If the offender's age does not exceed 21 years he is liable to imprisonment with hard labour for two years, with or without whipping. |

² Vaginal sex.

| SECTION | OFFENCE | SPECIFIED OFFENCE PROVISIONS | PUNISHMENT |
|---------|---|---|---|
| s 188 | Defilement (carnal knowledge) or attempted defilement of (female) idiots [Consent not an issue] | A person cannot be convicted of either of the offences upon the uncorroborated testimony of one witness. | |
| s 189 | Indecent dealing with girls under 16, who is known to be an idiot or imbecile or who is under the age of 17 years, and of whom the accused person is a guardian, employer, teacher, or schoolmaster [Consent not an issue] | <p>A prosecution for the offence of unlawfully and indecently dealing with a girl under the age of 16 years must, if she is of or over the age of 13 years, be commenced within three months after the offence has been committed.</p> <p>If a person accused of the offence of unlawfully and indecently dealing with a girl under the age of 16 years proves that the act was done with the consent of the girl, that she was in fact of or over the age of 13 years, and that he believed at the time on reasonable grounds that her age was greater than stated in the indictment, he shall be in the same position as if her age had in fact been such as he so believed it to be.</p> | <p>Imprisonment with hard labour for four years with or without whipping.</p> <p>If the offender's age does not exceed 21 years he is liable to imprisonment with hard labour for two years, with or without whipping.</p> <p>If the girl dealt with is under the age of 13 years he is liable to imprisonment with hard labour for seven years with or without whipping.</p> |

| SECTION | OFFENCE | SPECIFIED OFFENCE PROVISIONS | PUNISHMENT |
|---------|--|--|---|
| s 190 | Defilement (carnal knowledge) by guardian, employer, teacher, or schoolmaster of any girl or woman under the age of 17 years [Consent not an issue] | | Imprisonment with hard labour for five years with or without whipping. |
| s 192 | Procuring defilement (carnal knowledge) of woman by threats or fraud, or administering drugs [Consent not an issue] | | A person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness. |
| s 193 | Abduction of girl under 18 with intent to have carnal knowledge [Consent not an issue] | It is a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of 18 years. | Imprisonment with hard labour for two years. |
| s 325 | Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent if the consent is obtained by force, threats, intimidation, or by means of false and fraudulent representations as to the nature of the act is guilty of rape | | Imprisonment with hard labour for life, with or without whipping (s 326); for attempt imprisonment with hard labour for fourteen years, with or without whipping (s 327). |
| s 328 | Unlawful and indecent assault on a woman or girl | | Imprisonment with hard labour for four years. |

* Section 206 provided that a second offence under ss. 187, 188, 189, 326 or 327 against a girl under 13 committed by an offender who is over 16 years old or an offence under s. 185 if the offender is over 16 years old could result in the offender being sentenced to a whipping in addition to any other punishment provided by law which the Court may see fit to impose.

Table 2 - Sexual offences against females or males

| SECTION | OFFENCE | SPECIFIED OFFENCE PROVISIONS | PUNISHMENT |
|---------|--|------------------------------|---|
| s 181 | Unnatural offences including “carnal knowledge against the order of nature” ³ and permitting a male person “to have carnal knowledge of him or her against the order of nature” [Consent not an issue] | | Imprisonment with hard labour for 14 years, with or without whipping. |
| s 182 | Attempt to commit unnatural offences (s 181) [Consent not an issue] | | Imprisonment with hard labour for seven years, with or without or without whipping. |
| s 183 | Indecent treatment of child under 14 ⁴ [Consent not an issue] | | Imprisonment with hard labour for seven years, with or without whipping. |
| s 203 | Indecent acts in public or with intent to offend [Consent not an issue] | | Imprisonment with hard labour for two years. |
| s 314 | Assault of another with intent to have carnal knowledge of him or her against the order of nature | | Imprisonment with hard labour for 14 years. |

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³ Anal sex.

⁴ This section of the Code refers to unlawful and indecent dealing with a child under the age of fourteen years and defines “The term ‘deal with’ [to include] doing any act which, if done without consent, would constitute an assault as hereinafter defined”.

Table 3 - Sexual offences against males

| SECTION | OFFENCE | SPECIFIED OFFENCE PROVISIONS | PUNISHMENT |
|---------|--|------------------------------|--|
| s 184 | Indecent practices between males (“gross indecency” ⁵) [Consent not an issue] | | Imprisonment with hard labour for three years, with or without whipping. |
| s 315 | Unlawful and indecent assault on any male person ⁶ | | Imprisonment with hard labour for three years. |

⁵ An act between males that is obviously unbecoming or offensive.

⁶ An act on a male that is unbecoming or offensive, done without his consent.

Appendix 6

A Case Study of a Cross-Examination

The following is reproduced from a study by work of Dr Christine Eastwood and Professor Wendy Patton published in 2002.¹ Unfortunately there is no reference in the report or its appendices to when the alleged offences, court cases, or interviews with the researchers took place, but the extract from a transcript of a child witness's cross-examination is taken from a Queensland committal hearing in which the child, who was 14 years old, was not permitted to give evidence by CCTV.

Although reforms, such as the abolition of committal proceedings were implemented in WA by 2003, committal proceedings were part of the legal system during the time of Dennis McKenna's offending, and as such the transcript provides an insight into the process which applied at the time. The committal process was often a gruelling one for complainants because these were an initial hearing which took place before a magistrate and without a jury. Defence lawyers did not need to temper their approach because of fears of alienating the jury by being seen to attack a child victim. As noted previously, following a committal proceeding, a complainant would often have many months to dwell on the looming ordeal of the trial.

The child in this case, with the pseudonym "Chrissie", was required to give evidence-in-chief and be cross-examined during the committal proceedings. Her father was the accused, and she had waited twelve months to testify for the first time. While giving evidence-in-chief, defence counsel repeatedly interjected and mumbled "ridiculous" while she was trying to describe intimate details of the abuse. During direct evidence defence counsel interjected 12 times on a variety of matters.

According to the police prosecutor, throughout the entire cross-examination process the defence lawyer was hostile, intimidating, and continually yelling at Chrissie and thumping his fist on the table. Chrissie was crying throughout cross-examination. The researchers advise that the excerpts from the court transcript reproduced below are reported precisely as recorded in the transcript document. Breaks in the transcript are appropriately indicated.

The Court Transcript

"The Cross-Examination Begins

Mr X: Why didn't you tell anyone for such a long time?

Child: Beg your pardon?

Mr X: Why didn't you tell anyone for such a long time?

Child: Because I was scared.

Mr X: Scared of what?

Child: My Dad.

¹ Eastwood, C and Patton, W 2002, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Queensland University of Technology, pp. 77-87.

Mr X: What was he going to do to you?

Child: I'm not sure.

Mr X: Well you can't be scared of nothing can you?

Child: No.

Mr X: You have to be scared of something don't you.

Child: Yes

Pros: Objection your worship. Fear is certainly subjective...

Mr X: I beg your pardon?

Pros: She can develop a fear – without any person...

Mr X: Oh look I object to my friend putting words in to the witness's mouth.

BENCH: Well, the situation is this, that you asked the witness. She said she was scared that's why she didn't say anything to anyone. She said she was scared of her father.

Mr X: Yes.

BENCH: Right?

Mr X: Now I'm asking her why she was scared of the father

Bench: And what was your answer to that? Did you say anything there?

Mr X: I might approach it this way. Did he ever hit you?

Child: No

Mr X: Did he ever threaten you? Do you know what a threat is?

Child: Yes.

Mr X: Did he ever threaten you?

Child: I don't think so.

Mr X: What do you mean you don't think so.

