

**ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEXUAL ABUSE**

**Public Hearing - Case Study 40
(Day 193)**

Level 17, Governor Macquarie Tower
1 Farrer Place, Sydney

On Friday, 24 June 2016 at 9.30am

Before:

The Chair: Justice Peter McClellan AM
Commissioners: Mr Robert Fitzgerald AM
Professor Helen Milroy

Counsel Assisting: Mr Angus Stewart SC

1 MR STEWART: I call the witness [CJU], your Honour.

2

3 <[CJU], affirmed: [9.32am]

4

5 <EXAMINATION BY MR STEWART:

6

7 MR STEWART: Q. Thank you, sir. Your names and details
8 are known to the Royal Commission. Do you have in front of
9 you a copy of your statement, prepared for the
10 Royal Commission, dated 25 May 2016?

11 A. I have the original copy that I signed, not the
12 revised copy signed by a second person.

13

14 Q. By "signed by a second person", do you mean witnessed?

15 A. Yes.

16

17 Q. I'm sure we can put a copy in front of you.

18 A. That's fine, thank you.

19

20 Q. Is that the one that has been witnessed?

21 A. They have both been witnessed. There was just
22 a slight error on one of them, but the wording is the still
23 the same.

24

25 Q. Looking at the one that has been witnessed, do you
26 confirm that that statement is true and correct?

27 A. I do, yes.

28

29 MR STEWART: I will tender the statement, your Honour.

30

31 **EXHIBIT #40-017 STATEMENT OF [CJU] DATED 25/05/2016**

32

33 MR STEWART: Q. I invite you to read your statement
34 commencing at the third paragraph?

35 A. Thank you. "My full name is [CJU]. I was born in
36 1962 and I am 54 years of age.

37

38 I come from a close, working class family. I grew up
39 in Parkerville outside Perth. My father was a member of
40 the Navy in the 1950s and later was an artillery sergeant
41 in the Citizens Military Forces (CMF). From an early age
42 he had demanded respect from me and my three siblings.

43

44 From an early age, I had an interest in music and
45 I joined the Salvation Army band as well as my high school
46 band and towards the end of year 10 my music teacher
47 suggested that playing music in the military might be good

1 for me. I was interested in pursuing this, particularly as
2 my father had served in the Defence Force.

3
4 Army Apprentice School, Balcombe, Victoria

5
6 In 1977, when I was 15, I applied to be an apprentice
7 musician and auditioned at the Irwin Barracks in Perth.
8 I had to play an instrument and demonstrate I could read
9 music, including playing scales and sight-reading music
10 transcripts.

11
12 In October or November 1977 I received a letter
13 stating that I had been accepted as a junior apprentice at
14 the Army Apprentice School in Balcombe, Victoria
15 (Balcombe). My parents had to sign paperwork to say that
16 they would accept me joining the military. One of the
17 documents was an acknowledgment that I was a minor and
18 stated that the military would be my guardian during my
19 time at Balcombe.

20
21 In January 1978 I travelled to Balcombe to commence my
22 apprenticeship. I was part of the 33rd intake, which, at
23 the time, was referred to as the junior class or 'juniors'.
24

25 Balcombe was made up of five 'companies'. Four of the
26 companies (Alpha, Bravo, Charlie and Delta) had three
27 platoons. The fifth company (Administration Company) had
28 only one platoon comprising third-year electrical
29 technicians. Each platoon was made up of about 40 to 50
30 people. In my company, the platoons were known as
31 Ten Platoon, Eleven Platoon and Twelve Platoon.
32 Ten Platoon had electrical mechanics and electrical
33 technicians in that group. Eleven Platoon, which I was
34 part of, had musicians and vehicle mechanics.
35 Twelve Platoon was made up of fitters, carpenters and
36 plumbers.

37
38 Upon arrival at Balcombe I was placed into a group
39 with other junior apprentices in my intake. All the
40 training staff were there. I recall being shown the bed
41 spaces in what was called the guts huts, which is where we
42 slept. I was told if I had any issues, to report them to
43 the Regular Army Sergeant. I was told he was there to make
44 us soldiers.

45
46 A normal day included cleaning, drills, basic training
47 and classes. Throughout the week, I had physical training

1 and different sessions with education officers. It was
2 like school, but I was learning to be a soldier. At the
3 time, I enjoyed being an apprentice.
4

5 After training, most of the staff went home. During
6 the evening, a sergeant stayed back and supervised the
7 apprentices. Sometimes they taught us, the apprentices,
8 practical things about being a soldier or spoke of their
9 experiences in the Army. Some evenings the junior
10 apprentices were able to take the night off where we would
11 go to the canteen or non-denominational
12 Christian Fellowship Club, located in the old mess, where
13 you could play a game of pinball or just relax and watch
14 TV. Lights out were about 9 o'clock.
15

16 I enjoyed the first couple of weeks at Balcombe. It
17 was challenging and interesting, just like my father said it
18 would be. I remember thinking, 'This is it. I've just got
19 to get through my training and my apprenticeship and this
20 will do me for life.'
21

22 Initiation and bastardisation at Balcombe 23

24 Shortly after I started at Balcombe and following the
25 Christmas leave, the senior and junior recruits merged
26 together in the same platoon. In the evenings, the juniors
27 were left alone with the seniors unsupervised. It was not
28 long until I and the other juniors, known as 'sprogs' were
29 treated like slaves, forced to iron and polish for the
30 seniors. If there was non-compliance, extra duties were
31 given.
32

33 One evening, the seniors took me and the other juniors
34 into the recreation room and said, 'We are the senior
35 class. We are in charge. You'll do what you're told. If
36 you don't do what you're told, there will be consequences.'
37 The seniors said that if any junior complained to training
38 staff, it would be 'bad luck' for us all. This was our
39 initiation.
40

41 After the 'initiation' the physical abuse and bullying
42 continued regularly. I and other juniors would be held
43 down, for example, on my bed, while a large framed senior
44 belly flopped on to me. One time, he broke the springs on
45 my bed and my back landed against the footlocker under the
46 bed. I sustained an injury to my back but was too
47 frightened to report it as I had been warned about the

1 consequences.

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1 when it was appropriate, and also in the bathrooms. The
2 bastardisation and abuse was so bad that I pretended once
3 that I had frostbite of the ears so I could have two weeks
4 away from the barracks while they modified my ears.

5
6 Sexual abuse by the seniors at Balcombe

7
8 Several weeks after the physical abuse was reported,
9 I was sexually abused by the senior recruits.

10
11 One night after lights out, I was dragged out of my
12 bed by a group of seniors. I recognised their voices but
13 could not positively identify anyone as they were wearing
14 balaclavas.

15
16 I was held down and a rag was put in my mouth while
17 others pulled my pants down and smeared Vegemite over my
18 stomach, groin, genitals and legs. They then brought in a
19 dog to lick the Vegemite off me. I was scared the dog was
20 going to bite my genitals. The seniors were laughing and
21 said words to the effect of, 'That's what you get for
22 dobbing on us.'

23
24 The seniors then turned me over so that I was kneeling
25 and my head was pushed on to the ground. They pushed the
26 dog against my backside and said, 'This is the only way
27 you're ever going to have sex.' 'You're a dog for
28 reporting us.' And, 'If you tell anyone about anything
29 else, the next time it will be worse and we'll kill you.'
30 The seniors then left. After the assault I went back to
31 the showers and stood under the shower for about three
32 hours. I spent time scrubbing my genitals and my anus
33 trying to get the experience off my mind.

34
35 I did not report the sexual abuse to any staff member
36 due to my previous experience reporting which effectively
37 resulted in the perpetrators being glorified and I ended up
38 being sexually assaulted. There was no reason why I felt
39 that reporting this abuse would have had any other effect.
40 If word had got back to the seniors that I'd reported,
41 I feared that their threats of even worse punishment would
42 be carried out.

43
44 Sexual abuse by the staff at Balcombe

45
46 Around the end of April 1978, while I was still
47 a junior apprentice, I was assigned laundry duties. The

1 laundry was run by a civilian named Bert. We nicknamed him
2 'Cheesy Bert'. Bert had stacks of pornographic magazines
3 and allowed me to look at them. It was my introduction to
4 porno. During my time at the laundry, I saw Bert smelling
5 boys' underwear. He caught me one day watching him do this
6 and he told me it was 'our secret' and not to tell anyone.

7
8 On at least one occasion, Bert asked me to masturbate
9 with him and on another occasion to go off base with him,
10 but I refused and warned him not to come anywhere near me.
11 He was a civilian so I didn't have to answer to him.
12 Despite the way Bert acted, I chose to spend time in the
13 laundry because it was a place I could hide from the senior
14 apprentices.

15
16 I never reported Bert's behaviour to anyone because
17 I didn't think I would be believed and again feared being
18 punished for reporting.

19
20 In around August 1978 I was going to the
21 Everyman's Club regularly because it gave me the
22 opportunity to escape in the evening from the seniors.
23 Around this time, I met a captain at the club. I can't
24 recall his name but I recall he wore a captain's uniform.
25 He was approachable and asked me about my welfare. On one
26 occasion we had the following conversation: the captain
27 said, 'You seem to be up here quite a bit in the evenings.'
28 I replied, 'I don't like it here. I'm getting picked on
29 and bullied by the seniors.' And the captain told me, 'You
30 are talking to the right man.'

31
32 The captain told me that he could help me. He invited
33 me to go and sit in his car. He then told me to tell him
34 my story. I told the captain everything that had happened.
35 He then said, 'I can help you but you have to help me.'

36
37 The captain said, 'For me to help you, you have got to
38 help me.' I said, 'Yes, I can give you the names and
39 things like that.' The captain said, 'No, we'll talk about
40 that later. Come with me.'

41
42 I then followed the captain into the bushes. He
43 pulled down his pants and asked if I have had sex before".
44

45 Sorry, I missed out a part there. My fault.
46 "I thought the captain meant he wanted further information
47 and details of the incidents. He took me away in his car

1 and drove me to the cliffs near Mt Martha" and then had
2 that following conversation.

3
4 "I followed the captain into the bushes and we sat
5 down and looked out across the bay at the water and he
6 pulled down my pants and asked if I had had sex before.
7 I told him I didn't. He said, 'I'll show you how to do
8 it.' The captain then pulled down my pants and masturbated
9 me. He asked me to do the same to him. I felt scared to
10 say no because he was a captain and scared that I would get
11 into trouble because I was off base without permission.
12 When he had finished he drove me back to the barracks. But
13 I never saw that captain again during the remainder of my
14 time at Balcombe.

15
16 Shortly after this I rang my dad and told him that
17 I wanted to go home. I didn't say why, because I didn't
18 want to disappoint him. My dad told me to just stick it
19 out and that it would do me good.

20
21 I didn't tell anyone about the sexual abuse by the
22 captain. I didn't know how to tell people about what had
23 happened. It was ingrained in me that reporting abuse
24 would make things worse and I was living in fear of
25 retribution and punishment.

26 Leaving Balcombe and joining the Army

27
28
29 In 1978, at the end of my first year, I went home for
30 the Christmas break. When I returned to Balcombe the
31 following year I was a senior. The new intake of junior
32 apprentices had commenced and the seniors started bullying
33 the new juniors. I did not want the new juniors to
34 experience what I went through so I stepped in and I said,
35 'This isn't happening.' I ended up with a bloody nose and
36 took a beating.

37
38 I just persevered with my training at Balcombe and
39 once my training was complete, I joined the Army and
40 I stayed there for 11 years as a musician.

41
42 On 26 January 1989, at my request, I was discharged
43 from the Army.

44
45 Disclosure of abuse to DLA Piper and Defence Abuse
46 Response Taskforce (DART)

47

1 In June 2011 I saw a DLA Piper advertisement.
2 I wanted to tell of my experience at Balcombe and I wanted
3 acknowledgment that the abuse shouldn't have happened and
4 that the Army, as my guardian, should have protected me.
5

6 I spoke with someone from DLA Piper but didn't give
7 the full details about the incident with the dog because
8 I didn't know who I was talking to. The process of
9 disclosing the abuse to DLA was hard as it brought back
10 a lot of old feelings. They told me they would take the
11 story about my experiences at Balcombe on board. I do not
12 recall any further correspondence or interaction from
13 DLA Piper.
14

15 In 2013, I was contacted by DART asking me to make
16 a submission, which I made on 23 July 2013. I was
17 contacted by a representative by telephone to clarify some
18 points and they asked me if I wanted money. I said,
19 'I don't want money. I was assaulted and raped; receiving
20 money would make me feel like a prostitute.' They
21 responded by saying that I had to claim some money
22 otherwise they couldn't process my claim. An apology is
23 not what I want either. Those involved in restorative
24 engagement processes have not harmed me, nor do they have
25 anything to apologise for.
26

27 What I wanted was an acknowledgment from the Army that
28 they didn't protect me and that they knew, even before
29 I joined the military, that these things were happening and
30 they did nothing about it.
31

32 DART asked me about my counselling and support and
33 I told them that I didn't have any; just myself and my
34 wife. They told me that they had to make sure I was safe
35 and that I had to go to a counsellor. I spoke with
36 a counsellor for one session but I didn't like him and so
37 I didn't return to him.
38

39 In December 2013 DART told me that I was eligible for
40 maximum payments, but I kept telling them that I didn't
41 want the money, and that all I wanted was an acknowledgment
42 from the Army. I didn't feel like I was being heard.
43

44 Eventually, I decided to take part in the Restorative
45 Engagement Program (REP) in Melbourne. During the REP
46 I again asked for an acknowledgment. The Army
47 representative, Major General Gus McLachlan, acknowledged

1 that these things had happened and should never have
2 happened. He told me that I was a good soldier and that my
3 family should be proud of me. He agreed to provide
4 a written letter stating the same and to apologise. Again,
5 I reiterated that I did not want an apology as he
6 personally had nothing to be sorry for. I just wanted the
7 acknowledgment.

8
9 During the REP I also asked for my discharge to be
10 reconsidered and changed from 'at own request' to a
11 'medical discharge'. I left the Army because I needed to
12 escape to avoid the mental pain and anguish I experienced
13 from the assaults and the bullying. Changing my discharge
14 would have given me some closure. It would be an
15 acknowledgment from the Army that my mental trauma arose
16 from my abuse suffered at Balcombe was the reason I left
17 the Army.