Child: I can't remember.

Mr X: So the answer is that he has never threatened you. Is that right?

Child: Yes.

Mr X: He's never been violent towards you?

Child: No

Mr X: Well then what were you scared of?

Child: What he did to me.

Mr X: Scared of that?

Child: Yes. Because I didn't.... (child interrupted)

Mr X: How long was it from when you first told your mother that you'd seen your father? Last seen him? Even talked to him? How long? A year and a half? Does that sound right?

Child: Yes.

Mr X: But you got the courage up did you?

Child: Yes.

Mr X: And your mother was sitting in bed?

Child: Laying in bed.

Mr X: And you just gathered this courage up to go and tell her. Is that right?

Child: Yes.

Mr X: In a cool, calm way you just went in there and told your mother? That's what I thought you just told this fellow here – that she was sitting in bed and you gathered up the courage to go in there and tell her. Is that right?

BENCH: I don't think she said – did she say in a cool calm way?

Pros: No she didn't say that.

BENCH: No. Okay. Well – well the question is that you didn't go in there in a cool calm way. You – you went in and told your mother. That – that's what's being asked of you.

Mr X: You got up the courage to go and tell her. Is that right?

Child: Yea.

Mr X: So out of the blue, as it were, you decided to go in there and tell her about what had happened? I just want you to confirm this for me. You got the courage up..

Pros: Objection Your Worship

Mr X: To what?

BENCH: Well, first of all, let's keep the voice down a bit when questioning this witness Mr X. It'll come to a situation of badgering the witness or harassing the witness with your attitude toward her. Ask the questions calmly and properly and let her answer those questions.

Mr X: Thank you.

Pros: Your Worship I maintain my objection.

BENCH: Yes.

Pros: In that Mr X put to the witness that she's come up with it out of the blue and the witness has clearly said that she's come up with the courage..

BENCH: Yes

Mr X: Oh look this is rubbish. I object to this. Perhaps the witness can wait outside.

BENCH: No. No. You question the witness. As I stated before, I don't want any badgering, harassing, raising your voice. Just ask the witness her questions. I can understand what the witness is saying. I don't want any words put into her mouth.

Before you said that she went in a cool, calm way which she hadn't. She hadn't given that evidence at all. That was just put in her mouth.

Mr X: Well it was a question with respect Your Worship.

BENCH: Yes. But those words weren't given in evidence. You just put that – you said to her that she went in in a cool calm way and she didn't say that at all. So just continue with your cross-examination of her.

Mr X: I will.

BENCH: And just keep everything down just to a nice calm level.

Mr X: Thank you.

BENCH: Ask the witness her questions. Just – if you feel you're being harassed or badgered in any way you just let me know. You just take your time. Okay?

Mr X: Do you remember about 10 minutes ago when this fellow was asking you some questions? Do you remember that?

Child: Yes.

Mr X: Do you remember telling him that you told your mother on a night when – or an occasion when she was sitting or lying in bed? Do you remember telling him that 10 minutes ago.

Child: Yes.

Mr X: Do you remember telling him that you did that because you'd got the courage to go and do that? That was the words you used "courage" wasn't it?

Child: Yes.

Mr X: That there was not conversation between you and your mother immediately before you went into her bedroom to tell her?

Child: Could you please repeat the question?

Mr X: Your mother's in the bedroom watching TV. Is that right?

Child: Yes.

Mr X: You walk into her bedroom and tell her do you?

Child: Yea

Mr X: Right. So there was no conversation before you walked into her bedroom to tell her.

Child: No.

Mr X: So there was no outside influence that prompted you to go in and tell her?

Child: No.

Mr X: You did it out of the blue.

Child: I'd been thinking about it for a while.

Mr X: Yes. Apart from you thinking about it, you didn't talk to your mother before you walked in that night and just told her while she was lying on the bed watching the TV?

Child: No.

Mr X: That's right isn't it.

Child: Yes.

(Break in the transcript)

Mr X: you were not having an argument with your mother.

Child: No.

Mr X: You didn't blurt out; I've been touch or words to that effect during the course of an argument with your mother.

Child: No.

Mr X: All right. If there's one thing we can be certain of it's that that did not happen? Is that right?

Child: Yes.

Mr X: What did his penis look like?

Child: I beg your pardon?

Mr X: What did it look like? Do you want me to explain that question to you?

Child:No.

Pros: Your Worship she has just had three goes at trying to get it out. I've watched her Your Worship.

BENCH: Yes.

Pros: Maybe he could let her speak.

BENCH: Or be more specific with the question.

Mr X: What did it look like? Can you use words to describe what is was you saw?

Child: Not really.

Mr X: Why not? How long was it? How wide was it? What colour was it? How big was it?

BENCH: One question at a time.

Mr X: I'm just trying to give her some hints.

BENCH: No. You're getting a bit over giving hints. You're getting towards harassing her. One question at a time. If you can't answer the question – if you don't know the answer witness – just so say so. I'll take a short adjournment and just let you settle down a bit and then we'll come back and we'll run this at a more calm and leisurely way.

Mr X: Your Worship perhaps the...

BENCH: ... than the harassment that's going on now. Or otherwise I'll excuse the witness for the rest of the...

(Break in the transcript. Adjournment followed by some questioning)

Mr X: I was asking you before the break what his penis looked like. Can you please tell me now.

Child: No.

Mr X: You can't describe it at all? I beg your pardon?

Child: I don't know how to.

Mr X: Well, how long was it?

Child: I don't know.

Mr X: Is it because you didn't see it that you don't know how long it was?

Child: I did see it.

Mr X: Well, how long was it?

Child: I don't know.

Mr X: Well how long was it?

Child:how do you expect me...

Mr X: No. I expect you to tell me. Tell me this. Do they teach you at school how long a centimetre is?

Child: Yes.

Mr X: How long is a centimetre? Hold up your fingers please and show me how long a centimetre is? Right. Using your understanding of centimetres, how long was it?

Child: I don't know.

Mr X: Well you say you saw it. I am now asking you to tell me what it was that you saw?

Child: I know what I saw but I don't know how long it is or how wide it is.

Mr X: How much of it did you see?

Child: Not very much of it.

Mr X: All right. How much? How long?

Child: About three centimetres of it.

Mr X: Now why didn't you say that before?

Child: Because I thought you meant how long the whole thing was.

Mr X: So you're saying you saw three centimetres of it. Is that right?

Child: About that.

Mr X: And how wide was it?

Child: I don't know.

Mr X: Well you say you saw it. We know that you have an understanding of centimetres. You say you saw three centimetres of it. How wide was it?

Child: I don't know.

Mr X: What did it look like at the end?

Child: A normal penis.

Mr X: I beg your pardon.

Child: A normal penis.

Mr X: Without going into it too far, have you seen a penis on another occasion?

Child: When we had sex ed last year.

Mr X: Oh. Do you know the difference between a circumcised penis and an uncircumcised penis? Did they teach you that?

Child: What? An erection and a normal?

Mr X: No. I'm afraid we're just going to have to stick with this. You'll have to describe – I'm afraid miss – what you saw. Did you see the end of it.

Child: Yes.

Mr X: Well can you please use words to describe what it was that you saw? I think so far we have got you saw three centimetres of its length. Is that right?

Child: Yes.

Mr X: How wide was it?

Child: I don't know.

Mr X: Why not?

Child: Because I didn't see it straight on. I saw it from, not like front on. It was...

Mr X: What did the end of it look like please? Was it square, rounded? Square or rounded? I'm not trying to put words in your mouth. I'm asking you to use your own words. Can you draw it?

Child: No.

Mr X: Why not?

Child: No. Because I can't draw.

Mr X: Now they teach you to draw things at school surely. I'll give you a piece of paper and a pen and ask you to draw what it was that you saw – you say you saw.

BENCH: She just said she can't draw. Can you draw it or not? Just..

Mr X: Well I'd like her best effort at least Your Worship.

BENCH: Well she said – she described it. You keep asking her to describe it.

She said it was like a normal penis as she was taught in sex education at school. So – what – what further do you want? What are you – what do you want her to draw?

What do you want her to say? Like, she...

Mr X: Well I want her to draw what she saw.

BENCH: Can you – can you draw what you saw?

Mr X: I'd like her to make her best effort to draw what she saw. It's a matter for, in my respectful submission at the end of the day, for the jury – for the jury as to whether or not they accept this of course. If you could do it to scale. Do you know what to scale means?

Child: Yes. Can I just draw it?

Mr X: Are you finished?

Child: Yes.

Mr X: Can you just hold it up so I can see that?

Child: I drew a little..

Mr X: Perhaps if I can. You've got a sort of a bulb on the end of it. Is that right?

Child: It's not a bulb.

Mr X: Well I'm not trying to put words in your mouth but you seem to have two lines coming down parallel – can you look at me for a moment please? You seem to have two lines coming down parallel and then a round thing on the end. Do you want to have a look?

Child: It's not a round thing – it's the end of a penis.

Mr X: Well, I'll just ask you to have a look at what you've drawn. Do you agree that there seems to be some sort of round thing or bulb on the end of the two parallel lines?

Child: Yes.

Mr X: Is that what you saw?

Child: No – I can't draw it exactly.

Mr X: Is that what you were shown in your sex lessons at school?

Child: No.

Mr X: Have you drawn there what you were shown in the sex lessons at school as opposed to what you saw that day?

Child: No.

Mr X: What you say you saw that day?

Child: No.

Mr X: Well, have you drawn what you saw or not please?

Child: I drew it to the best of my ability?

Mr X: And the best of your...

Child: I can't..

Mr X: ...the best of your ability?

Child: I can't...

Mr X: ...ability includes that bulb – round thing on the end. Is that right?

Child: It's not a bulb thing.

Mr X: Well just look at it and tell me what it is if it isn't a bulb thing? Perhaps if Your Worship could have a quick look at it?

Child: I can't draw a penis.

Mr X: I'm not asking – I'm asking you to draw what you saw that day? What you said you saw that day?

Child: I can't draw it.

Mr X: Because you didn't see it.

Child: I did so.

Mr X: I'll get back to this bulb thing that you've drawn on that. Am I to understand that's a drawing of what you say you saw that day? Is it?

Child: Not exactly because I can't draw it exactly.

Mr X: But your best efforts to draw it include that bulb at the end of the two parallel lines. Is that right? Is that right? That's your best effort to draw what you say you saw that day. Do you accept that? Do you accept that? Are you thinking now or do you want me to repeat the question? Do you want me to repeat the question?

Child: No

Mr X: Are you going to answer the question?

Child: It's not exactly what I saw because I can't draw properly.

Mr X: Well can you use words to describe it?

Child: No – because I can't draw it properly.

Mr X: You didn't see anything that day did you?

Child: Yes I did.

Mr X: That's why you can't draw it. Cause you don't know what it looks like. Is that right?

Child: No.

Pros: Objection Your Worship. She's explained why she can't draw it.

BENCH: She's explained quite often why she can't draw it. She said she can't draw a penis. She said she did see it on that date what she's drawn there is the best of her ability. So that's the evidence she's given now. I'd suggest possibly move on

Mr X.

(Break in the transcript. During later questioning the issue is raised again)

Mr X: Did he use he use his left arm or did he use his right arm? Did he take you by the left hand or the left arm, or hand, or the right arm or the right hand? Forget about the fact that you can't draw a penis, the thing you say you saw. Tell me what he did?

(Cross-examination continues)"

Appendix 7

**ST ANDREW'S HOSTEL INQUIRY
INVITED SUBMISSION
30th JUNE 2012**

**“APPROPRIATE REFORMS TO DEFAMATION AND PROTECTION
LAWS”**

**PROFESSOR MICHAEL GILLOOLY
LAW SCHOOL
THE UNIVERSITY OF WESTERN AUSTRALIA**

A. INTRODUCTION

The Inquiry has “heard evidence from members of the Hostel community, including parents of students that:

- Where they did raise concerns or suspicions about inappropriate conduct of the warden, Mr Dennis McKenna, they were threatened with defamation proceedings and in some instances received letters from legal firms to this effect.
- Because of their fear of defamation proceedings they did not make a complaint about inappropriate conduct within the Hostel.”¹

I have been asked to briefly advise “on what might be appropriate reforms to current defamation or protection laws in respect of the following:

1. Allowing a person who reports child sexual abuse, believing it to be true, to have statutory protection from defamation proceedings.
2. Whether designating additional positions or authorities for this purpose would be appropriate (consistently with the currently designated mandatory reporters, the Department for Child Protection or Western Australia Police).
3. Whether the PID Act can be suitably amended, or alternatively, provides an appropriate model for that purpose.
4. Any other mechanisms or protections that could be considered to ensure that those who have a valid complaint of child sexual abuse can disclose it appropriately.”²

B. THE CAUSE OF ACTION IN DEFAMATION

1. Low threshold for action

The reason why the threat of defamation proceedings is such an effective deterrent is because the law sets the threshold for action so low. A plaintiff need not prove the falsity of the allegations complained of, any actual harm flowing from their publication, or any fault on the part of their publisher. All that must be established is the communication to some person other than the plaintiff of material that has a tendency to lower the plaintiff in the eyes of the community.³

¹ Letter of invitation from the Special Inquirer (19/6/12) p 1

² Ibid p 2

³ See *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 469, 466[1] – 468[7]. The elements of the cause of action for defamation are established by the common law, rather than being codified in the uniform defamation legislation. For example, s 6 *Defamation Act 2005* (WA) (“DA”) provides: “(1) This Act relates to the tort of defamation at general law. (2) This Act does not affect the operation of the general law in relation to

Even the gossip about others commonly contained in everyday conversations will often suffice to expose the speaker to proceedings for defamation.

In the present context, there is no doubt that allegations of child sexual abuse, whether actual or suspected⁴, are defamatory, and if communicated to anyone other than the person accused, would perfect the accused's cause of action against the person making the allegations. Thus the fear of defamation proceedings referred to by members of the hostel community is completely understandable. Undoubtedly the fear is not just of the potential for an adverse damages award at the end of the proceedings, but also of the cost and mental wear and tear of being involved in the litigation, regardless of the ultimate result.

2. Defences and the interests at stake

Of course, merely establishing the elements of the cause of action does not mean that the action will be successful. If the defendant is able to prove a legally recognised excuse for the publication, then he or she will avoid liability. In the following pages, the defences currently available to potential reporters of child sexual abuse are reviewed to determine whether they provide that level of clear and specific protection necessary to induce such persons to communicate their concerns to the appropriate authorities. And, in conducting this review, it must be borne in mind that it is not just the interests of the reporters that are at stake.

In many defamation cases, the aspersions cast upon the plaintiff are essentially of concern only to the plaintiff – the plaintiff complains that he or she has been lowered in the esteem of others, and seeks compensation to make up for that injury. However, where the allegedly defamatory material is a report of suspected child sexual abuse, the interests not just of the person accused but also of his victims, are implicated. Failure to provide an adequate defence for reporters may facilitate the continuation of the abuse, potentially leaving the most vulnerable people in our community at the mercy of their tormentors. Furthermore, where the abuser is a person who has been placed in a position of authority over the victim by the community, the breach of trust involved provides yet another compelling reason for removing any disincentives to potential reporters coming forward.

the tort of defamation except to the extent that this Act provides otherwise...” However, s 7(1) abolishes the old distinction between libel and slander, and s 7(2) confirms that “the publication of defamatory matter of any kind is actionable without proof of special damage.”