18
19 On 26 August 2015 I received a letter from
20 Major General McLachlan of the Australian Army
21 acknowledging the abuse I experienced and acknowledging
22 that it shouldn't have happened. The letter also
23 acknowledged that I was a good soldier. The letter
24 enclosed a certificate from the Australian Army promoting
25 me to corporal, 26 years after I was discharged. I felt
26 the letter was insincere as I believed it contained
27 inaccurate information.

28
29 On 7 September 2015 I received a generic letter
30 providing me with instructions on how to make an
31 application to change my mode of discharge. I am still
32 waiting for this issue to be resolved.

33
34 Claim for compensation and the Department of Veterans'
35 Affairs

36
37 In May 2015 I applied to the Department of Veterans'
38 Affairs (DVA) for compensation in respect of post-traumatic
39 stress disorder, for health care to be provided at the
40 expense of DVA and for confirmation that the PTSD is
41 related to the physical and sexual abuse I experienced at
42 Balcombe in 1978. Acceptance of this would support my
43 application for the change of means of discharge to
44 'medical'. I want them to provide a long-term plan with
45 support services.

46
47 Around early June 2015, DVA interrogated me for an

1 hour and a half over the phone without any notice. I had
2 no support with me at the time. They finished the call by
3 asking, 'Do you feel suicidal? Okay, thank you, bye'.
4 They didn't even seem sincere. It left me feeling cold.
5

6 DVA requested that a report be prepared by
7 a psychiatrist to assist with assessing my claim. I went
8 to several sessions with a consultant psychiatrist and
9 a report was provided to DVA confirming the PTSD was
10 service related and specific to the assaults in 1978.
11

12 On 9 November 2015, I received a telephone call from
13 DVA stating that because the psychiatrist had attributed
14 this disorder to my experiences at Balcombe, my claim had
15 been put into abeyance. She said, 'You either accept the
16 abeyance or we decline the offer and you have to go through
17 the appeals process.' To me, it felt like a threat.
18 I told DVA that this wasn't fair and I was going to get
19 some independent advice.
20

21 I received a letter entitled 'Acknowledgment of
22 Authority to Defer Decision' from DVA about a week later.
23 The letter referred to my earlier conversation and my
24 claim. The letter thanked me for accepting the abeyance
25 and indicated that I would be notified about the
26 reactivation of my claim after the Commonwealth Government
27 had made a decision on how the Balcombe claims were to be
28 administered. I was shocked. I hadn't even had a chance
29 to seek advice.
30

31 I received a second letter from DVA that same day.
32 This letter referred to the psychiatrist report and
33 indicated that I am eligible to receive hospital and
34 medical treatment at the expense of DVA for PTSD, for
35 depressive disorder and for alcohol use disorder. The
36 letter stated that my claim to have this condition
37 recognised as being service related is still in progress,
38 and I will be advised of its outcome in due course. It
39 didn't make sense to me because I had received a letter
40 from the Army acknowledging that this had happened, which
41 I had forwarded on to the DVA, but the DVA wouldn't accept
42 that as an admission that anything happened.
43

44 DVA sent me two further letters that are identical
45 other than the dates advising that I am eligible to receive
46 treatment funded by DVA for PTSD. Overall, the contact
47 from DVA was disjointed and very confusing.

1
2 Impact of abuse
3

4 I have carried this secret from my family and my
5 friends for 35 years. The abuse affected my relationship
6 with my wife and kids. My whole life has been uncertain.
7 I told my son that I would rather he become a drug addict
8 than join the military. I told him the military isn't
9 a place for good men. I only disclosed my abuse to my
10 family, including my mother, in 2014.
11

12 I can't play music any more as it is a trigger for me.
13

14 I suffer from PTSD, depression and anxiety, and have
15 trouble sleeping. I have attempted suicide several times.
16 I want to lead a normal life. I see a psychiatrist at the
17 moment, through DVA. This helps but I am totally dependent
18 on my medication.
19

20 I was brought up as a Christian, but I've lost my
21 faith in God.
22

23 My work life has been a nightmare. Since leaving the
24 Army I have worked in many different jobs but have
25 struggled to keep a job as I leave when I see bullying or
26 feel threatened. I find it hard to trust colleagues or
27 people in senior positions. If I see people being
28 threatened or bullied I get cold shakes and I have to leave
29 the room.
30

31 My recommendations to the Royal Commission
32

33 My father died not knowing what actually happened to
34 me. The military were my guardians and they covered this
35 up. The Army knew why I wanted to get home; they knew
36 I was being bullied and bastardised. They told my father
37 I was homesick. I had a letter, once, that was signed by
38 the Army to my parents stating that. I want recognition
39 that I was assaulted and that they put me in a position
40 where they knew that it could happen. I want them to take
41 responsibility for that. They are still denying it, even
42 now.
43

44 Something needs to be done about the way DVA handles
45 victims of child abuse like myself. They need a better
46 method to handle victims.
47

1 I recommend that DART not be shut down. They dragged
2 me into this and got it going and now they've told me that
3 they are shutting down and my counselling will stop."

4
5 MR STEWART: Thank you, sir. I have no further questions.

6
7 THE CHAIR: Does anyone else have any questions?

8
9 MR O'BRIEN: Briefly.

10
11 **<EXAMINATION BY MR O'BRIEN:**

12
13 MR O'BRIEN: Q. You presented the Royal Commission this
14 morning, I think in the early hours of the morning, with an
15 additional statement that you wanted to make. My name is
16 O'Brien and I represent you, Mr [CJU].

17 A. Yes, sir.

18
19 Q. As I was saying, you had an additional statement
20 prepared. Did you want to read that?

21 A. If you don't mind, please, sir.

22
23 MR O'BRIEN: I think Counsel Assisting has agreed with
24 that.

25
26 MR STEWART: Yes.

27
28 THE WITNESS: "Since I came out and I made the
29 announcement of my abuse, I have continually been asked by
30 many people like this Royal Commission why am I standing
31 now and reporting; what happened to me should never have
32 happened.

33
34 My reason for reporting.

35
36 I have had 38 years of carrying the burden that not
37 only was I raped by my seniors and by staff at Balcombe who
38 I thought I could trust, I was physically and mentally
39 abused with a dog, the lowest of the low, bestiality.

40
41 The embarrassment and shame of being raped with a dog
42 will be something that I have and will always have to carry
43 until the day I die.

44
45 The hurt and pain this causes to a young soldier
46 I cannot describe. These were people I thought I could
47 trust.

1
2 The hurt and pain I saw in my loving wife's and
3 children's eyes when I finally shared my story to them was
4 even more painful than being physically assaulted by a dog
5 and is further pain a loving husband and father should
6 never have to feel.

7
8 Having to repeat my story to DLA Piper, to DART, to
9 DVA, to psychologists, to psychiatrists, to investigators
10 and legal teams, while difficult, is something I have done
11 not for myself but for my family, to try and reduce the
12 pain that I have caused them stemming from my alcoholism,
13 my rage and my attempts of suicide caused by this story."

14
15 MR O'BRIEN: Q. Thank you. There is only one other area
16 that you have asked me to clarify from your statement, and
17 that relates to your claim that your PTSD be determined by
18 the DVA as service related. It is the case that you,
19 in November, were told by the DVA - November of last year,
20 2015, you were told by the DVA that that claim is in
21 abeyance?

22 A. Yes, sir.

23
24 Q. Have you had any contact at all with the DVA since
25 that time?

26 A. No, sir.

27
28 Q. And it is the case, without going to the document
29 which is in the tender bundle, that you have been notified
30 by the DVA that the Commonwealth Government is considering
31 these types of claims related to your service at present?

32 A. Yes, sir.

33
34 Q. And I expect that you understand that that is
35 something which is ongoing, is it?

36 A. There is no indication when it will finish, sir.

37
38 Q. Because you have had no contact since November?

39 A. Correct, sir.

40
41 Q. Why is it important to you that your claim that the
42 PTSD you now suffer was related to your service history be
43 recognised?

44 A. It is acknowledgment that it actually did happen.
45 It's acknowledgment that the guardians of me failed me and
46 it's the importance to me and my family that this is the
47 fact. It's the reason I am here today.

1
2 MR O'BRIEN: Thank you.
3
4 THE CHAIR: Mr O'Brien, or maybe Mr Stewart or maybe
5 Ms McLeod, what is meant by the claim being "in abeyance"?
6
7 MR O'BRIEN: That's a question that I want to ask and
8 I expect Counsel Assisting might want to ask some of the
9 representatives from the institution, and particularly from
10 the DVA, because it simply means that it's not being
11 processed and it's not being dealt with.
12
13 THE CHAIR: That's the normal meaning of the word but --
14
15 MR O'BRIEN: The witness has given testimony that he was
16 told and the tender bundle demonstrates that --
17
18 THE CHAIR: Do we have the letter?
19
20 MR O'BRIEN: Yes.
21
22 MR STEWART: Tab 101, your Honour.
23
24 MS McLEOD: Your Honour, may I assist?
25
26 THE CHAIR: I think we need assistance. You understand
27 what I say about the normal meaning of the word "abeyance"?
28
29 MS McLEOD: Yes. Mr Bayles will assist on this topic,
30 your Honour, but in short, the DVA is waiting for data to
31 come from the DART which presents a cluster of
32 presentations, if you like, of incapacities as a result of
33 abuse and "abeyance" simply means on hold so that the DVA
34 can gather that information and respond to the cluster
35 data, if you like; so it simply means on hold.
36
37 THE CHAIR: But in what space? Is it the position that
38 what is in abeyance is a decision as to whether or not
39 there are entitlements as a result of what happened?
40
41 MS McLEOD: Yes, your Honour.
42
43 THE CHAIR: Why do they need the DART? Why don't they
44 just look at the individual cases?
45
46 MS McLEOD: Can I ask Mr Bayles to address that
47 specifically, your Honour?

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THE CHAIR: Very well.

MR STEWART: Your Honour, Mr Bayles' statement does touch on this and I intend asking him to explain just what is happening and how long it is expected to be in abeyance.

THE CHAIR: Yes. Mr [CJU], you may know a little bit more about what has been happening when we have had that evidence. Do you understand what I --

THE WITNESS: Thank you, your Honour.

MS McLEOD: If it provides any immediate answer, your Honour, Mr Bayles' statement, at paragraphs 91 and 92, addresses the issue, and the claims are placed in abeyance where there is little or no other evidence about the claimant's contention that the abuse occurred, and so in order to trigger the entitlement, DVA have gone back seeking further information from the DART in terms of the cluster data, to assist in processing the claims.

THE CHAIR: Why don't they just talk to the claimant?

MS McLEOD: They have, your Honour. It is the additional information, but, as I said, Mr Bayles will address that.

THE CHAIR: Yes. Very well, we will come to that in due course. Mr Stewart, do you have any questions?

MR STEWART: No, I don't, your Honour.

THE CHAIR: Thank you, Mr [CJU]. Thank you for your evidence. You are excused.

<THE WITNESS WITHDREW

MR STEWART: Your Honour, I call Alan McDonald

<ALAN MARTIN MCDONALD, sworn: [10.10am]

<EXAMINATION BY MR STEWART:

MR STEWART: Q. Mr McDonald, will you state your full names and occupation?

A. Alan Martin McDonald and I'm retired.

1 Q. Do you have in front of you, Mr McDonald, your
2 statement, prepared for the Royal Commission, dated 14 June
3 2016?

4 A. Yes.

5

6 Q. Do you confirm that that statement is true and
7 correct?

8 A. To the best of my knowledge, yes.

9

10 MR STEWART: I tender the statement, your Honour.

11

12 **EXHIBIT #40-018 STATEMENT OF ALAN MARTIN McDONALD**
13 **DATED 14/06/2016**

14

15 MR STEWART: Q. Mr McDonald, you joined the
16 Australian Army in 1948; is that right?

17 A. Correct.

18

19 Q. Relevantly to this inquiry, from 9 December 1972 until
20 6 January 1976 you served as the commanding officer of the
21 Army Apprentice School at Balcombe; is that right?

22 A. Correct.

23

24 Q. When did you retire from the Army, Mr McDonald?

25 A. 1985, at the age of 55.

26

27 Q. Dealing with the Army Apprentice School in the time
28 that you were there, 1972 to 1976, and in particular,
29 looking at paragraph 9 of your statement, which should come
30 on the screen in front of you, Mr McDonald, but whichever
31 is easier for you to look at, the hard copy or on the
32 screen, I understand, from the last sentence in that
33 paragraph, that the age at which apprentices may have
34 commenced their training could be in the range from 15 to
35 19; is that correct?

36 A. To the best of my knowledge, yes.

37

38 Q. A junior apprentice could be as young as 15 or as old
39 as 19?

40 A. Yes.

41

42 Q. How many years at Balcombe would an apprentice train?

43 A. How many years?

44

45 Q. For how many years would an apprentice train at
46 Balcombe?

47 A. All the apprentices, with the exception of the

1 electronic trade, spent two years at Balcombe. The
2 electronic trade, they were kept for their third year of
3 training at Balcombe and then they graduated.
4

5 Q. I would like to deal with how the school was organised
6 at the time that you were there. You say in paragraph 13
7 that there were four apprentice companies. How many
8 apprentices were there per company?

9 A. Around about 15 in each section, up to 15, and the
10 companies were about 50 or 60.
11

12 Q. So would the 15 be per - when you referred to
13 a section, is that a reference to a platoon? 15 per
14 platoon?

15 A. Pardon?
16

17 Q. You said there would be about 15 in each section. Is
18 that a reference to a platoon?

19 A. I don't understand what you --
20

21 Q. I will come at it differently, Mr McDonald. At the
22 time that you were there, do you recall about how many
23 apprentices were there in total at the Army Apprentice
24 School at Balcombe?

25 A. Over 600 in each year. That was the total of the
26 people during that year.
27

28 Q. The total number of apprentices?

29 A. Apprentices, yes.
30

31 Q. Thank you. In paragraph 31 of your statement, if we
32 can have that shown to you, you say in that statement that
33 you are aware that there was a hierarchy within the ranks
34 of apprentices at Balcombe, including between the different
35 intakes of apprentices, and that the term "sprog" was used
36 by the senior intakes to indicate the members of the junior
37 classes. I take it that you were aware of that hierarchy
38 at the time that you were the commanding officer at
39 Balcombe?

40 A. It had always been so, yes.
41

42 Q. Did you have any particular view about the hierarchy
43 and the use of the term "sprog"?

44 A. Not really, but junior classes in any environment, of
45 people who first come in, are juniors, and this was just
46 a name that apparently Balcombe used, the people at
47 Balcombe.