⁴ An imputation of suspected criminal behaviour is capable of being defamatory: *Hyams v Peterson* [1991] 3 NZLR 649; *Mirror Newspapers v Harrison* (1982) 149 CLR 293; *Favell v Queensland Newspapers* (2005) 79 ALJR 1716

C. GENERAL DEFAMATION DEFENCES

1. Truth and honest opinion

If the defendant can prove the substantial truth of what has been published, then he or she has a good defence.⁵ If the defamatory publication comprised an expression of opinion, then a defence of honest opinion may be available but normally only on condition that the factual basis for the comment is shown to be substantially true.⁶ This need to prove truth undermines the utility of these two defences for potential sexual abuse reporters like the members of the hostel community referred to earlier. Honest belief in the truth of their complaints is not enough – proof of the actual truth of the defamatory imputations to the exacting standard required in a court of law is what is required, and this can be extremely problematic. Defendants will usually need to look to a defence that does not require proof of truth. Hence attention turns to the defence of qualified privilege.

2. Qualified privilege at common law

The common law recognises that there are certain situations in which the public interest requires that protection be given to the publisher of defamatory material,⁷ even though its truth cannot be established.⁸ Where the publisher has a social, moral or legal duty or interest in communicating the material in question, and the recipient of the material has a corresponding duty or interest in receiving it, then the law confers on the publisher a “privilege” to defame. The material is said to be published on an occasion of privilege - defamatory statements made in the course of giving an employment reference or in a call to Crime Stoppers are well known examples. However, this privilege is not absolute but qualified. The qualification is that the privilege will be lost if the

⁵ Both at common law and under the uniform defamation legislation, a defence of justification is available. See, for example, DA s 25 : “It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.”

⁶ DA s 31(1) provides: “It is a defence to the publication of defamatory matter if the defendant proves that – (a) the matter was an expression of opinion of the defendant rather than a statement of fact; (b) the opinion related to a matter of public interest; and (c) the opinion is based on proper material.” Under s 31(5) “an opinion is based on proper material if it is based on material that – (a) is substantially true” or published on a privileged occasion (paragraphs (b) and (c))

⁷ All that is required to constitute “publication” under the law of defamation is communication of the defamatory material to a single person, other than the plaintiff: see *Dow Jones v Gutnick* (2002) 210 CLR 575

⁸ For a recent summary of the elements and rationale of the defence, see *Cush v Dillon* (2011) 243 CLR 298, 305[11]-[12] & authorities there cited. The common law defence has survived the enactment of the uniform defamation legislation across Australia. See eg DA s 24(1): “A defence under this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability”. Note also s 6(2): “This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).” Under s 4 “general law means the common law and equity”.

defendant was actuated by “malice” ie “ill will, spite or other improper motive”.⁹ Knowingly publishing false defamatory material readily leads to an inference of malice against the publisher.¹⁰ On the other hand, an honest belief in the truth of what is published, even if it subsequently turns out to be false, tends to rebut the inference.¹¹

There is no doubt that reports about child sexual abuse, whether actual or suspected, which are made to an appropriate person, honestly and in good faith, would be protected by the defence of qualified privilege. Nonetheless, the long standing existence of that protection proved an insufficient inducement to members of the hostel community to come forward and voice their concerns about the activities of the Warden. It is submitted that the reason is the common law nature of the defence. Because the defence is rooted in the common law, it suffers from certain deficiencies as a form of encouragement to potential complainants:

First, the defence can only be stated in the broad terms of general principle. The virtue of this generality is that qualified privilege is flexible enough to apply in a multitude of different situations. In this regard it can be contrasted with its distant cousin, absolute privilege, which only applies in a narrow range of specifically enumerated circumstances.¹² However, the defence’s generality and flexibility are also its major weaknesses for present purposes, for there may be some element of uncertainty attaching to the precise scope of its application.¹³ Hence, it fails to provide a potential reporter with a clear and specific statement of his or her immunity from action.

Second, the defence is not readily accessible to non-lawyers. Its existence and elements are to be found in the interstices of the common law, and considerable specialist knowledge is required to grasp its full implications.

Third, like all common law principles, the defence is open to change retrospectively and without notice by judicial decision.¹⁴

⁹ *Lange v ABC* (1997) 189 CLR 520, 574. See also *Roberts v Bass* (2002) 212 CLR 1, 31[76]; *Cush v Dillon* (2011) 243 CLR 298, 306[14]-307[15]

¹⁰ See *Cush v Dillon* (2011) 243 CLR 298, 311[28]-[29].06[14]-307[15]

¹¹ *Horrocks v Lowe* [1975] AC 135, 150 See *Cush v Dillon* (2011) 243 CLR 298, 306[14]-307[15]

¹² See DA s 27

¹³ Eg *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 (Bank mistakenly dishonouring customer’s cheque and marking it “Refer to Drawer” held entitled to a defence of qualified privilege at trial. Decision unanimously confirmed by NSWCA, but overturned by HCA by a majority of 3 to 2)

¹⁴ Eg *PGA v R* [2012] HCA 21 (the conventional wisdom that rape in marriage was not legally possible at common law overturned, the court determining that rape in marriage was legally possible *as at 1963*)

3. Qualified privilege under the *Defamation Act*

The Australia-wide uniform defamation legislation includes a general defence of qualified privilege. Section 30(1) of the *Defamation Act 2005* (WA) provides:

There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that –

- (a) the recipient has an interest or apparent interest in having information on some subject;
- (b) the matter is published to the recipient in the course of giving the recipient information on that subject; and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.¹⁵

This provision was based upon a defence contained in earlier New South Wales defamation legislation, which had been intended to provide media outlets with access to a defence of qualified privilege.¹⁶ Traditionally, media defendants had been unable to rely on the common law defence because of an inability to establish a duty or interest of the relevant kind to publish the defamatory material to all their readers, listeners or viewers.¹⁷ The legislature relieved the media of that burden in the statutory defence, but substituted for it what turned out to be an even more difficult hurdle for the media to jump namely the requirement, now embodied in paragraph (c), that the defendant’s conduct was “reasonable in the circumstances”. Stringent judicial interpretation of that requirement almost invariably led to the failure of the defence. For, once it has been demonstrated that the defamatory allegations are false, then it normally follows that there were steps that the defendant could have taken to reveal that falsity prior to publication. With the benefit of twenty-twenty hindsight, there is an overwhelming temptation to conclude that that “peerless paragon of virtue”,¹⁸ “the reasonable person”, would have taken those steps. Hence the publisher has not acted reasonably, and so the defence is forfeited.

Section 30(1), like its New South Wales predecessor, is not of course limited in its terms to media defendants (although a number of the matters set out in subsection (3) indicate its origins¹⁹). A member of the public, like a child sexual

¹⁵ For a recent illustration of the operation of the defence, see *Lvmh Watch and Jewellery Australia Pty Ltd v Michael Lissanah and Ors* [2011] NSWCA 370

¹⁶ *Defamation Act 1974* (NSW) s 22

¹⁷ *Lange v ABC* (1997) 189 CLR 520, 569-570, 572-573

¹⁸ Gillooly M, *The Third Man – Reform of the Australasian Defamation Defences*, The Federation Press, 2004, at p 159. See also the observations of Kirby J in *Favell v Queensland Newspapers* (2005) 79 ALJR 1716, 1722[23] – 1723[26]

¹⁹ DA s 30(3) sets out a non-exhaustive list of factors that a court may take into consideration in assessing the reasonableness of the defendant’s conduct. These factors include: “(f) the nature of the business environment in which the defendant operates; (g) the sources of information in the matters published and the integrity of those

abuse reporter, could potentially rely upon it. On the credit side, the statutory defence does overcome the second and third problems mentioned above with respect to the common law defence ie lack of accessibility, and the risk of judicial alteration. However, due to the generality of its terms, the section still fails to provide potential complainants with the specific guarantee of protection that is needed to induce them to come forward. Also, the addition of the “reasonableness” requirement further undermines the utility of the defence in the suspected abuse scenario. It makes clear to potential reporters that their own honest beliefs are not enough. Their protection is dependent upon the application of an external standard – their conduct must be adjudged to be “reasonable”. And this is not “reasonableness” in the loose, quasi-subjective sense in which the ordinary, lay person may understand the term. Rather, it is “reasonableness” in the precise, objective, lawyer’s sense. The law expects the “reasonable person” to exhibit all the desirable attributes of the model citizen, rather than merely the actual attributes of the ordinary member of the community. On this exacting standard, many potential complainants may be found wanting. As a result, such persons may be deterred from reporting their suspicions at all, or at least defer their reporting until they are able to obtain sufficient evidence to ensure that their conduct will subsequently be deemed “reasonable”.²⁰

4. Amendments to the *Defamation Act* not recommended

Notwithstanding the deficiencies in the general defamation defences identified above, I do not recommend any statutory alteration. The current *Defamation Act 2005* (WA) is part of a national scheme of uniform defamation legislation agreed to by all the Australian jurisdictions, and no change to it should be made without nationwide consensus. However, s 24(1) does permit the creation of defences under other legislation:

A defence under this this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.

It is by the appropriate amendment of legislation dealing specifically with the protection of children and the disclosure of misconduct by public officials that any necessary changes should be made.

sources; (h) whether the matter published contained the substance of the person’s [plaintiff’s] side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person.”

²⁰ It is interesting to note that cl 4 of the *Defamation Bill 2012* (UK) currently before the British Parliament, provides a defence for “*responsible* publication on a matter of public interest” (my emphasis). The defence is based upon the well-known species of qualified privilege with respect to *responsible* publication recognised by the House of Lords in *Reynolds v Times Newspapers* [2001] 2 AC 127.

D. DEFENCES UNDER THE *CHILDREN AND COMMUNITY SERVICES ACT*

1. Current provisions

Section 129 of the *Children and Community Services Act 2004* relevantly provides:

129. Protection from liability for giving information

- (1) This section applies if a person acting in good faith —
- (a) gives information to the CEO or another officer about any aspect of the wellbeing of a child; or...
 - (e) makes a report under section 124B(1); or...
- (2) In giving the information or making the report...the person —
- (a) does not incur any civil or criminal liability; and
 - (b) is not to be taken to have breached any duty of confidentiality or secrecy imposed by law; and
 - (c) is not to be taken to have breached any professional ethics or standards or any principles of conduct applicable to the person's employment or to have engaged in unprofessional conduct.
- (3) The protection given by subsection (2) also applies to a person who, in good faith —
- ...
 - (b) provides information on the basis of which —
 - (i) the information mentioned in subsection (1)(a)...is given; or
 - (ii) a report is made under section 124B(1); or...
- or
- (c) is otherwise concerned in —
 - (i) providing the information mentioned in subsection (1)(a)...or causing the information to be provided; or
 - (ii) making a report under section 124B(1) or causing a report to be made; or...

Subsection (2) absolves from any civil or criminal liability (which includes liability for defamation) the persons specified in subsections (1) and (3). Those persons may be conveniently considered under the following three headings.

Category (a) – Voluntary informants

Paragraph (1)(a) covers people who, in good faith, give to a relevant official “information... about any aspect of the wellbeing of a child”. Section 3 of the Act provides that “**wellbeing** of a child includes the care, development, health and safety of the child”. It would seem clear that concerns about a child being sexually abused would qualify as such information, and so a good faith reporter could claim protection. A consideration of the objects section of the *Child and*

Community Services Act 2004,²¹ in light of the statutory directive in the *Interpretation Act 1984* to prefer a construction that promotes the purpose or object of legislation,²² supports this view. Indeed, the Attorney-General, when introducing the Bill that inserted the mandatory reporting provisions into the Act in 2007,²³ explicitly acknowledged the existence of this general discretion to report concerns about child sexual abuse. After outlining the new provisions, Mr J.A.McGinty MLA said:

It is also important to note that any person may give information to the chief executive officer of the Department of Child Protection or another officer about any aspect of the wellbeing of a child... However, the bill now removes the discretion in relation to the reporting of child sexual abuse by doctors, nurses, midwives, teachers and police officers to the chief executive officer of the Department of Child Protection.²⁴

Unfortunately, the beneficial effect of this defence, in the context of reporting child sexual abuse, is somewhat reduced by its obscure location within the *Children and Community Services Act 2004*. The Act now contains a specific division entitled "Reporting sexual abuse of children".²⁵ At present that division only contains provisions relating to mandatory reporting. It is there that one would expect to find some mention of a general right to make a voluntary report, but there is no such mention. Its absence may mislead people into thinking that there is no such right. If potential reporters are to be induced to come forward, then the legislature must set out the protection provided in clear, specific and accessible terms. An appropriate amendment is suggested below.

Category (b) – Mandatory reporters

Paragraph 129(1)(e) only applies to a limited class of person namely a "doctor, nurse, midwife, police officer or teacher".²⁶ Under s 124B(1), if such professionals form a reasonable belief, in the course of their work, that a child has been or is being sexually abused, they must report it as soon as practicable to

²¹ Section 6 *Child and Community Services Act 2004*: "The objects of this Act are —

(a) to promote the wellbeing of children, other individuals, families and communities; and (b) to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and (c) to encourage and support parents, families and communities in carrying out that role; and (d) to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; and (e) to protect children from exploitation in employment."

²² Section 18 *Interpretation Act 1984*: "In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."

²³ *Children and Community Services Amendment(Reporting Sexual Abuse of Children) Bill 2007*, and see category (ii) below

²⁴ *Hansard* Legislative Assembly 28/11/07 pp7901c-7902a (Second reading speech of Mr JA McGinty, Attorney-General)

²⁵ Part 4, Division 9A

²⁶ *Children and Community Service Act 2004* s 124B(1)(a)

the CEO or persons approved by the CEO. A person who makes such a report in good faith incurs no liability for defamation, provided that the statutory requirements are met.

Category (c) – Providers of information to voluntary informants and mandatory reporters, and others involved

Subsection 129(3) covers people who provide relevant information to the informant or reporter, or are otherwise concerned in providing, or causing to be provided, the information, or making or, causing to be made, the report. Thus the protection from liability under subsection (2) is extended to the informant or reporter's sources of information which might, in a particular case include abused children, their parents, or other members of the public. The effect is to increase the range of people to whom protected complaints of child abuse can be made by members of the public, to include the mandatory reporters specified in s 124B.

2. Suggested amendments

In view of the deficiencies mentioned above, the following amendments to the Act are suggested.

(a) Creation of a specific and explicit right to report child abuse for ordinary members of the public

A provision expressly and specifically confirming the right of the ordinary citizen to report concerns relating to child sexual abuse should be inserted into the Act. What is envisaged is a section along the following lines:

Section XXX. Voluntary reporting of child sexual abuse

(1) A person, who believes or suspects that a child has been, is being or will be the subject of sexual abuse, may report that belief or suspicion to the CEO of the Department of Child Protection, the Commissioner of Police or any of their officers.