1
2 Q. You will accept, Mr McDonald, that broadly speaking,
3 there might be two approaches to dealing with juniors. One
4 would be to regard them as the lowest of the low, remind
5 them of that and make sure they don't forget it, and
6 another would be to nurture them and assist them into an
7 institution and to take their full place within that
8 institution. Do you understand that distinction?
9 A. Yes. Yes, I do.

10
11 Q. I am to understand that at Balcombe, certainly, what
12 was taking place was the first - in other words, juniors
13 were made to know that they were juniors and not to forget
14 it; would that be right?
15 A. Not really. I guess that's how they felt, but I - it
16 didn't strike me as - I wouldn't say that.

17
18 Q. Well, it's not something you discouraged in any way,
19 is it?
20 A. No.

21
22 Q. And so you and the other officers responsible for
23 running Balcombe, you were all aware that there was this
24 significant hierarchy operating within the ranks of the
25 juniors; is that right?
26 A. Yes.

27
28 Q. I would like to move on to deal with the question of
29 the standing orders that applied at Balcombe at the time.
30 In paragraph 33 of your statement, you say that there were
31 standing orders which were held by all commanders and the
32 staff headquarters and were available to all staff as
33 required, and you say all relative items were communicated
34 to apprentices on a needs basis at all times. Now, am I to
35 understand from that that the standing orders themselves,
36 in a documented form, were not available to apprentices?
37 A. I really don't know. I think if an apprentice
38 actually asked to look at standing orders they would be
39 readily available.

40
41 Q. In the absence of asking for them, were they otherwise
42 available - in other words, distributed to or made
43 available for --
44 A. No, their company commander - the company office had
45 a set, and in discussions the apprentices all knew that
46 there were standing orders that governed, really, the way
47 that the school operated.

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Q. And you relied on a system of informing orally the apprentices of what the relevant standing orders were for them; is that right?

A. Yes. The chain of command ensured that this was known, that the contents of standing orders were known and had to be obeyed at all levels of the school.

Q. And that was done orally, in other words, by telling the apprentices what the rules were and how it was to operate; is that right?

A. Not in that way, but over the time they absorbed what was required of them by the way that their seniors were dealing with them.

Q. You will accept, of course, Mr McDonald, that youths can often struggle to pay attention and are forgetful of things that you are told; would you accept that?

A. Sorry?

Q. That youths often struggle to pay attention and are forgetful of things that they are told?

A. I'm not quite sure what you are --

Q. What I am suggesting, Mr McDonald, is that a system that relies on the apprentices being told what the rules are and what the procedures are and not having it available to them in writing that they can consult at their own leisure is a poor system; do you accept that?

A. Yes.

Q. And dealing with the question of --

A. During their time there, especially at the beginning, I instituted a system where the junior apprentices, when they came in to Balcombe, were taken away from there to a spot completely away with their own staff for two weeks.

Q. I'm going to come to that in a minute.

A. And during that time, they were informed about what was in front of them and the way they had to act and what the orders required of them. That was one of the things that was given to them at that stage. But then, right through their service, they came up against things and obviously would have to ask questions and they would be told by people what was expected of them.

Q. Let's deal with that now. You deal with that at

1 paragraph 35 of your statement and you explain there, as
2 you have done right now in your evidence, that you
3 introduced this system. Are you aware, Mr McDonald, that
4 that system had been mooted since at least 1967, that is to
5 say, a system of taking the junior apprentices and keeping
6 them separate for a period prior to integration in with the
7 senior apprentices? Are you aware that that had been
8 mooted from much earlier?

9 A. No, I'm not.

10
11 Q. I will show you that. It is at tab 113. It will come
12 up on the screen for you. You will see that this is
13 a report by a court of inquiry at the Army Apprentice
14 School and it is dated 26 July 1967. That was, of course,
15 well before your time, Mr McDonald?

16 A. Yes.

17
18 Q. You will see in paragraph 3 it says:

19
20 *The need to grant more authority and*
21 *responsibility to Apprentice NCOs is*
22 *recognised by the School, and steps have*
23 *been taken to this end by placing the*
24 *control of apprentice parades in the hands*
25 *of the Apprentice NCOs. Formerly parades*
26 *were controlled by the staff.*

27
28 So that's a separate issue. Then it goes on:

29
30 *This is felt to be the first step in*
31 *extending the activity of Apprentice NCOs;*
32 *further steps planned are responsibility*
33 *for occasional kit/barrack room*
34 *inspections, the continuous conduct of*
35 *defaulter parades. These activities will*
36 *be expanded when feasible.*

37
38 What these two paragraphs moot is greater responsibility
39 being placed in the hands of the apprentice NCOs. Was that
40 the position when you were there?

41 A. I don't think so.

42
43 Q. So the apprentice NCOs, for example, taking control of
44 the parades rather than the staff?

45 A. Not to my knowledge.

46
47 Q. Then if we go over the page, in paragraph 7 it

1 references a particular document in which it is stated,
2 "Review of the desirability of further segregation of new
3 apprentice intakes." And then it goes on, you will see
4 there, to say:

5
6 *Separation of Junior Apprentices within*
7 *each existing company would not achieve any*
8 *significant advantage. To be successful,*
9 *a separate Junior Company should be formed,*
10 *separated geographically from the other*
11 *companies.*

12
13 Am I to understand that that is then what you did when you
14 were there, you formed a separate junior company which was
15 separated geographically from the other companies for
16 a period of time?

17 A. I don't remember doing that.

18
19 Q. Would you explain, then, more fully, what it is that
20 you did by way of separating junior apprentices from their
21 seniors for a period of time?

22 A. I didn't do anything to separate them. They were part
23 of the company. They were part of the sections. All the
24 apprentices were distributed to different companies.

25
26 Q. Perhaps we can go back to your paragraph 35,
27 Mr McDonald, of your statement. In the second sentence you
28 say:

29
30 *In July 1973, I conducted an experiment*
31 *with the 28A Musicians intake, which*
32 *involved isolating them from Balcombe (and*
33 *by that I mean physically separating them*
34 *from Balcombe and placing them at*
35 *a separate camp) for a two to three-week*
36 *intensive military training camp.*

37
38 That is what you did; is that not so?

39 A. Yes, I tried that with the junior apprentices that
40 came in in that intake and I thought that was very
41 successful because the staff were able - they had
42 a fortnight in which there would be no interference at all,
43 they would have the attention of the apprentices because
44 there was no other influences there, and they would get to
45 know what was required of them as apprentice soldiers.

46
47 Q. Yes. Did you just do that as a one-off and not pursue

1 it with other intakes?

2 A. No, I took over - I took over the apprentice school
3 in January and I instituted that for the first intake that
4 came in in the mid-year, which was only musicians, because
5 they were the only ones that ever came mid-year, and
6 I tried it out and it was very successful, I thought, my
7 staff thought it was successful, and then I instituted it
8 from 1974 and 1975. When all the apprentices arrived they
9 were - they had no contact at all with the other
10 apprentices for two weeks. They were taken away, it was
11 away from Balcombe, I forget now the places where we went,
12 I think one of them might have been Langwarrin, or
13 something like that; were completely away from everyone.
14 They lived in tents, if need be, and they were given
15 instructions on what was required of them in their new
16 apprenticeship.

17
18 Q. Now, what you say in that paragraph is that this
19 system was designed to settle the new intakes in and, as
20 you put it, "without the influence of the more senior
21 intakes". What influence, in particular, did you regard or
22 understand to be a negative influence from which you were
23 seeking to isolate the juniors?

24 A. Well, I had gone through Duntroon in 1948 in a junior
25 class and we were separated, not physically but there was
26 obviously a difference between us and the other senior
27 people who had been there for one, two or three years
28 before, and they were trying to put their case of,
29 you know, "We are soldiers and you've still got to learn
30 and this is the way you do it." And I wanted to take that
31 away initially for that two weeks where they got the actual
32 ideas from the staff as to what to do without any other
33 blemishes.

34
35 Q. The kind of blemishes you refer to there are
36 identified by you in the final sentence of that paragraph,
37 are they not, and they include bullying and improperly
38 guiding the junior intakes; is that right?

39 A. Yes. Always - I've found in life that in any group of
40 people that come together, there's always a proportion of
41 those people who want to act quite differently to the other
42 people and don't accept that other people have a view of
43 life and that should be respected. It happens in all
44 elements of life and I felt that this was the best way to
45 treat the junior apprentices.

46
47 Q. In adopting that system, you had identified there was

1 a problem to be addressed - not so?
2 A. Yes, well, the staff would have told me how the system
3 operated when I got there and I would have come up with my
4 own judgment. I can't reflect back 50 years to how I felt
5 at that time, but it is obvious that I believed that we
6 needed a better system than what was in vogue at the time.

7
8 Q. And one of the reasons for that, as stated by you
9 here, is because you knew or became aware that there was
10 bullying by senior intakes of junior intakes, is that
11 right, or senior apprentices?

12 A. Well, I think in my time there that I would have been
13 told by the staff what really happened, so I would be aware
14 of it, yes.

15
16 Q. Are you able to recall now, Mr McDonald, what it is
17 that you were told? In other words, just how serious was
18 the problem of bullying that came to your attention then?

19 A. Well, I knew that - not necessarily bullying in that
20 way, but that some people want to do things in a different
21 way, not necessarily the way that we wanted the new junior
22 apprentices to act.

23
24 Q. Are you saying, Mr McDonald, that you were not aware
25 of a problem of physical bullying?

26 A. No, I'm not saying that at all.

27
28 Q. What are you saying with regard to what your awareness
29 or knowledge was of the physical bullying of junior
30 apprentices?

31 A. No, I thought that this was a much better way.
32 Instead of people coming into a situation and being left
33 with the older people who may have had different ideas to
34 what the system required, that we'd take them away and
35 individually, with that group, put them in the picture and
36 what was required of them in their time, their new time at
37 Balcombe.

38
39 Q. Mr McDonald, I understand that that is the system you
40 sought to introduce. I'm addressing a different question.
41 I would appreciate an answer from you, to the best of your
42 ability and that is: what was your awareness or knowledge,
43 at the time you decided to introduce this system, as to the
44 severity and type of bullying that was taking place at
45 Balcombe?

46 A. I can't really give you a direct answer to that, what
47 I knew, but I would have known that - and I would have been

1 informed by my staff who had been there before of how
2 junior apprentices were accepted into the apprentice school
3 by their seniors. I would have been informed about that
4 but I tried to lessen this impact by briefing them on their
5 own.
6

7 Q. You say that you would have been told by your staff
8 how the junior apprentices were accepted into the
9 apprentice school by their seniors. What do you mean by,
10 specifically, "how the juniors were accepted into the
11 school by their seniors"? What is there in that word
12 "accepted"?

13 A. Well, I don't know, but all I can say is that I went
14 to a boarding school for five years before I joined the
15 Army. I joined the Army and went to Duntroon, and I'd been
16 in the Army, I'd commanded my own regiment, I'd been at
17 various schools. I knew how some people reacted to new
18 people coming in, in all aspects, and I wanted to minimise
19 this for the junior apprentices, because they were kids of
20 15 years of age and they really didn't know anything very
21 much about life and what I wanted to do was to make certain
22 that their first instruction, anyway, was given by people
23 who didn't deviate from the way that we wanted them to act.
24

25 Q. Mr McDonald, in your experience in the Army from 1948
26 through to your taking command at Balcombe in 1972, had you
27 come to know of people having the types of experiences that
28 former Balcombe apprentices have given evidence of
29 yesterday and this morning?

30 A. No. The evidence that - I first became aware of the
31 problems that existed back in my time at Balcombe from
32 a letter I got from one of the students, one of the junior
33 apprentices, who wrote to me in 2013, three years ago, and
34 told me about his life and how it had been affected by
35 service at Balcombe and his treatment. That was a shock to
36 me because I didn't really know that it existed in that
37 form, and sitting here the last couple of days and
38 listening to the ex-apprentices who have been brought here
39 to tell their story, I was shocked. I didn't know that had
40 occurred.
41

42 Q. Some of that occurred while you were the commanding
43 officer at Balcombe. You heard the evidence of Daryl James
44 and [CJV]. They were abused at Balcombe when you were the
45 commanding officer. How do you respond to that?

46 A. Well, I knew what happened to Daryl James because
47 Daryl James was the young man that wrote to me and told me

1 about his experiences. And then I spoke with him. My wife
2 was telling me the other day, when this came in, that
3 I spoke to someone for two hours on the telephone and
4 I guess it was Daryl and I met him here at this inquiry or
5 this Royal Commission, but I was really saddened, as
6 I believe everyone here was saddened, to hear the stories
7 that we heard. I'm sure all the people here are shocked at
8 what they heard.

9
10 THE CHAIR: Q. Mr McDonald, I'm sure you are right, but
11 you were the officer in charge of the establishment. You
12 should have known of these problems, shouldn't you?

13 A. I should have known?

14
15 Q. Yes.

16 A. Why do you say that?

17
18 Q. You are the officer in charge. Surely it is incumbent
19 upon you, in the way you exercise that command through your
20 subordinates, to know when there are really serious issues
21 occurring within your establishment?

22 A. I didn't know that these serious issues had occurred.

23
24 Q. I know you say you didn't know, but you should have,
25 shouldn't you?

26 A. Well, everyone's got an opinion on that.

27
28 Q. But you had a responsibility --

29 A. Did you, your Honour, know all that your children did?
30 Were you aware of all the things that they did when they
31 were growing up?

32
33 Q. I am not quite sure it's the same. You had
34 a responsibility for these boys --

35 A. Well, wouldn't you, as a father, have
36 a responsibility?

37
38 Q. Please just deal with my question. You had
39 a responsibility for these 15-year-olds, didn't you?

40 A. Of course.

41
42 Q. And you exercised that responsibility through your
43 subordinate officers, didn't you?

44 A. Yes.

45
46 Q. It was incumbent upon those who had direct contact
47 with these boys to make themselves familiar with what was

1 happening and how they were treating each other, was it
2 not?

3 A. Well, we heard from the people that they never
4 reported any of these things, they kept it to themselves,
5 because if they reported it they would get worse treatment,
6 and I think in all the statements they said that they were
7 asked that, they were asked whether they had reported it,
8 and they said they hadn't. So where would this be
9 available? If someone was treated in this manner and they
10 didn't tell anyone about it, I mean, one of them went to
11 the hospital and said that he fell over jumping a fence.
12

13 Q. When you went to Duntroon was there an initiation
14 process for the younger students by the older ones?

15 A. Yes.

16
17 Q. What did that involve?