(2) A person making a report under subsection (1) shall state their reasons for forming the reported belief or suspicion.

Express voluntary reporting provisions are now found in the child protection legislation of all the other States and the Australian Capital Territory,²⁷ and the time is now ripe for Western Australia to follow suit.

²⁷ The voluntary reporting provisions of the other Australian jurisdictions are set out below. *Children and Young People Act 2008*(ACT) s 354: “(1) This section applies if a person believes or suspects that a child or young person – (a) is being abused; or ... (c) is at risk of abuse... (2) The person may report (a *voluntary report*) the belief or suspicion, and the reasons for the belief or suspicion, to the director-general.”

The suggested provision covers not only beliefs but also suspicions and does not require either to be based on reasonable grounds. Whilst such requirements may be appropriate when imposing a duty upon professionals to report under s 124B, they are counterproductive when endeavouring to encourage ordinary members of the public to come forward. Reputational damage to the accused person is kept to a minimum by limiting the recipients of the report to the specified officials.

The most convenient place in the Act for this new provision would be in the existing Division 9A – “Reporting the sexual abuse of children” – of Part 4 - “Protection and care of children”. This Division currently contains only provisions relating to mandatory reporting by certain professionals, but could comfortably accommodate the voluntary report section suggested. Consequential amendments to some of the other provisions of the Division will, of course, be necessary, for example the provisions designed to protect a reporter’s identity.²⁸

Children and Young Persons (Care and Protection) Act 1998 (NSW) s 24: “A person who has reasonable grounds to suspect that a child or young person is, or that a class of children or young persons are, at risk of significant harm may make a report to the Director-General.”

Child Protection Act 1999 (Qld) s 22: “(1) This section applies if a person, acting honestly— (a) notifies the chief executive or another officer of the department that the person suspects— (i) a child has been, is being or is likely to be, harmed; or (ii) an unborn child may be at risk of harm after he or she is born; or (b) gives the chief executive, an authorised officer or a police officer — (i) information about alleged harm or alleged risk of harm to a child; or (ii) information, relating to an unborn child, about a suspected risk of harm to the child after he or she is born. (2) The person is not liable, civilly, criminally or under an administrative process, for giving the notification or information.”

Children’s Protection Act 1993 (SA) s 12: “A person who (whether voluntarily or pursuant to a requirement of this Act) notifies the Department of a suspicion that a child has been or is being abused or neglected or provides any information to the Department in respect of such a notification— (a) cannot, by virtue of doing so, be held to have breached any code of professional etiquette or ethics, or to have departed from any accepted form of professional conduct; and (b) insofar as he or she has acted in good faith, incurs no civil or criminal liability in respect of the notification or the provision of the information.

Children, Young Persons and Their Families Act 1997(Tas) s 15: “(1) This section applies to a person who voluntarily, or as required by section 14 or section 18(3), informs the Secretary or a Community-Based Intake Service – (a) that he or she knows, or believes or suspects on reasonable grounds, that a child has been or is being abused or neglected or that there is a reasonable likelihood of a child being killed or abused or neglected. . .(2) A person – . . .(b) to the extent that he or she has acted in good faith, incurs no civil or criminal liability in respect of informing the Secretary or a Community-Based Intake Service as specified in subsection (1).”

Children, Youth and Families Act 2005 (Vic) s 28: “A person may make a report to the Secretary if the person has a significant concern for the wellbeing of a child.”

In contrast, in the Northern Territory, a duty to report is imposed on all persons, not just certain professionals. *Care and Protection of Children Act (NT) s 26(1):* “(1) A person is guilty of an offence if the person: (a) believes, on reasonable grounds, any of the following: (i) a child has suffered or is likely to suffer harm or exploitation; (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence; (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer: (i) that belief; and (ii) any knowledge of the person forming the grounds for that belief; and (iii) any factual circumstances on which that knowledge is based.”

²⁸ Section 124F

(b) Expansion of s 129 to provide protection for a voluntary reporter

The last division in Part 4 - “Protection and care of children” is Division 10 – “General”. Within this Division, current s129(2) provides that a person incurs no criminal or civil liability, and is not to be taken to have breached any duty of confidentiality or any ethical standard, through making a report referred to in subsection (1). Subsection (1) provides that “This section applies if a person acting in good faith - (e) makes a report under section 124B(1)”²⁹. To confer the requisite protection on a voluntary reporter, subsection (1) must be expanded to include an explicit reference to a good faith report under the new voluntary reporting section, perhaps by the addition of a new paragraph along the following lines: “(exxx) makes a report under section XXX”.

(c) New provisions regarding defamation proceedings

The present Inquiry has revealed that the threat of defamation proceedings has proved effective in dissuading members of the public from reporting suspected child abuse. The enactment of the new section XXX proposed above will go some way to counteracting such threats. However, it is submitted that more needs to be done. Hence, it is suggested that the following section be added to Part 4, Division 10, perhaps after s129.

Section 129XXX. Provisions relating to defamation proceedings

(1) In any proceedings for defamation, when a defence under s 129(1)(exxx) and (2) is relied upon, the defendant need not prove that he or she acted in good faith, but the onus of proof lies on the plaintiff to establish the defendant’s lack of good faith in order to defeat the defence.

(2) Where defamation proceedings fail due to successful reliance by a defendant on a defence under s 129(1)(exxx) and (2), and the plaintiff proves the falsity of the defamatory imputations conveyed by the report made under s XXX, the court may make a declaration of the falsity of those imputations.

(3) A person shall not threaten or foreshadow the initiation of defamation proceedings in order to deter or dissuade a person from making a good faith report under s XXX.

Penalty: a fine of \$6000

The purpose of subsection (1) is to cast the onus on the issue of good faith on to the plaintiff. The proposed statutory defence is then consistent with the common law defence of qualified privilege, where the onus of proof of disqualifying malice is also on the plaintiff.

²⁹ This is the mandatory reporting provision for the members of certain occupational groups ie doctors, nurses, midwives, police officers and teachers

Subsection (2) is designed to deal with the situation where a good faith, voluntary report under section XXX ultimately proves to be false. If the plaintiff proves the falsity of the content of the report, then he or she may seek a declaration of that falsity from the court.³⁰ In such a situation the defendant is absolved from liability, but the plaintiff's reputation is restored.

Subsection (3) is intended to provide a disincentive to those who would use the threat of defamation proceedings to suppress good faith reporting of suspected child sexual abuse. Whilst successful prosecutions might be rare, the subsection sends a clear message about the unacceptability of abusing the legal process in this way.³¹ A legal practitioner would be obliged to advise a client of the penal consequences of such abuse.

E. DEFENCE UNDER THE *PUBLIC INTEREST DISCLOSURE ACT*

1. Current provisions

Where the perpetrator of child sexual abuse is an employee of a public authority, as in the present Inquiry,³² the *Public Interest Disclosure Act 2003* (WA) may provide a measure of protection for members of the public wishing to report such abuse. Section 13 of the Act provides:

Section 13. Immunity for appropriate disclosure of public interest information

A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 —

- (a) incurs no civil or criminal liability for doing so; and
- (b) is not, for doing so, liable —
 - (i) to any disciplinary action under a written law;
 - (ii) to be dismissed;
 - (iii) to have his or her services dispensed with or otherwise terminated; or
 - (iv) for any breach of a duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by a written law) applicable to the person.