18 A. Oh, we just had to do what the seniors wanted us to
19 do.
20

21 Q. What sort of things?

22 A. Oh, dress yourself properly, march - when you were
23 out, you march, you don't walk; you dress yourself; you
24 take notice of what the seniors tell you, and so on, just
25 ordinary things, but they were - they made it quite
26 personal as to how you were to react.
27

28 Q. Was there any form of abuse administered by older
29 students to younger students?

30 A. I don't remember any at Duntroon, no; that's not to
31 say it didn't happen. I'm not sure if it happened or not
32 but not to my knowledge. In fact, what came out here, in
33 this Royal Commission, I was shocked to hear, but I wasn't
34 so shocked because I had been alerted by this letter from
35 Mr James to me three years before.
36

37 MR STEWART: Q. Mr McDonald, you say that you didn't
38 know of these things at the time and we can put that to one
39 side for now, but dealing with your knowledge today, you
40 know and accept now, I take it, that, in fact, severe
41 physical and, in some cases, sexual abuse, was quite rife
42 at Balcombe in your time?

43 A. Well, it appears that some people, some of the
44 apprentices were treated in this way; I don't know how many
45 but I wouldn't think very many.
46

47 MR STEWART: I would like to refer you to a report and

1 I will tender it. It is a report of the Defence Abuse
2 Response Taskforce, "Report on abuse in Defence".

3
4 THE CHAIR: We will make that exhibit 40-019.

5
6 **EXHIBIT #14-019 DEFENCE ABUSE RESPONSE TASKFORCE REPORT ON**
7 **ABUSE IN DEFENCE**

8
9 MR STEWART: Q. In particular, I will ask that you are
10 shown on the screen page 168. You will see that that
11 section of the report is titled "Overview of complaints of
12 abuse in the Army". This report was published in 2014
13 following the complaints that had been collected by DART
14 and in particular, in the middle of the page, if we can
15 scroll down to the paragraph beginning, "The analysis of
16 abuse reported", right in the middle of the screen,
17 Mr McDonald, you will see it says:

18
19 *The analysis of abuse reported to have*
20 *occurred at Army recruit and employment*
21 *training establishments is based on a close*
22 *review of complaints received by 246*
23 *complainants which raised at least one*
24 *plausible allegation of abuse that occurred*
25 *at one of the following locations ...*

26
27 And the first one is the Army Recruit Training Centre, 117
28 complainants, and the second one is the Army Apprentice
29 School, that will be the Army Apprentice School Balcombe,
30 65 complainants.

31
32 In the next paragraph you will see it says:

33
34 *Analysis of the complaints of abuse that*
35 *occurred while complainants were*
36 *undertaking initial recruit and employment*
37 *training in the Army reveals a disturbing*
38 *pattern of abuse. Many complainants*
39 *experienced multiple types of abuse, with*
40 *particularly high rates of harassment and*
41 *bullying as well as physical abuse. This*
42 *frequently occurred on an ongoing basis*
43 *often involving individuals of equal or*
44 *marginally higher rank within the context*
45 *of hazing or initiation practices. This*
46 *was particularly common in complaints of*
47 *abuse at the Army Apprentice School ...*

1
2 And then I will take you to page 175, which deals
3 specifically with sexual abuse. A third of the way down
4 the page you will see a paragraph beginning:

5
6 *The Taskforce received complaints of sexual*
7 *abuse that occurred between the 1950s and*
8 *late 2000s, with the highest rates of*
9 *sexual abuse during the 1970s and 1980s.*
10 *However, there are significant differences*
11 *in complainants' experiences of sexual*
12 *abuse between earlier and later decades.*

13
14 And then the report goes on:

15
16 *In particular, a substantial majority of*
17 *sexual abuse during the 1960s and 1970s*
18 *occurred at the Army Apprentice School.*
19 *This type of abuse was typically*
20 *characterised by hazing or initiation*
21 *practices carried out by groups of more*
22 *senior apprentices against newer intakes,*
23 *and often carried out in addition to other*
24 *forms of harassment and bullying or*
25 *physical abuse.*

26
27 A. Mmm.

28
29 Q. What I'm suggesting, Mr McDonald, is that the evidence
30 seems to suggest that it was widespread and regular, this
31 form of physical and sexual abuse at Balcombe.

32 A. I reiterate, I wasn't aware of it. Had I been aware
33 of it, those people would not have stayed any longer with
34 me at Balcombe.

35
36 Q. You have explained that you were not aware of it
37 because reports were not made, but the reality is,
38 of course, it was you who oversaw a system in which reports
39 were not made - not so?

40 A. I wasn't aware of it, no.

41
42 Q. You would accept that the system failed - it failed
43 those boys who were abused in this way? You may not have
44 been aware of it but the system that you were in charge of
45 failed those boys?

46 A. Yes, well, obviously, it failed some of the boys.

47

1 Q. You would accept that it was a failure in the
2 management of the Army Apprentice School at Balcombe that
3 allowed these things to happen?
4 A. I couldn't say that, really, because everyone was
5 aware that we had to run a fair and complete system which
6 made junior boys and girls into adults and be accepted as
7 soldiers.
8
9 Q. But we know, in truth, that for a significant number
10 of those boys the system in fact failed them; it was not
11 fair, was it?
12 A. It's obvious that it failed some of those boys, yes.
13
14 Q. And you accept that that is then a failure in the
15 management of that system, that that was allowed to happen?
16 A. Well, no-one would want that to happen but it
17 obviously did.
18
19 Q. You will have seen from what the DART report said that
20 there were widespread practices of initiation or hazing.
21 You have said you were not aware of the severity of
22 physical and sexual abuse. Putting that to one side,
23 I take it you were aware of some practices of initiation or
24 hazing, at least to the extent that you yourself had
25 experienced at Duntroon?
26 A. Yes.
27
28 Q. And you were aware at least that there were some
29 practices of initiation or hazing taking place by senior
30 apprentices on or of junior apprentices at Balcombe when
31 you were the commanding officer?
32 A. Yes.
33
34 Q. And to your knowledge, what were those practices? In
35 other words, you have said you don't have knowledge of the
36 severe physical and sexual abuse: what did you have
37 knowledge of?
38 A. Only what my staff told me.
39
40 Q. What was that?
41 A. Well, I can't remember back.
42
43 Q. Your evidence is that you can't remember what the
44 nature of the initiation and hazing was that you were aware
45 of?
46 A. I would be aware when my staff told me and obviously
47 if there had been serious events, I would have taken them

1 on notice and done something about it. The fact that
2 I didn't do - I didn't - sorry. There is a case that was
3 brought to my notice for this Commission about five
4 apprentices attacking one of the junior apprentices and
5 I think it went on to say that it was dealt with and
6 I'd recommended that they be discharged from the Army and
7 within seven days they were discharged. So that anything
8 that I - if I thought and I heard of cases which didn't
9 satisfy my view of how things should be done then I would
10 take action.

11

12 Q. When one case came to your attention, did that not
13 suggest to you that there may be others that hadn't come to
14 your attention?

15 A. Well, I suppose you could say that but I wasn't aware.

16

17 Q. Did you take any steps to find out whether the type of
18 case that did come to your attention wasn't more
19 widespread?

20 A. I think I would have talked and discussed this with my
21 staff and if nothing had come forward, there wouldn't be
22 anything to further on.

23

24 Q. The final aspect I want to address with you briefly,
25 Mr McDonald, is the question of supervision. You deal with
26 that in paragraph 34 of your statement. That will come up
27 for you. You say:

28

29 *A 24 hour Duty Officer was present in each*
30 *company.*

31

32 Of what rank would the duty officer be?

33 A. I can't answer that; I don't remember.

34

35 Q. But it would be a junior ranking Army staff member?

36 A. The duty officer doesn't really mean that it's an
37 officer rank, it would have been a duty member, but they
38 are called duty officers.

39

40 Q. Yes, but I'm assuming that you, as commanding officer,
41 for example, did not take duty as a duty officer?

42 A. I would not?

43

44 Q. Take duty as a duty officer?

45 A. I'm not sure what you --

46

47 Q. I am trying to understand what you mean in

1 paragraph 34 when you say:

2

3 *A 24 hour Duty Officer was present in each*
4 *company.*

5

6 Firstly, let's separate that out. When you say duty
7 officer, you don't mean an apprentice, I take it; it's not
8 an apprentice NCO?

9 A. Yes. It would have been a member of the staff was on
10 duty for the whole 24 hours and would conduct visits around
11 the company area, hopefully.

12

13 Q. My question is what rank would that member of staff
14 typically be? In other words, which ranks actually had to
15 serve that function?

16 A. I would say it would be not less than a sergeant.

17

18 Q. And there was one per company, you say?

19 A. Yes, each company. Well, that was the requirement by
20 the Army, that this system was to be in vogue at Balcombe.

21

22 Q. Then you say:

23

24 *A Duty Log was maintained in which*
25 *incidents were reported to Headquarters at*
26 *the end of each duty.*

27

28 Is that a log that you inspected?

29 A. Things would be - if there was something in there that
30 needed my attention, it would be brought to my notice by my
31 staff.

32

33 Q. So if there had been an incident that had either been
34 reported or discovered by the duty officer, then it should
35 be reported in the logbook?

36 A. It would be reported in the log, yes.

37

38 Q. Are you aware that the Army has been unable to locate
39 these logbooks from Balcombe and produce them to the
40 Royal Commission? Are you aware of that?

41 A. No, I'm not aware of that.

42

43 Q. Are you able to say, in your time, what happened to
44 the logbooks once they were full or no longer needed for
45 immediate requirements?

46 A. I have no idea.

47

1 Q. You don't know what system of archiving or storage
2 there was?

3 A. No.

4

5 Q. Several of the witnesses have given evidence of the
6 extent of supervision and I would like to refer you to just
7 a few of those. Mr Sparreboom, at paragraphs 11 and 12 of
8 his statement, that will be brought up for you, that's
9 tab 10 of the statements bundle, says, and I will start
10 reading it while it comes up:

11

12 *The Apprentice --*

13

14 A. I haven't got it here.

15

16 Q. It will come in a minute, but while I'm waiting I will
17 read it anyway.

18 A. All right.

19

20 Q. There it is:

21

22 *The Apprentice Corporals and the Apprentice*
23 *Sergeants slept in rooms attached to the*
24 *barracks. These Apprentice NCOs were our*
25 *immediate supervisors and we were*
26 *answerable to them ...*

27

28 Those, obviously, were apprentices perhaps in their second
29 year, would that be right?

30 A. Yes.

31

32 Q. The next paragraph:

33

34 *We very rarely saw the regular army*
35 *non-commissioned officers. The regular*
36 *army staff were only around from 9am to 4pm*
37 *during weekdays. There was no real*
38 *supervision in the barracks by the*
39 *regular army staff other than the daily*
40 *inspections.*

41

42 That was Mr Sparreboom's experience. What do you say to
43 that?

44 A. Well, that's a soldier's view. I don't think that
45 that's necessarily the way that it happened.

46

47 Q. He clearly didn't experience or feel that there was

1 adequate supervision?

2 A. Yes.

3

4 Q. And Mr [CJC] said - and for those following, it's at
5 paragraph 30, but I can read it out for you, Mr McDonald -
6 that a staff member would do nightly patrols of the area -
7 that's the accommodation area - but this was rarely
8 noticed. He had a similar experience. Do you see that?
9 It is the last sentence in that paragraph 30.

10 A. Paragraph 30?

11

12 Q. Yes.

13 A. Yes. I can imagine that exactly happened.

14

15 Q. Finally, I will show you [CJV] --

16

17 THE CHAIR: Q. I am sorry, you imagine what exactly
18 happened? What do you say exactly happened?

19 A. Nobody ever approached me about this and honestly,
20 given the environment, I wouldn't have expected anyone to.
21 "A staff member would do nightly patrols of the area but
22 this was rarely noticed." I just agree with - I don't see
23 anything wrong with what he said there.

24

25 Q. You mean --

26 A. That's what an individual apprentice can remember.
27 I'm not sure that what one person could remember would
28 really detail what happened in the whole company or the
29 whole battalion.

30

31 THE CHAIR: I think there is more.

32

33 MR STEWART: Q. Let me take you to [CJV]'s statement at
34 paragraph 16. It is on page 3. You will see that he has
35 a heading there, "Supervision in the barracks and the
36 apprentice hierarchy". Remind me, Mr McDonald, Mr [CJV]
37 commenced at Balcombe in January of 1973, so his first year
38 as an apprentice was 1973, which was one of the years in
39 which you were the commanding officer. He says then in the
40 first sentence:

41

42 *Staff members never stayed in the barracks*
43 *with the apprentices during the night.*

44

45 That's correct, isn't it? I am just dealing with the first
46 sentence, Mr McDonald.

47 A. What is the question?

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Q. The staff members did not stay in the barracks with the apprentices at night?

A. No.

Q. Then he goes on and he says:

They slept in their own officer barracks or off base with their partners if they were married.

A. Yes.

Q. That's correct?

A. Yes.

Q. And he says:

The only time I saw a staff member in the barracks was at around 9pm, when a duty sergeant would walk around and order, "lights off".

Now, firstly, the duty sergeant who came around to order lights off, that would be the duty officer you referred to earlier; is that right?

A. Mmm.

Q. And you see he says that that is the only time that he saw the duty officer, was at the time of lights out and not thereafter?

A. That's right, but you have to understand that apprentices, when lights out occurred, weren't allowed to move out of their hut or anything of that nature. They were only allowed to go to the toilet or something of this. That's - so they wouldn't know what was really happening outside their hut.

Q. I think what is being suggested is exactly the reverse, in the sense that the duty officer didn't know what was going on inside the huts when he should have done, because Mr [CJV] goes on.

A. Exactly, I can understand that, but I would suggest that if the duty person had heard a noise inside the hut after lights out, he would have gone in to see what was happening.

1 Q. That depends on two things, doesn't it, Mr McDonald.
2 One, it depends on just how regularly he was patrolling as
3 to whether he was likely to hear it - not so? Would you
4 accept that?
5 A. Exactly.
6
7 Q. And secondly, it depends on how many apprentices he is
8 responsible for and you have said it is a whole company,
9 one duty officer per company?
10 A. Yes. Well, that would be three huts, probably next to
11 each other.
12
13 Q. And if he's on duty but sitting somewhere else and not
14 patrolling, he's not going to hear anything, is he?
15 A. Yes, but if I was - I'm just thinking if I was one of
16 those people in the senior class doing something like this
17 to a junior classman, I would make certain that there were
18 no duty people in that vicinity at the time; that's one of
19 the things I think you would do. I mean, they are not
20 silly. They know that if they do something and it is found
21 out, that they will be punished, because it's not allowed
22 by orders.
23
24 Q. We know that this happened and happened to the extent
25 that it did. It suggests, doesn't it, that the duty
26 officer --
27 A. Well, yes. I mean, I've heard all this --
28
29 Q. Mr McDonald, let me finish my sentence, then it will
30 be your turn. The fact that these things happened and they
31 happened to the extent that they did suggests that the duty
32 officer system of supervision failed; it was inadequate?
33 A. You could say that.
34
35 Q. It's inevitable, isn't it; you have to accept that?
36 A. It failed in that instance, yes, but does that mean
37 that the whole system failed?
38
39 Q. Well, I suggest it does, yes. One instance like this
40 is too many, isn't it?
41 A. Mmm. That's life, I'm afraid.
42
43 Q. And we know there were many instances?
44 A. You say?
45
46 Q. We know there were many instances that --
47 A. Well, do we know that there were many? We've heard

1 from five witnesses.

2

3 Q. Well, I showed you the DART report which gave
4 substantial numbers.

5 A. Well, if he said that, I suppose he was aware of that,
6 but we weren't aware of that.

7

8 Q. I suggest the system of supervision was inadequate and
9 it let --

10 A. Well, you could come to that view, yes.

11

12 Q. Are you saying you don't accept that view?

13 A. What I'm saying is that had it come to our notice, we
14 would have done something about it.

15

16 MR STEWART: I have no further questions, your Honour.

17

18 THE CHAIR: Does anyone else have any questions?

19

20 MR FEHRING: Yes, your Honour.

21

22 THE CHAIR: Many?

23

24 MR FEHRING: Three or four topics.

25

26 THE CHAIR: We have been here for an hour and a half.
27 I think we might take the short adjournment now and start
28 again after that. Yes, we will adjourn.

29

30 **SHORT ADJOURNMENT**

31

32 MR STEWART: I am sorry, your Honour, I'm not able to
33 explain what has happened to the witness.

34

35 MS McLEOD: Apologies, your Honour.

36

37 THE WITNESS: I'm sorry, your Honour, that I wasn't here.

38

39 THE CHAIR: That's all right.. it's not your fault..
40 don't worry.

41

42 **<EXAMINATION BY MR FEHRING:**

43

44 MR FEHRING: Q. Ian Fehring, Mr McDonald, I appear for
45 a number - four - of the witnesses who gave evidence
46 yesterday as to their experience at Balcombe.

47

A. I find it hard to hear you.

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Q. Ian Fehring is my name and I appear for four of the witnesses yesterday who gave evidence as to their experiences at Balcombe; is that clear?

A. Yes. Thank you.

Q. My questions, by and large, go to the question of your knowledge and the question of supervision, but there are a couple of areas I wish to cross with respect to that. First of all, in the two years before you became the commander, where were you stationed before you went to Balcombe?

A. There is a list in the records here of my service. I'm not sure if I was a commander of the Signal regiment.

Q. Have you got a location?

A. At Cabarlah in Queensland.

Q. That's sufficient.

A. I'm not quite sure, I would have to have a look at the service --

Q. If you are not sure, that's quite all right, I was just asking if you may have remembered, you may not, it is a very long time ago and I accept that. When you were transferred --

A. Oh, no, I'm sorry, I think I was the chief instructor of the tactics wing at Canungra, before I came there.

Q. When you were either to be transferred or it had been decided that you were going to Balcombe, were you briefed or given advice or any instructions as to what your role was in particular once you arrived at Balcombe?

A. I can't recall, but I suggest to you that we all knew that when we went to a new posting, that we were informed of what was required, if there were any problems, what you had to look for, and then we always had access to the outgoing commander, so I would have talked with, in particular, Max Johnson, who is a particular friend of mine and was - he went to Duntroon with me. He was the former CO and I would have certainly been briefed by him and I would have asked him all the questions in the world so that I was pretty well briefed before I went there.

Q. Can we take it from that that there was certainly no advice or instructions or directions that there might be a problem at Balcombe involving either physical or sexual

1 abuse, or otherwise you would probably remember that sort
2 of advice; correct?

3 A. No, not correct.

4

5 Q. So you might have been advised that Balcombe had
6 a problem or could have a problem, at least, with physical
7 or sexual abuse and you wouldn't have thought that is out
8 of the ordinary?

9 A. I wasn't conversant - I'm trying to think back, but
10 I wasn't conversant, certainly not now, with sexual abuse.
11 I don't believe that anyone who carried out any of those
12 actions would have been accepted into the Army anyway, let
13 alone be at Balcombe, and to go on with that, that the
14 young fellows coming in and the young girls coming in to
15 Balcombe for training as a soldier, it wouldn't be known
16 what - how they reacted, so - but sexual abuse, it wasn't
17 known in those days, not to the - certainly I didn't -
18 I didn't believe that that could happen anywhere.

19

20 Q. At the time that you became the commander at Balcombe
21 were you aware of or did anyone bring to your attention the
22 Rapke Report about what had occurred at Leeuwin in
23 Western Australia?

24 A. I can answer that: definitely no.

25

26 Q. No-one brought to your attention that some year or
27 18 months previous to you taking command of a facility that
28 involved young boys and children, that there had been
29 events in Western Australia which required an inquiry by
30 a County Court judge in Victoria as to what had happened?

31 A. I can't recall anything.

32

33 Q. Shortly after you took over the command, in March of
34 1973, there was an incident involving one of the recruits,
35 Stephen Gower; do you remember that?

36 A. I don't remember the incident, no, but I could - if
37 I saw all the evidence, I could probably then recall it.

38

39 Q. You make reference to it in your statement --

40 A. Fair enough.

41

42 Q. I'm just going to assist you. Paragraph 44. Could
43 that be put on the screen, please. You were taken to this
44 just before the break, but do you see the latter part of
45 that paragraph, about three lines from the bottom of
46 paragraph 44?

47 A. Yes.

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Q. Once it came to your attention that there had been an assault, what investigations did you put in place, first of all, as to the assault?

A. I don't remember what I did.

Q. Did you take or put in place any investigations as to whether or not this was a one-off event or might represent part of ongoing behaviour by senior recruits?

A. I can't recall, but I'm sure that I would have then talked to all my staff saying how important it was to try to find these things out before they become of this nature - that people who are liable to go off the rails are identified before they make any damage and I'm sure the staff would have got that message, that they had to look out for that. Then you just waited and hoped that everything of that nature would be reported to you; that it would be found by the staff. I'm sure that anyone that came up to me for those sort of offences, the same thing would have happened. I would have recommended their discharge as not suitable to (a) be an apprentice, and (b) to be a soldier.

Q. The discharge of these five recruits occurred on 22 March, it would appear, but certainly by March you as the commanding officer had to have been aware that there was a problem which required investigation; would you accept that?

A. Yes.

Q. And steps put into place to ensure that that sort of behaviour stopped; do you accept that?

A. I accept that.

Q. What steps did you put in place?

A. I can't recall.

Q. Could the witness be shown tab 92, 001.0515. Just while that is being found, Mr McDonald, I will tell you what it is and then I will give you a chance to read it. It is a letter, which you wrote to parents of the intake of that year, of 11 May 1973.

A. It has gone off.

Q. I think they are trying to enlarge it so we can all --

A. I am sorry, I haven't got it here.

1 Q. Yes. I think it is about to come back on the screen
2 in a second.

3 A. I see. When anything of a serious nature occurred
4 with an apprentice, because I was virtually the apprentice
5 master, I would notify the parents.

6

7 Q. There is just a small glitch. I think you have a hard
8 copy. That is fairly legible; it is on the screen as well,
9 if that would help.

10 A. Yes, that's a - I think that's a pretty fair letter.

11

12 Q. I want to take you to paragraph 3 of the letter. It
13 says:

14

15 *The settling in period did not pass without*
16 *incident as you are well aware. That*
17 *incident is hopefully the first and last*
18 *for the year. All apprentices are now*
19 *completely settled into their new*
20 *environment.*

21

22 This is a letter written to all parents of intakes in that
23 year; correct?

24 A. Sorry?

25

26 Q. This is a letter which you signed and sent out --

27 A. Yes.

28

29 Q. -- to the parents of all of the intake for that year,
30 sending them their report?

31 A. Yes.

32

33 Q. So this is sent to every parent who had a child at
34 Balcombe in that year --

35 A. Yes.

36

37 Q. -- who had just come in in January in that intake?

38 A. Yes.

39

40 Q. And you make reference to the incident occurring?

41 A. Made reference to?

42

43 Q. An incident occurring?

44 A. Yes. Well, that was the one that - floating around
45 here, that five apprentices were disciplined and then
46 discharged within a week.

47

1 Q. Thank you, that's what I was just about to clarify.
2 A. I mean, when I say - that was in the papers, so
3 parents must have come across it, I would think, if they
4 had a young son at the apprentice school and they read that
5 in the paper.
6
7 Q. Was there any other communication about the incident,
8 being Mr Gower's hospitalisation as a result of assault,
9 other than this letter to parents of intakes in that year?
10 A. What, in 1973?
11
12 Q. Yes.
13 A. Yes, well, anyone who was - that had a problem, we
14 informed the parents.
15
16 Q. But what about the parents of other intakes, other
17 boys who were not assaulted but simply happened to be in
18 the school in this year, did you notify them of the event
19 and what steps were taken?
20 A. All apprentices and their parents were treated in the
21 same way. It didn't matter what intake they were in. If
22 it was a report on their progress, everyone would have
23 a report.
24
25 Q. I will put this question to you then. How could you
26 have any confidence, when you wrote this letter to all of
27 these parents, that the incident "is hopefully the first
28 and the last for this year"?
29 A. Well, I hoped that when something as serious as that
30 occurred, that we, in the apprentice school, from me down,
31 would take steps to see that the incident didn't occur
32 again; take steps to ensure that the apprentices were safe
33 from this type of conduct. I'm sure that we all did
34 everything that we possibly could as a result of that
35 incident to ensure this.
36
37 Q. Did you become aware at any stage in March or April,
38 at around this time in 1973, that the apprentices who were
39 discharged claimed that they had been brutalised and
40 tortured when they were juniors? Did you become aware of
41 that assertion?
42 A. I can't recall, but - I don't know.
43
44 Q. This is a slightly different topic. In the time that
45 you were commander at this facility, did you become aware
46 of what has been described as "crab night"?
47 A. I'm sure I did. I'm sure I did.

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Q. Did you understand that when a year or recruits were about to leave Balcombe, they had a function which became known as crab night?

A. Right, mmm.

Q. Did you understand that on those occasions when the crab night occurred, there would probably be some boisterous behaviour and probably a fair bit of alcohol consumed?

A. I would have believed that, yes.

Q. And that there was a risk that, in that situation, inappropriate behaviour, if not physical assaults, might occur on junior recruits?

A. I'm sure all our staff would have been aware of that and they would have been told, if not by me, by their commanders, that they were to look out for any signs of trouble and prevent it if they could, but obviously, this was something 100 days to go that they - it always occurred, 100 days to go, and this was accepted.

Q. Can you just explain which part was accepted, that they have a crab night or that they engage in at least physical violence, if not worse, to other recruits?

A. I wouldn't accept that, no.

Q. So you accept that one of the activities is a crab night, which is part of the routine or the customs that exist, which each intake would go through; when they got towards the end of their year, they had this function?

A. Yes, 100 days to go.

Q. 100 days to go. And that there was a risk that in that evening's activities, inappropriate behaviour or violence might occur to other recruits. Do you accept that that is part of the evening?

A. We hoped that that wouldn't occur and the staff would have been reminded that they were to look out for any signs of this and take steps to ensure that it went smoothly.

Q. Did you take any steps to inform those recruits who were about to participate that it was completely inappropriate and wrong for them to engage in physically abusive behaviour to other recruits?

A. That would be my thought, at this stage.

1 Q. Is that a question of recollection again, or do you
2 say you don't know whether you did or you didn't?
3 A. I'm sorry?
4
5 Q. Is that a question of whether you can't remember what
6 happened on these nights?
7 A. I can't remember what happened at those times, no.
8
9 Q. Could you be shown, please, paragraph 47 of your
10 statement? Do you have that there, Mr McDonald?
11 A. I have read through these things that I said at the
12 time that I wrote it and that reflects what I know.
13
14 Q. You have been asked some questions about this but
15 I just want to try to clarify what your answer was. It
16 would appear that while you were the commanding officer,
17 you had heard, or knew about, what is described as the
18 "royal flush", the "running the gauntlet" and "scrubbing" -
19 that's paragraphs (b), (c) and (d). Just have a look at
20 them to ensure that that is correct.
21 A. Yes, what I've written there I agree with.
22
23 Q. I am not sure if I understood, and that's what I'm
24 seeking some clarification about, is how it is that you
25 knew, as the commander, that these practices existed at
26 Balcombe?
27 A. I would have been informed by my staff that these
28 things had occurred in the past or could occur, but
29 I wasn't - I didn't know during my time there of those
30 three things, of those occurring. They were never reported
31 to me.
32
33 Q. So was your, if you like, policy operandus that if
34 a complaint had come forward about these sorts of
35 activities, then you would have acted but not otherwise?
36 A. I would have acted, absolutely.
37
38 Q. But only if you got a complaint?
39 A. Well, how else would you act, react, if you didn't
40 have a complaint? You wouldn't know that it occurred.
41
42 Q. But you did know that this was happening?
43 A. No, that - I did know that it had occurred during an
44 apprentices's year at Balcombe at some stage.
45
46 Q. Then what steps did you take to ensure that it was not
47 continuing to happen, other than formal complaints being

1 made?

2 A. Well, the staff would have been made well aware by me
3 and my subordinates that this was never to occur.

4

5 Q. It is one thing to give a direction to the staff
6 saying it is never to occur, but what steps did you take to
7 try to prevent the behaviour occurring?

8 A. Well, to point out that - at all levels of command to
9 point out that these things weren't tolerated and that -
10 well, they wouldn't be tolerated. If it was a minor
11 offence, they would face discipline. If it was a nasty
12 offence, a bad offence, or whatever you like to call it,
13 that they would be probably discharged from Balcombe and
14 they may even be discharged from their obligation to the
15 Army. And they would be reminded of that at all times.