³⁰ For examples of legislation explicitly conferring power to award declaratory relief in defamation proceedings, albeit in different contexts from the present, see *Defamation Act 1992* (NZ) s24, and *Defamation Act 1996* (UK) c 31 s 9(1)(a)

³¹ Cf *Defamation Act 1992* (NZ) s 45: "The commencement of proceedings to recover damages for defamation shall be deemed to be a vexatious proceeding if, when those proceedings are commenced, the plaintiff has no intention of proceeding to trial"

³² Denis Reynolds was employed as Warden at the St Andrew's Hostel, a hostel owned and operated by the Country High School Hostels Authority under the *Country High School Hostels Authority Act 1960* – see St Andrew's Hostel Inquiry Public Hearing 20/2/12 Transcript pp 9-12

By virtue of paragraph (a), a person who makes a disclosure under s 5 incurs no criminal or civil liability (including liability for defamation). Section 5(1) confers a right on any person to make an “appropriate disclosure” of “public interest information” to a “proper authority”.

(a) “*Public interest information*”

Under s 3 of the Act, “public interest information” includes:

Information that tends to show that, in relation to its performance of a public function..., a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in

- (a) improper conduct; [or]
- (b) an act or omission that constitutes an offence under written law;

“Public officer” includes an employee of a “public authority”³³ like the Country High School Hostels Authority, a body established by statute to supervise and provide hostel accommodation for isolated students.³⁴ There is little doubt that information relating to sexual abuse of the children committed to his care by the warden of such a hostel constitutes “public interest information” under the Act.

(b) “*Appropriate disclosure*”

Section 5(2) provides:

A person makes an appropriate disclosure of public interest information if, and only if, the person who makes the disclosure —

- (a) believes on reasonable grounds that the information is true; or
- (b) has no reasonable grounds on which to form a belief about the truth of the information but believes on reasonable grounds that the information may be true.

Without paragraph (b), the standard of certainty required before there could be an “appropriate disclosure” of information relating to child sexual abuse by a public officer, would be set too high. However, under paragraph (b), all that is required is a reasonable belief that the information *may* be true. Whilst not the equivalent of the subjective “in good faith” requirement under the *Children and Community Services Act*, the paragraph moves the standard of certainty necessary in the mind of the reporter substantially in that direction, and away from the more stringent requirement in paragraph (a). Practically speaking, one would expect a good faith reporter of child sexual abuse to be able to satisfy

³³ “Public officer” and “public authority” are defined in s 3.

³⁴ *Country High School Hostels Authority Act* ss 4, 7

paragraph (b) in virtually all situations. Hence no change to the statutory definition of “appropriate disclosure” is recommended in the present context.

In any event, given that the definition of “public interest information” covers such a broad spectrum of matters beyond reports of child sexual abuse, then it would be inappropriate to amend general legislation like the *Public Interest Disclosure Act* to deal with such a special situation. Matters pertaining to child sexual abuse are better dealt with in a specific statute dealing with the protection of children like the *Children and Community Services Act*, as recommended elsewhere in this submission.

(c) “*To a proper authority*”

Section 5(3) provides:

A disclosure of public interest information is made to a proper authority if —

(a) where the information relates to an act or omission that constitutes an offence under a written law — it is made to a police officer or to the Corruption and Crime Commission;

(b) where the information relates to a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources — it is made to the Auditor General;

(c) where the information relates to a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971* — it is made to the Parliamentary Commissioner or to a person who occupies a position specified under section 23(1)(a) in relation to the public authority concerned;

(d) where the information relates to a person who holds an appointment made under the *Police Act 1892* Part I, III, IIIA or IIIB — it is made to the Commissioner of Police or to the Corruption and Crime Commission;

(e) where the information relates to a judicial officer — it is made to the Chief Justice;

(f) where the information relates to a member of either House of Parliament — it is made to the Presiding Officer of the House of Parliament to which the member belongs;

(g) where the information relates to a public officer (other than a member of Parliament, a Minister of the Crown, a judicial officer or an officer referred to in Schedule 1 to the *Parliamentary Commissioner Act 1971*) — it is made to the Commissioner or the Parliamentary Commissioner;

(h) where the information relates to a matter falling within the sphere of responsibility of a public authority — it is made to a person who occupies a position specified under section 23(1)(a) in relation to that authority; or

(i) where the information relates to a person or a matter of a prescribed class — it is made to a person declared by the regulations to be a proper authority for the purposes of subsection (1) in relation to such information.

Under this subsection, the proper authorities to receive information regarding child sexual abuse by a public officer are: a police officer or the Corruption and Crime Commission (paragraph (a)); the Public Sector Commissioner or the Parliamentary Commissioner (paragraph (g)); and the person within the relevant public authority designated to receive disclosures of public interest information (paragraph (h)).

The original intention behind the subsection was to assist potential whistleblowers by providing a convenient list of the proper places to complain.³⁵ However, there are two major impediments to the achievement of this laudable objective.

First, a concerned member of the public who consults this list will have to possess or acquire a certain mastery of the various pieces of legislation mentioned in order to determine to whom it is safe to disclose information.

Second, if the person making the disclosure errs, and informs the wrong person or agency in the list, then the “proper authority” has not been informed and the immunity under s 13 is forfeited.³⁶

2. Suggested amendments

To overcome the deficiencies identified above, it is suggested that a new paragraph (j) be inserted into s 5(3), and a new subsection (3A) into s 5, along the following lines.

Paragraph 5(3)(j)

(j) where the information relates to any of the matters referred to in any of the preceding paragraphs of this subsection, except for paragraph (g)³⁷ – it is made to the Commissioner.

³⁵ Explanatory Memorandum accompanying the *Public Interest Disclosure Bill 2002*, cl 5: “To assist whistleblowers, the clause lists the agencies to which a whistleblower can make a public interest disclosure and designates specific agencies depending upon the nature of the public interest disclosure.”

³⁶ Cf eg *Public Interest Disclosures Act 1994* (NSW) s15 which protects those who honestly and reasonably misdirect their disclosure to the wrong agency

³⁷ Section 5(3) provides that a disclosure of public interest information is made to a proper authority if “(g) where the information relates to a public officer... - it is made to the Commissioner or the Parliamentary Commissioner”

Subsection 5(3A)

Where a disclosure is made to the Commissioner under s5(3)(j), the Commissioner shall refer the disclosure to the relevant “proper authority” and is not subject to the obligations set out in Part 2, Division 2 with respect to that disclosure.³⁸

The purpose of these provisions is to make the Public Sector Commissioner a “one stop shop” or the normal point of first contact for all complaints of wrongdoing against public officers. Given the special responsibilities imposed on the Commissioner under Part 4 of the Act,³⁹ it is submitted that the Commissioner is clearly the appropriate person to fulfil this role. Potential complainants may avoid the risk of reporting to the wrong authority, and thereby losing their s 13 protection, by making their disclosure to the Commissioner. Where the disclosure falls within s 5(3)(g), the Commissioner is a “proper authority” and so must discharge the normal obligations to investigate, act and notify contained in Part 2, Division 2.⁴⁰ Where the disclosure falls within one of the other paragraphs of s 5(3), then the Commissioner’s sole obligation is to act as a “post box” and refer the disclosure to the appropriate “proper authority”.

3. A practical problem - Identifying the person responsible for receiving disclosures of public interest information within a public authority

Under s 23(1)(a) of the Act, the principal executive officer of each public authority is required to “designate the occupant of a specified position with the authority as the person responsible for receiving disclosures of public interest information”. The Special Inquirer has observed that “the designation of PID officers within agencies does make it difficult to access the appropriate person, particularly for a child in a regional environment”.⁴¹

One of the avowed purposes of the Act is “to facilitate the disclosure of public interest information”.⁴² If the way in which s 23(1)(a) is being implemented hinders disclosure, then the legislative intent is being thwarted.

Under s 19, the Public Sector Commissioner is required to monitor compliance with the Act, and to provide assistance with compliance to public authorities and

³⁸ Cf eg *Public Interest Disclosures Act 1994* (NSW) s 25 – Referral of disclosures by investigating authorities; *Public Interest Disclosures Act 2002* (Tas) s 27 – Referral of disclosure to State Services Commissioner, s 29B – Referral of disclosure to Integrity Commission, s 42 – Referral of public information disclosures to relevant public body for investigation

³⁹ Part 4 – Role of the Public Sector Commissioner – ss 18 to 22 impose obligations relating to the monitoring, assisting with and reporting on compliance with the Act.

⁴⁰ Part 2 – Public Interest Disclosures, Division 2 – Obligations of a person to whom a disclosure is made

⁴¹ Letter of invitation from the Special Inquirer (19/6/12) p 2

⁴² The long title of the *Public Interest Disclosure Act 2003* is “An Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.”

officers. Under s 21, the Commissioner may prepare “guidelines on internal procedures relating to the functions of a proper authority under this Act”. Under s 23(2), the internal procedures of the authority “must be consistent with guidelines prepared by the Commissioner under section 21.”

In view of the Special Inquirer’s observation about the practical difficulty in accessing the appropriate person within authorities, it is recommended that the Public Sector Commissioner be invited to consider the preparation of guidelines under s 21 to address this problem, without the further legislative action at this stage. Specific consideration should be given to situation where the person wishing to make a disclosure is a child in a regional environment.

F. CONCLUSIONS

In all, five specific recommendations for action have been made in this submission. For convenience, these have been gathered together in the Appendix.

By way of summary, I shall relate those recommendations to the four particular matters upon which I was asked to advise.

1. “What might be appropriate reforms in respect of...Allowing a person who reports child sexual abuse, believing it to be true, to have statutory protection from defamation proceedings.”

I have recommended the creation of an explicit right to report for members of the public, and protection from liability for those who exercise that right in good faith (Recommendations 1 and 2).

2. “Whether designating additional positions or authorities for this purpose would be appropriate (consistent with the currently designated mandatory reporters, the Department for Child Protection or the Western Australia Police).”

Under the new provision creating a right to voluntarily report child sexual abuse, the authorised recipients of such reports are the two primary investigative bodies, the Department for Child Protection and the Western Australia Police (Recommendation 1). Under the amendment proposed to the *Public Interest Disclosure Act*, the Public Sector Commissioner would become the normal “one stop shop” for complaints against public officers (Recommendation 4).

Pursuant to s 129(3)(b) and (c) of the *Children and Community Services Act*, those who provide information to the mandatory reporters specified in s 124B ie doctors, nurses, midwives, police officers and teachers, are protected provided they have acted in good faith. Under s 13 of the *Public Interest Disclosure Act*, in the type of scenario being considered by the Inquiry, protection is conferred upon disclosures to a police officer, the Corruption and Crime Commission, the Public Sector Commissioner, the Parliamentary Commissioner as well as the person within the relevant public authority designated to receive disclosures of public interest information.

In light of the above, it is submitted that the range of people to whom a protected report of child sexual abuse can be made is appropriate, and that there is no need for any further expansion.

Specifically with respect to the difficulty in identifying the person within an authority who has been designated to receive public interest disclosures, it is recommended that the Public Sector Commissioner be invited to consider the preparation of guidelines to overcome this problem (Recommendation 5).

3. “Whether the PID Act can be suitably amended, or alternatively, provides an appropriate model for that purpose.”

Appropriate amendments to both the *Children and Community Services Act 2004* and the *Public Interest Disclosure Act 2003* have been recommended (Recommendations 1-4).

4. “Any other mechanisms or protections that could be considered to ensure that those who have a valid complaint of child sexual abuse can disclose it appropriately.”

Special provisions relating to defamation proceedings, the institution of the Public Sector Commissioner as the normal “one stop shop” for complaints against public officers, and the preparation of guidelines to facilitate the identification of the person designated within public authorities to receive public interest information, have all been recommended (Recommendations 3-5).

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APPENDIX

SUMMARY OF RECOMMENDATIONS

AMENDMENTS TO THE *CHILDREN AND COMMUNITY SERVICES ACT 2004*

1. That a specific and explicit right to report child abuse for members of the public be enacted

The insertion into Part 4 Division 9A of provision along the following lines is suggested:

Section XXX. Voluntary reporting of child sexual abuse

(1) A person, who believes or suspects that a child has been, is being or will be the subject of sexual abuse, may report that belief or suspicion to the CEO of the Department of Child Protection, the Commissioner of Police or any of their officers.

(2) A person making a report under subsection (1) shall state their reasons for forming the reported belief or suspicion.

2. That the subsection 129(2) protection be extended to cover reporters exercising the new right enacted pursuant to Recommendation 1

The insertion into s 129(1) of a new paragraph along the following lines is suggested:

Paragraph 129(1)(exxx)

(exxx) makes a report under section XXX;

3. That special provisions relating to defamation proceedings be enacted in order to: (i) cast the onus with respect to good faith under the new defence on the plaintiff; (ii) enable a defendant to obtain a declaration of falsity in an appropriate case; and (iii) penalise the use of defamation proceedings to deter good faith reporting of child sexual abuse

The insertion, after s 129, of a new section along the following lines is suggested:

Section129XXX. Provisions relating to defamation proceedings

(1) In any proceedings for defamation, when a defence under s 129(1)(exxx) and (2) is relied upon, the defendant need not prove that he or she acted in good faith, but the onus of proof lies on the plaintiff to establish the defendant's lack of good faith in order to defeat the defence.

(2) Where defamation proceedings fail due to successful reliance by a defendant on a defence under s 129(1)(exxx) and (2), and the plaintiff proves the falsity of the defamatory imputations conveyed by the report made under s XXX, the court may make a declaration of the falsity of those imputations.

(3) A person shall not threaten or foreshadow the initiation of defamation proceedings in order to deter or dissuade a person from making a good faith report under s XXX.

Penalty: a fine of \$6000

AMENDMENTS TO THE *PUBLIC INTEREST DISCLOSURE ACT*

4. That section 5 be amended to make the Public Sector Commissioner the “one stop shop” for the initial receipt of public interest disclosures

The insertion into section 5 of provisions along the following lines is suggested:

Paragraph 5(3)(j)

(j) where the information relates to any of the matters referred to in any of the preceding paragraphs of this subsection, except for paragraph (g)⁴³ – it is made to the Commissioner.

Subsection 5(3A)

Where a disclosure is made to the Commissioner under s5(3)(j), the Commissioner shall refer the disclosure to the relevant “proper authority” and is not subject to the obligations set out in Part 2, Division 2 with respect to that disclosure.⁴⁴

ADMINISTRATIVE RECOMMENDATION

5. That the Public Sector Commissioner be asked to consider the preparation of guidelines under s 21 to facilitate the identification of the person within a public authority who has been designated to receive public interest information disclosures

⁴³ Section 5(3) provides that a disclosure of public interest information is made to a proper authority if “(g) where the information relates to a public officer... - it is made to the Commissioner or the Parliamentary Commissioner”

⁴⁴ Cf eg *Public Interest Disclosures Act 1994* s 25 – Referral of disclosures by investigating authorities; *Public Interest Disclosures Act 2002* s 27 – Referral of disclosure to State Services Commissioner, s 29B – Referral of disclosure to Integrity Commission, s 42 – Referral of public information disclosures to relevant public body for investigation