16

17 Q. You say people would be reminded of this at all times,
18 but in what way would they be reminded of these
19 inappropriate practices?

20 A. Well, in each platoon there was a Regular Army
21 sergeant whose job it was to look after those people, to
22 inform them of what they could do, what they shouldn't do,
23 and what Army life was all about. That was their job.
24 They had to know these people, know their background, get
25 to know their background and the way that they acted at
26 Balcombe, and keep them on the right path. That was their
27 job, that was their task, and they reported to their
28 company commander, and the company commander, if he
29 couldn't deal with the problem, he passed it on to me. And
30 I had staff officers who - one for training and one for
31 administration - looked after those particular matters at
32 the apprentice school. They gave me briefings and accepted
33 briefings from me on how they may react if this occurred.

34

35 Q. Could the witness please be shown what is exhibit 15,
36 the statement of Mr James.

37 A. Which one?

38

39 Q. Just a second, it will come up. Could we go down to
40 paragraphs 12 and 13, please.

41 A. What about David?

42

43 Q. Just a second. On the screen there you will see,
44 Mr McDonald, a part of Mr James's statement. Do you have
45 that there on the screen in front of you?

46 A. Yes.

47

1 Q. Would you take a moment just to read paragraphs 12 and
2 13. This is what Mr James said he was told by
3 a Sergeant Carter about crab night.
4 A. Mmm. I've got no problem with that.
5
6 Q. So this is the sergeant warning relevant recruits
7 under his responsibility about the upcoming crab night and
8 what steps they should take to protect themselves. Do you
9 accept that?
10 A. Yes.
11
12 Q. And that this person in authority was suggesting that
13 they should effectively lock and barricade themselves
14 inside their barracks because there was a risk that they
15 might be harmed or otherwise treated very badly that
16 evening; correct?
17 A. Correct.
18
19 Q. And do you say that's the best the Army could do to
20 look after these boys on this particular night?
21 A. I can't remember what steps I took with my staff at
22 that particular night, but I'm sure I wouldn't have just
23 let it occur without having my staff be a part of an
24 exercise to stop any infringements that might get out of
25 hand. I'm sure I would have taken steps to see that this
26 was minimised, that any problems were minimised, but you
27 couldn't stop crab night. 100 days to go is something that
28 occurs and you would accept that such a thing would occur.
29
30 THE CHAIR: Q. What did you expect to happen on
31 crab night?
32 A. There would be a lot of drinking and there would be
33 a lot of talking amongst the senior class, the ones that
34 were graduating, what they were going to do, how they were
35 going to do it, what they had done in their time at
36 Balcombe, and I imagine that some of them would have had
37 too much to drink and therefore, they could be a problem,
38 and I'm sure that we put in place steps to minimise this.
39
40 Q. This suggests that the sergeant thought that the
41 problem could be damage to the other boys in the
42 establishment, doesn't it?
43 A. Well, yes. Yes.
44
45 Q. Was it tolerable to have a regime where you
46 anticipated that that would happen?
47 A. No, that that might happen.

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Q. Well, might happen, and that as a consequence, the protection was for these boys to lock themselves away? Was that an acceptable way to manage the --

A. No, this is what the sergeant told the apprentices to do.

Q. Precisely.

A. But that - the sergeant didn't do that from my - it didn't come from my order. It came from something he had probably seen, I don't know Sergeant Carter, how long he'd been, but he'd probably been at the apprentice school when 100 days to go was celebrated the previous year, or something, and he was just saying to the young fellows, "Take precautions because they could get out of hand, and the best way that you can do it is to lock yourselves in."

Q. Shouldn't the system have been that the sergeant was obliged to report to a superior and that action should be taken at a superior level to ensure that things didn't get out of hand?

A. I don't know that I could do much more. What would you suggest?

Q. There might be a control put on the amount of alcohol that might be consumed, that's one starting point.

A. Well, I'm sure that that was - that did occur, but that doesn't mean that people don't have too much to drink; it depends on the person.

Q. The second thing you might do is put in place Regular Army people to supervise those who might get drunk and stop them doing violence to other members of the establishment?

A. I'm sure that was implemented.

Q. How could that be implemented if the sergeant was saying, "You had better go and lock yourselves away"?

A. Because that's an additional precaution that he would have told the young fellows, there's nothing else they can do but lock themselves away. I don't see any problem with that.

Q. It presents a picture that there's part of this establishment where there's just drunken rampaging violence that has the potential to occur on this night, that's the picture one has?

1 A. That it could happen?
2
3 Q. Yes.
4 A. They were hoping that it didn't happen.
5
6 Q. And obviously, if they thought it could happen, it's
7 something that must have happened previously, isn't it?
8 A. Yes.
9
10 Q. Do you think that's the proper way to care for young
11 boys in training?
12 A. Other than cancelling the night, what would you do?
13
14 Q. Well, you were in charge?
15 A. Well, I was in charge and I accepted that they were
16 able to have this hundred days to go.
17
18 Q. Even with the risk of drunken violence to others?
19 A. And - no, that we would do our best and we hoped that
20 nothing would go the wrong way. And we would take all the
21 precautions we could to ensure that if it did start to go
22 that way, that there were staff in place to look after it.
23
24 MR FEHRING: Thank you.
25
26 **<EXAMINATION BY MR O'BRIEN:**
27
28 MR O'BRIEN: Q. My name is O'Brien and I appear for
29 a witness in these proceedings by the name of [CJU]. He
30 gave evidence yesterday afternoon; do you recall that?
31 A. Yes, I was here.
32
33 Q. I am sorry, he gave evidence this morning and
34 of course Mr James gave evidence yesterday afternoon; do
35 you recall that?
36 A. I recall all the - the three - the five boys that
37 talked.
38
39 Q. Good.
40 A. The five young men that talked.
41
42 Q. I want to ask you about some commonality in their
43 evidence. It relates to this laundry operator by the name
44 of Bert. Did you hear about the evidence from both of
45 those witnesses in relation to Bert?
46 A. Only from the evidence.
47

1 Q. Yes. So you don't personally remember him or recall
2 him in your time?
3 A. No.
4
5 Q. It appears that Bert had a paedophilic attraction to
6 young boys that was commonly known about within the
7 apprentices, at least in 1972. Do you understand that to
8 be Mr James's evidence?
9 A. I do.
10
11 Q. It appears that Bert was able to continue through from
12 1972, where that was commonly known amongst the
13 apprentices, right through to 1978, when he abused my
14 client, Mr [CJU]. Do you understand that?
15 A. Not quite, no.
16
17 Q. Well, he was there in 1972?
18 A. Yes.
19
20 Q. It was commonly known amongst the apprentices that he
21 was a molester of boys?
22 A. Yes.
23
24 Q. He was still there in 1978 when indeed he molested my
25 client?
26 A. Yes. As a matter of fact, I asked someone here on the
27 staff if they knew how long he'd been there, when he left,
28 because he was still there for two of the young men that
29 talked; so that was from '72 to '77.
30
31 Q. Yes, six years, and Mr James gave evidence that he
32 thought he might have been there for decades?
33 A. I don't know. I wasn't aware of this particular
34 person or of the things that he did.
35
36 Q. I want to ask you this: if it was commonly known
37 amongst the apprentices that this fellow, Bert, was a child
38 molester, why wasn't it known by those supervising him,
39 that is, by those supervising the boys?
40 A. That's something we would have liked to have known,
41 but obviously we didn't know, because I'm sure, had would
42 known, that person would have moved on very swiftly.
43
44 Q. Well, it demonstrates, does it not, a serious
45 disconnect between the children and those meant to be
46 supervising them, doesn't it?
47 A. It does, but it doesn't take into consideration the

1 other events. I mean, how would anyone necessarily know
2 about this on the staff?

3

4 Q. The evidence is in this Royal Commission from
5 Mr James, uncontradicted, and obviously corroborated by the
6 fact that it happened all these years later, that this man
7 was commonly known on a widespread basis amongst the
8 apprentices as a child molester, but that information
9 didn't seem to get up to your level at all, did it?

10 A. It didn't, no.

11

12 Q. And we don't know whether it got into any level
13 between you and the children, do we?

14 A. No.

15

16 Q. And you say - and you have accepted - that it
17 represents a serious disconnect in the supervision of
18 children and the children themselves; you agree?

19 A. Yes.

20

21 Q. Could it also suggest that there was a tolerance to
22 this type of behaviour by staff, by elders on children?

23 A. I know now but I wouldn't have known then.

24

25 Q. This man was able to stay on for so many years,
26 perhaps decades, with such common knowledge amongst the
27 apprentices that he was a child molester. Doesn't that
28 suggest that there is possibly a level of tolerance, either
29 at your level or below, to that sort of carry on and that
30 type of activity towards children within your care?

31 A. I can't answer for everyone else, but I didn't know
32 about it and I'm sure my staff didn't know about it or they
33 would have informed me.

34

35 Q. You don't know that because you don't know what came
36 up and you don't know what information filtered from the
37 apprentices --

38 A. No.

39

40 Q. -- which was commonly known, to you, do you?

41 A. That's right.

42

43 MR O'BRIEN: I have nothing further.

44

45 THE CHAIR: Ms McLeod, do you have anything?

46

47 MS McLEOD: Thank you, your Honour.

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<EXAMINATION BY MS McLEOD:

MS McLEOD: Q. My name is McLeod and, as you know, I appear for Defence. You say no case of sexual assault was ever brought to your attention, but you were taken to a passage in your witness statement where you mention an assault that resulted in the discharge of five boys. Do you actually remember that event?

A. No, but I've been reminded, having read the - read in to the - when I was writing my statement for here and what I've heard at the Commission in the last two or three days.

Q. We are looking for the Ringtail references, but if I can just hand these two letters to Counsel Assisting, and could I ask that Mr McDonald be shown those two letters, please. I've preemptively redacted some of the names in anticipation that the Commission might wish to take that course, your Honour, but of course that is a matter for you. Mr McDonald, could I invite you, first, to read the letter of 8 March 1974 to yourself.

THE CHAIR: Are these letters in the bundle at all?

MS McLEOD: They are not in the tender bundle, your Honour.

Q. Mr McDonald, looking at that letter of 8 March 1974 first --

THE CHAIR: Can we have them on our screens, please?

THE WITNESS: Could I give you a copy?

THE CHAIR: No.

MS McLEOD: Q. You hang on to yours, Mr McDonald, if you don't mind. This appears, Mr McDonald, to be a letter that you have written to a parent of an apprentice in relation to an assault that came to your attention resulting in his discharge. Do you see that?

A. Yes, I do.

Q. Now have a look at the second letter, October 1974.

THE CHAIR: Just before you do that, what is the balance of that letter? Is there anything more in the letter?

1
2 MS McLEOD: "I'm sorry to pass on to you disturbing news"?

3
4 THE CHAIR: Yes.

5
6 MS McLEOD: It is not on your screen yet, your Honour,
7 yes.

8
9 THE CHAIR: It doesn't finish on our screens. Can we see
10 the rest of it?

11
12 (Balance of letter shown on screens)

13
14 THE CHAIR: Yes.

15
16 MS McLEOD: Q. Yes. And the second letter
17 is October 1974, if I could just ask that the letters be
18 swapped over. There is a reference to a further assault,
19 a letter to a parent, it appears, from Major Knightbridge -
20 do you see that at the foot of the page?

21 A. I can see that.

22
23 Q. This letter is not from you, but it refers to the
24 discharge of the offender, and also in the last paragraph
25 notes:

26
27 *Incidentally, all of the boys have been*
28 *warned on a number of occasions that any*
29 *acts of violence may result in an*
30 *application to a higher authority for their*
31 *discharge.*

32
33 Can I ask you first, Mr McDonald, when you have finished --
34 A. Yes.

35
36 Q. -- do you remember these two incidents?

37 A. No, I don't. Obviously, I was absent from the
38 apprentice school at this time, because Major Knightbridge
39 has assumed command and he would be acting as I would have
40 acted.

41
42 Q. I see. You may have just started answering my
43 question, but my question was what action would you have
44 taken if you learned of assaults on the base?

45 A. Exactly the same as what is said in this letter here,
46 telling the parent that it will not be tolerated and the
47 way to resolve this is possibly to discharge the member,

1 certainly from Balcombe and maybe from the Army.

2

3 Q. And in terms of the second letter, the October
4 letter --

5 A. Yes.

6

7 Q. -- the last paragraph referring to warnings of the
8 boys --

9 A. Yes.

10

11 Q. -- do you recall yourself personally, or your staff,
12 warning the boys on any occasion that acts of violence may
13 result in their discharge?

14 A. Absolutely.

15

16 Q. How did you do that?

17 A. Well, I can only tell you what I believe now, but
18 I would have acted exactly in this way, that I would have
19 had all the company commanders and all the people who had
20 access to the apprentices to tell them about the nature of
21 what had happened and the fact that this isn't tolerated in
22 a military society.

23

24 Q. Do you recall doing that yourself on parade or in any
25 other way?

26 A. Well, this would have occurred when anyone carried out
27 this action, they would have been discharged. I don't know
28 how many were discharged when I was there, but if anyone
29 had taken part in these things, and they were that serious,
30 they would have been recommended by me for discharge.

31

32 MS McLEOD: Thank you, Mr McDonald.

33

34 MR STEWART: Your Honour, I haven't seen these documents
35 previously, and I understand that, subject to correction,
36 they have not previously been produced to the
37 Royal Commission. In those circumstances, right now
38 I don't have any questions for Mr McDonald, but I ask that
39 he not be excused until --

40

41 THE CHAIR: Is that correct, Ms McLeod, we haven't seen
42 them before?

43

44 MS McLEOD: We are trying to track that down, your Honour.
45 I am trying to see if they responded to a notice to produce
46 or not.

47

1 MR STEWART: I am advised that the notices were to produce
2 all records of incidents at Balcombe during the period.
3
4 THE CHAIR: The next step is that, presumably, they come
5 from a file.
6
7 MS McLEOD: Yes. We certainly can produce them and I will
8 find out the answer to that, your Honour.
9
10 THE CHAIR: We haven't had them before?
11
12 MS McLEOD: I think not.
13
14 THE CHAIR: We should have.
15
16 MS McLEOD: There may have been a judgment about what was
17 covered by the notice to produce, your Honour, but I can
18 work out the answer to that too.
19
20 THE CHAIR: We will need more than the letters. We will
21 need to know what the file is that they have come from and
22 what other files may be in a similar category.
23
24 MS McLEOD: Yes, I appreciate that, your Honour.
25
26 THE CHAIR: I think, in those circumstances, Mr McDonald
27 will have to stay until this is sorted out.
28
29 MS McLEOD: Yes, your Honour. We will track back and see
30 if there is anything else.
31
32 THE CHAIR: You understand what is happening, Mr McDonald?
33
34 THE WITNESS: No, I don't.
35
36 THE CHAIR: These documents apparently haven't been
37 produced to the Commission before, so, therefore, we don't
38 know what the context is for them and what may be on the
39 files from which they came and we don't know whether there
40 might be other files in the same category. I am going to
41 have to ask you to stay until we have sorted this out.
42
43 THE WITNESS: Okay.
44
45 THE CHAIR: But that concludes your evidence so far.
46
47 THE WITNESS: Good.

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<THE WITNESS WITHDREW

MR STEWART: Thank you, your Honour. I call Adair Donaldson. Your Honour, just before Mr Donaldson takes the oath, my learned friend Mr Smith wishes to place himself on the record.

MR SMITH: If it pleases the Commission, my name is Smith. I appear for Mr Donaldson.

THE CHAIR: Yes, you have leave.

<ADAIR ANGUS DONALDSON, sworn: [12.15pm]

<EXAMINATION BY MR STEWART:

MR STEWART: Q. Mr Donaldson, will you state your full names and occupation?

A. My full name is Adair Angus Donaldson and I'm a solicitor by trade and I'm the director of Donaldson Law.

Q. That's at Toowoomba; is that right?

A. It's actually in Sydney, today is in Sydney and it is a national practice, but home is Toowoomba.

Q. Thank you. Do you have before you a copy of your statement prepared for the Royal Commission?

A. I do.

Q. I am not finding a date on it but perhaps you can help me with that. I beg your pardon, 13 June 2016.

A. That's correct.

Q. Do you confirm the statement as true and correct?

A. It is true and correct to the best of my recollection.

**EXHIBIT #40-020 STATEMENT OF ADAIR ANGUS DONALDSON
DATED 13/06/2016**

MR STEWART: Q. You were admitted as a solicitor in 1997; is that right?

A. That's correct.

Q. You became a partner in Shannon Donaldson Province Lawyers, otherwise referred to as Shannon Donaldson, in 2000?

1 A. That's correct.
2
3 Q. Since then you have acted and lobbied for the legal
4 rights of survivors of abuse?
5 A. That's correct.
6
7 Q. In 2011, as a result of the ADFA Skype scandal, you
8 commenced assisting survivors of abuse in the Australian
9 Defence Force; is that right?
10 A. That's correct.
11
12 Q. In 2013, Shannon Donaldson was acquired by
13 Shine Lawyers; is that right?
14 A. That's correct.
15
16 Q. And you then became part of Shine Lawyers?
17 A. Yes.
18
19 Q. Where you are a partner there or director?
20 A. Yes, that's right.
21
22 Q. You continued, whilst at Shine Lawyers, to represent
23 ADF survivors of sexual abuse before the Defence Abuse
24 Response Taskforce Scheme?
25 A. Yes, that's correct.
26
27 Q. In 2014, you were appointed a partner in the
28 Shine Special Project section where you led a team advising
29 survivors of abuse?
30 A. Yes.
31
32 Q. And then obviously you left Shine to establish your
33 current practice; is that right?
34 A. That's right.
35
36 Q. In your statement, commencing at paragraph 25, you
37 provide an overview of your involvement in a collaborative
38 arrangement between Shine Lawyers and Defence regarding the
39 resolution of claims brought by survivors of abuse for
40 harassment within the ADF?
41 A. Yes.
42
43 Q. Can you just explain briefly how it is that you came
44 to establish that arrangement?
45 A. Well, first of all, I appreciate that the Commission
46 is dealing with a set time frame with respect to - with
47 HMAS Leeuwin and Balcombe, but what I was aware about was

1 that - what I was aware of was the fact that it wasn't just
2 Leeuwin, it wasn't just Balcombe, it stretched the whole of
3 the Defence Force in all different establishments, and what
4 we were seeing was that there were 15 and 16, 17-year-old
5 boys, and young women as well, that had been subjected to
6 abuse during their time within the ADF. These matters were
7 cold matters. They were - when I refer to that I talk
8 about the fact that they were out of time with respect to
9 under the statute of limitations.

10
11 Q. When you say "cold matter", is that what you mean?

12 A. That's what I mean, but they were matters that were
13 unable to be pursued under their common law rights, they
14 were precluded due to the statute of limitations.

15
16 So we had an issue. These matters were quite
17 difficult and - we have seen a snapshot over the last
18 couple of days about the horrors that these young men and
19 women were experiencing and to me we needed to find a way
20 around that. As you would have seen by my statement,
21 I went to the trouble of making different submissions.
22 I made a submission to this Royal Commission back in March
23 of 2014 when I raised issues that I believed needed to be
24 addressed. I then appeared before the Senate as well and
25 addressed the Senate in relation to issues that I believed
26 needed to be addressed and how the ADF could be handling
27 these matters better.

28
29 Now, it got to a stage where we had a matter which we
30 believed was capable of instituting proceedings, common law
31 proceedings, and we knew that if we did do that then the
32 policy at the time and the directive that was given by the
33 Attorney-General's Department at the time was that if you
34 institute proceedings, the Commonwealth then had to plead
35 the statute of limitations. So rather than going down that
36 course of instituting proceedings, we instead engaged with
37 the ADF and we established a collaborative process. We
38 worked with them to come up with a process to resolve these
39 matters.

40
41 Q. Who specifically did you engage and work with?

42 A. Initially, it was - the meeting would have been with
43 Michael Lysewycz. It would have been with Henry Davis York
44 that had been appointed by the government to resolve the
45 matters.

46
47 Q. That's the name of the law firm?

1 A. The name of the law firm, yes; so that's how it came
2 about.

3

4 THE CHAIR: Q. I think the Attorney has recently issued
5 a further --

6 A. He has, your Honour, and that was another positive
7 step that has been taken, from a point of view that that
8 happened, I believe, on around about 16 March or
9 thereabouts, that the Attorney-General announced that the
10 Federal Government will no longer rely upon time
11 limitations when it comes to defending matters of
12 survivors' claims, so that was a significant movement.

13

14 Q. I think it has been defined for a period of time,
15 though, hasn't it? For three years, as I understand it?

16 A. I'm not sure about that, your Honour, but I know that
17 the directive has been and it's very well received and it's
18 gratefully received by so many survivors. I just hope that
19 other governments then follow it, your Honour.

20

21 MR STEWART: Q. Just to put it briefly, Mr Donaldson,
22 what is the nature of the arrangement that you were able to
23 establish?

24 A. We set up a scheme, which is based on common law
25 principles, whereby with those matters that haven't been
26 receiving benefits through Department of Veterans' Affairs,
27 these are matters which have been knocked back, what we've
28 done is that we provide a statement and a statement of
29 claim to Defence, Defence then pays for our client to
30 attend upon an independent medical examiner and then we
31 will participate in alternative dispute resolution to
32 attempt to resolve that matter. I must say, to give credit
33 to the ADF, the manner in which they have been handling
34 these matters has been in a process where they embark upon
35 not to do any more harm upon the survivors, and, you know,
36 it's received in a very empathetic way, the manner in which
37 they handle the claims and also looking at non-monetary
38 outcomes for people as well, which are very important.

39

40 Q. Prior to the reversal of the policy on reliance on
41 limitation periods, how or what role did limitation periods
42 play in the resolution of claims through the alternate
43 dispute process? In other words, was the limitation period
44 still relied on and, if so, where did that leave you?

45 A. No. No, what we decided to do, for the purpose of
46 those matters, is that the ADF agreed not to - I suppose it
47 was parked to one side whilst we negotiated it. It

1 certainly wasn't an issue and certainly during the
2 negotiations, or the alternative dispute resolution process
3 that we have had, there hasn't been - it hasn't been
4 a sticking point, if I can put it that way.

5
6 THE CHAIR: Q. I think what Mr Stewart is looking for,
7 and so are we, is what are the assumptions that inform the
8 resolution and are any of those assumptions based upon
9 uncertainty as to the prospects of success in the
10 litigation, including because of the statute?

11 A. Yes. Your Honour, obviously, when we're looking at
12 any matter, we're not talking about attending upon an
13 alternative dispute resolution process where they are
14 simply going to lay down and say, you know, "You are going
15 to succeed". It's going to be conducted in a similar
16 manner in which any common law mediation would, and as part
17 of that, one of the considerations that we had to take into
18 account was the fact that there was going to be an issue
19 with respect to time limitations if we did proceed. There
20 were going to be issues with respect --

21
22 Q. Just stopping you there, that means that if you
23 proceeded, the chances were that the claim would fail?

24 A. That's correct, your Honour.

25
26 Q. So that was a relevant matter?

27 A. It was, your Honour.

28
29 Q. That's a pretty large impediment to any settlement,
30 isn't it?

31 A. But in saying that, your Honour, we mounted an
32 argument that the law - the manner in which other States
33 were approaching this with respect to time limitation and
34 the success that we've achieved - how can I put it,
35 your Honour, without - I believed that the success that
36 we've been able to achieve for clients is well in line with
37 common law settlements with precedents.

38
39 Q. I am not sure I'm understanding that, but there are
40 differences, of course, in the State statutes of
41 limitations and the way they are applied by the judges in
42 different States as well.

43 A. Yes, but I suppose I come back to, your Honour,
44 looking at the amounts of awards or compensation that we
45 have been able to secure for clients.

46
47 Q. A lot of those, outside of what you will have done,

1 will have been affected by statutes of limitations?
2 A. Well, at that time, what other options did we have for
3 our client, your Honour?
4

5 Q. I understand that, but are we to understand that if
6 you were approaching the matter today, in light of the
7 Attorney's recent direction, that the considerations would
8 be different and the outcomes would be different?

9 A. Oh, your Honour, I've thought about this, with those
10 matters that have resolved, and obviously - I think the
11 results that we have achieved still stand up to scrutiny,
12 even if you take into account where we are today with the
13 change that the government has adopted with respect to the
14 time limitation.
15

16 Q. I'm not quite sure what you mean by "stand up to
17 scrutiny"?

18 A. Well, I believe that the amounts that we have secured
19 in relation to compensation for our clients are in line
20 with precedent.
21

22 Q. Mr Stewart can take up the other elements that might
23 be relevant to the resolution of these matters.

24 A. Yes.
25

26 MR STEWART: Q. Mr Donaldson, just to pursue that a
27 little bit better - we will speak to Defence in due course,
28 hopefully today, about the extent to which or how they
29 factored in the limitation defence that was available to
30 them, but dealing with how you factored it in,
31 I understand - it is certainly no criticism implied, I'm
32 just trying to understand how it worked - that in your
33 efforts to settle these claims, prior to the reversal of
34 the position of the Commonwealth relying on the limitation,
35 one of the discounting factors you had to take into account
36 was that there would be a limitation defence available?
37

38 A. That's correct.
39

40 Q. And depending upon the particular factual
41 circumstances, and so on, you might have placed more or
42 less weight on the prospects of that defence being
43 successful?
44

45 A. That's correct.
46

47 Q. And as a consequence of that, it would seem inevitably
to follow - also not implying any criticism - that the
settlements you had to or did agree to would be less than

1 they would be today where you know you don't have to factor
2 that in?

3 A. I would say that certainly if you were negotiating
4 now - like, now - it is easier to mount a stronger argument
5 for your client for an increase in damages than what it was
6 in the past. But I can assure you, we used our best
7 endeavours to maximise the amounts that our clients
8 received at that --

9

10 Q. I'm not suggesting otherwise?

11 A. I know. But the issue is an issue that, as lawyers,
12 we've always had to face when we've been dealing with no
13 matter what authority, as you know, we've always had this
14 hurdle that we've got to overcome with respect to time
15 limitations. You know, whether we are dealing with any
16 other institution, we're still facing that same dilemma.

17

18 THE CHAIR: Q. We understand that, Mr Donaldson. What
19 we are seeking to work out is where we are now placed,
20 having regard to the fact that in two States they have
21 legislated to change the position and the Commonwealth,
22 through the Attorney, has indicated their position. That's
23 what we're trying to work out.

24 A. Yes. So what I would say, your Honour, is that
25 I would expect that with matters that are negotiated in
26 future with the ADF, that we will no longer have to allow
27 a discount in relation to time limitation.

28

29 Q. And just to complete that, given that the time
30 limitation was almost certainly going to be fatal in every
31 case, I assume the discount that would have been allowed
32 would have been significant?

33 A. What would you say was significant, your Honour? You
34 know, are we talking about 30 per cent discount? Are we
35 talking - because what we can do is we can come back and
36 have a look at - you know, so if you are asking me what was
37 the discount that we allowed in every case, there were
38 discounts that we made with respect to evidential burdens,
39 about causation, about - so it was all factored into one.

40

41 Q. I understand that.

42 A. Yes.

43

44 Q. But I would have thought, logically, looking at any of
45 these negotiations, when you know that your client's claim,
46 irrespective of anything else, is going to be fatal because
47 of the time limitation, then you have to compromise in a

1 significant way in respect of that issue.
2 A. Yes. I believe that you have to - in any negotiation,
3 that you have to compromise. I would argue that our -
4 I don't believe that our - we made a huge compromise, if
5 that - you know, we may have been up against it, but we
6 were certainly fighting very hard to get compensation for
7 them, despite the hurdles that we faced.
8
9 MR STEWART: Q. Mr Donaldson, I want to move on
10 specifically to the case of Mr Glen Greaves.
11 A. Yes.
12
13 Q. You are familiar with that case?
14 A. Yes.
15
16 Q. Mr Greaves has given evidence here yesterday. You are
17 familiar with his evidence, I take it?
18 A. I am familiar with his evidence.
19
20 Q. His was a case which you would describe, I understand,
21 as a cold case; is that right?
22 A. Yes. Can I talk about Glen's --
23
24 Q. Let's just deal with it bit by bit?
25 A. Yes, for sure, sorry.
26
27 Q. His was a cold case; is that right?
28 A. It was - yes.
29
30 Q. In other words, prima facie, at least, limitation
31 would be a problem?
32 A. Yes, that's correct.
33
34 Q. And, in fact, it might defeat any common law claim
35 completely?
36 A. That's correct.
37
38 Q. But perhaps different from the typical ones you
39 mentioned earlier, in his case, he was receiving benefits
40 from the Department of Veterans' Affairs; is that right?
41 A. Yes, he was receiving a TPI pension.
42
43 Q. And that's under the Veterans' Entitlements Act?
44 A. As I understand it, yes.
45
46 Q. And also, in his case, the reality is that he had not
47 known or, in any event, had missed the DART process where

1 some very limited reparation payments were made and
2 therefore hadn't got such a payment; is that right?

3 A. That's correct. And he's not alone in that.

4
5 Q. Yes. Well, we've heard of evidence of that, too, of
6 other people being in that position. So the TPI or total
7 permanent impairment pension that Mr Greaves was receiving
8 from DVA was - and correct me if I am wrong - for PTSD
9 arising from his Vietnam experience; is that right?

10 A. That's correct.

11
12 Q. And very early on in the piece, and taking
13 instructions from Mr Greaves, you were advised of that; you
14 knew about that?

15 A. That's correct.

16
17 Q. You then formed the view that the position that he was
18 in, as you put it in your statement, was unjust?

19 A. I do believe that. I believe it was unjust.

20
21 Q. What I want you to explain - and this is important,
22 because this Royal Commission has to make recommendations,
23 and, as we've already seen, in some respects
24 recommendations have been acted on - we were talking about
25 limitations a moment ago - so can you identify what, to
26 you, was the injustice of the position that Mr Greaves was
27 in?

28 A. Well, this Commission has heard Mr Greaves' evidence.
29 I think that upon hearing Mr Greaves' evidence - and I was
30 the first person that he told in its entirety, and what he
31 explained to me was that he had never had the
32 acknowledgment in relation to the abuse occurring; he had
33 never had that ability. He said that - his instructions to
34 me were that when he went to apply for benefits - and he
35 used an advocate - and the advocate, I understand,
36 explained to him that given the attitude of Department of
37 Veterans' Affairs towards survivors of abuse and accepting
38 their claims, that he was better off referring to another
39 incident, and a legitimate incident, that occurred in
40 Vietnam, which would then qualify him for the PTSD and
41 qualify him to receive the TPI. He was advised by his
42 advocate that if he did mention the abuse, then it wouldn't
43 be accepted and he wouldn't get his TPI.

44
45 Now, what that means is that since he was - I think
46 that with Mr Greaves, I think he was in his mid-30s when he
47 received the TPI. He had never received any benefit or

1 acknowledgment in relation to the violent sexual abuse that
2 occurred to him.

3
4 Q. So just to hold it there for a second, so you had
5 a situation where there are two, we will accept for present
6 purposes, materially contributing factors to the PTSD: one
7 is his abuse, and then, shortly thereafter, his experiences
8 in Vietnam?

9 A. That's correct. So that's one of the - and we know
10 that, with trauma - you know, DVA was set up to deal with
11 broken bodies and broken minds as a result of the core
12 business of the ADF, which is defending Australia. That's
13 what DVA was set up to do. DVA was not set up to be
14 dealing with survivors of abuse, and if you look at Glen's
15 situation, we had a report there and the report all
16 referred back to the incident that occurred in Vietnam but
17 made no mention in relation to what had occurred at
18 Leeuwin.

19
20 Q. So, getting back to the question of the injustice, so
21 the principal matter you have identified thus far is the
22 absence of acknowledgment?

23 A. Yes.

24
25 Q. In other words, by paying the TPI or providing for the
26 entitlement to TPI, there had been, as it were, a formal
27 acknowledgment of the consequences of what had happened in
28 Vietnam?

29 A. Mmm.

30
31 Q. But there had been no formal acknowledgment or any
32 kind of acknowledgment of what had happened to him at
33 Leeuwin; is that right?

34 A. Mmm; that's correct.

35
36 Q. So what else is there in the injustice?

37 A. The other unjust thing about it was that he had missed
38 out on DART, okay? So he had never received an ex gratia
39 amount. I believe that if Glen had applied to DART, he
40 would have qualified for the full amount of \$50,000. And
41 he had that in common with a lot of other people who were
42 simply unaware that DART existed and they didn't make their
43 application for it.

44
45 So when I looked at Glen's situation, after hearing
46 his story, you know, they are the two driving factors which
47 I thought - listen, one is he didn't get the

1 acknowledgment, second of all, he's never had a medical
2 report which has addressed that, to see the impact of the
3 abuse, and I knew that we had issues with respect to
4 claw-backs with the TPI, with statutory refunds. But
5 I believed - and what I hoped to achieve, and I was
6 unsuccessful in doing it - was to try to extract an offer
7 from the ADF that would provide him with some compensation
8 in relation to the hurt and harm that he suffered as
9 a result of the sexual abuse at Leeuwin. That's what
10 I hoped to achieve.

11
12 Q. I will come back to the actual circumstances of the
13 mediation and so on in a moment, but since you have
14 mentioned - I think the word you used was "claw-backs".
15 Can you --

16 A. Did I refer to claw-backs? Did I just refer to
17 claw-back then? We're talking about statutory refunds?

18
19 Q. Claw-backs, yes. You said "I knew that we had issues
20 with respect to claw-backs with the TPI?"

21 A. Yes.

22
23 Q. So can you just explain - you don't need to give the
24 section numbers and chapters and verse, but if you could
25 briefly --

26 A. If you were going to ask me that, counsel, I would
27 have great problems, so thank you for not doing that. So
28 let's - if I could just paraphrase, just so people
29 understand, you know, with a TPI, at the moment, Glen would
30 be receiving I think in the order of around about \$54,000.
31 In addition to that --

32
33 Q. Per annum?

34 A. Per annum.

35
36 Q. That's on the pension?

37 A. That's on a pension, a TPI, and in addition - which is
38 related to, or the majority of it is related to, his
39 psychological condition.

40
41 In addition to that, and most significantly, he also
42 receives a Gold Card, and the Gold Card means that he
43 receives health assistance in relation to any ailment that
44 he may suffer. So not just related to the PTSD, in
45 relation to any ailment that he may suffer. Now, both
46 those two things go to his dying day, all right? They
47 don't cut out.

1
2 So what we knew was that under the current legislation
3 as it stands, if our client were to bring a claim for
4 personal injuries that related to one of those conditions
5 that he was receiving the PTSD [*sic*] for, what that would
6 trigger would be a refund of all those amounts. Does that
7 make sense? I don't know if I'm explaining myself.
8

9 Q. Yes, I think that's very clear, thank you.

10 A. So what Glen's instructions were, from the very start,
11 when I explained that to him, he said, "Whatever you do,
12 don't impact upon my TPI." And I - you know, I was very
13 conscious of that. You will appreciate - yes, I was very
14 conscious of that.
15

16 THE CHAIR: Q. What does that mean? If you do any
17 calculation of the lump sum value of that benefit --

18 A. Yes.
19

20 Q. -- it's a very large sum of money?

21 A. Your Honour, it's a very large sum of money.
22

23 Q. Was there ever any prospect that you would get him
24 anything else?

25 A. So, your Honour, what I tried to do was - I believed
26 that there were other avenues open to our client so far as
27 a defective administration claim, for instance, that
28 I thought may not trigger the refund, okay? I went and
29 examined that under the Finance Act, for instance - there
30 may have been. I looked at whether there may have been
31 a claim for an ex gratia amount, okay, that we may be able
32 to get him something for general damages.
33

34 Obviously, we could explore it with respect to
35 a common law claim, and that would come out at a big
36 figure, but, in addition to that, we would then have to
37 subtract from that common law figure the benefits that he
38 receives under his TPI.
39

40 Q. What I'm suggesting, though, is given what those
41 benefits were worth, if you calculate it out --

42 A. Yes.
43

44 Q. -- given the risks involved in litigation, including
45 the statute of limitations --

46 A. Yes.
47

1 Q. -- it would be surprising if you would get above the
2 lump sum value of those benefits.
3 A. Which, your Honour, is why we wouldn't have instituted
4 proceedings.
5
6 Q. It would have been impossible.
7 A. Yes. And we certainly didn't do that, and I certainly
8 wouldn't have put him into that position, your Honour.
9
10 MR STEWART: Q. Because, essentially, there are two
11 possibilities where there is a benefit being paid in
12 respect of which the claw-backs will operate. The one is
13 you achieve sufficient in your common law damages that it
14 exceeds the benefit that was being received?
15 A. That's correct.
16
17 Q. That's the one possibility?
18 A. Yes.
19
20 Q. But in this case, given the value of the benefit, that
21 wasn't going to happen; is that right?
22 A. That's right. But we thought it was worth a go trying
23 to extract an ex gratia amount out of the --
24
25 Q. That's the second possibility I was going to identify.
26 A. Yes.
27
28 Q. It was to find some means, as it were, of getting
29 around the claw-back by finding some ex gratia reparation
30 payment or some other payment?
31 A. Yes. So what - you see, Glen wasn't Robinson Crusoe
32 here. He wasn't there all by himself, okay? There is
33 quite a number of individuals that I have come across, this
34 is survivors, that were told the same thing by their
35 advocates: "Whatever you do, don't mention the abuse;
36 refer to something else - a legitimate something else -
37 refer to the Vietnam service, refer to something else, but,
38 for goodness sake, don't mention the abuse, otherwise you
39 won't be successful."
40
41 Q. That's the second time you have used the word
42 "legitimate" in relation to that. Now, I understand you
43 are reporting what is reported to you?
44 A. Yes, that's anecdotal evidence, okay?
45
46 Q. Yes. But you have dealt with a lot of these cases,
47 what do you understand is the distinction that is being

1 made there between a "legitimate" basis for the claim and
2 a sexual abuse basis?

3 A. Because what we know with DVA in the past - and I can
4 use an example of one of your witnesses. I can use an
5 example of Graeme Frazer. Graeme Frazer, to give you an
6 idea, he came forward, this brave fellow, in 2000, okay?
7 And he was the first one that really raised the issue with
8 respect to the abuse at Leeuwin.

9
10 Now, if you have a look at the history, how Department
11 of Veterans' Affairs handled Graeme Frazer's matter, they
12 threw everything at that. For four years they put him
13 through the ringers - Court of Appeal, all those sorts of
14 things.

15
16 Q. I think you mean the AAT?

17 A. The AAT, sorry. Sorry. Put him through the AAT
18 there, and, you know, that should have been
19 a ground-breaking moment, the success in his matter. It
20 was reported all over the nation. It was on the ABC in
21 2004 about the success of Graeme's matter, you know, and
22 you would have thought that that would have triggered
23 changes in the manner in which DVA handled the matters.
24 Instead, it didn't. It just sent a message round saying,
25 "If you are going" - and I'm paraphrasing here, using
26 anecdotal evidence, but I can tell you that advocates were
27 well aware that if you brought a matter and included abuse
28 in your application to DVA, then you had very slim
29 prospects of success unless you had extensive corroborating
30 evidence.

31
32 Q. Has your experience of that changed? In other words,
33 Graeme Frazer's case was in the early 2000s; has your
34 experience in recent times changed?

35 A. Well, can I make two distinguishing things. My
36 experience with Department of Defence has changed
37 considerably, okay? And I'm on record about saying that
38 I believe the manner in which the Australian Defence Force
39 now is acknowledging and apologising and has made
40 significant attempts to resolve the manner in which they
41 handle matters empathetically and to bring about change -
42 so that's with the ADF.

43
44 But then let's turn to Department of Veterans'
45 Affairs. Now, I don't think it has changed. And again,
46 I will come back to that the Department of Veterans'
47 Affairs is set up there to handle and assist broken bodies

1 and minds as a result of their core business, which is
2 defending Australia. It is not set up to handle broken
3 minds as a result of surviving sexual abuse.
4

5 Now, I referred to Frazer there before, and what
6 I would like to - if I can refer to a very recent case, an
7 AAT decision, it's a matter of *Kleidon v Military*
8 *Rehabilitation and Compensation Commission*. This was
9 released on 3 June 2016. I don't want to go into the
10 circumstances from the point of view that the tribunal -
11 they made a decision there. But this case involved abuse
12 at HMAS Leeuwin. Why I want to draw attention to this is
13 the struggles that survivors face when they have to come to
14 deal with the tribunal and the court processes, and
15 particularly dealing with DVA. Because what we have heard
16 from all the witnesses is what a nightmare it is dealing
17 with DVA if you are a survivor of abuse, and re-traumatising
18 them by having to go through, jump through all the hurdles.
19 But if they do get to the stage where they get to the AAT,
20 they are not entitled to legal representation before the
21 AAT and so, invariably, what you have is very
22 well-intentioned and some incredible minds with these
23 Defence Force advocates, and a lot of them are giving up
24 their time and effort and they are incredible people, okay,
25 to be assisting these survivors, but who they find
26 themselves up against is - you know, if you have a look at
27 this situation here, they find themselves up against
28 a junior counsel, Sparke Helmore. So here they are
29 represented by --
30

31 Q. Sparke Helmore being a solicitors' firm?

32 A. Yes. Here we are represented by an advocate - and I'm
33 not sure whether they have legal training, but I'm pretty
34 sure that his very valiant advocate is putting his case
35 forward and then being met with this very adversarial
36 approach from DVA. I just don't think that's right.
37 I don't think that's fair.
38

39 THE CHAIR: Q. You speak of "extensive corroborating
40 evidence". What does that embrace as you understand it?

41 A. Well, your Honour, you will appreciate that the manner
42 in which DVA handled matters is - if I could break it down.
43 For instance, we have the DART approach, you know, Defence
44 Abuse Response Taskforce. We have their approach. They
45 based their evidence on plausibility, okay? It was
46 a really positive approach. But of course, when DVA
47 approach it - and I'm not being critical of any individual

1 in the organisation, because all they are doing is simply
2 applying policies and procedures, so I'm not - but they are
3 certainly adopting a very inquisitorial approach. So it's
4 not on - whilst they may base it on the balance of
5 probabilities, what they are looking for, as well, is
6 corroborative evidence.

7
8 Q. What I'm seeking to find out from you is what you
9 understand they see to be corroborating evidence?

10 A. Certainly they want statutory declarations to support
11 a person's - you know, witnesses of the events. They go
12 back and they want to make sure that there is something in
13 the records that referred to the incident. They want to
14 see whether there is medical evidence there, that they
15 reported it at the time, supportive medical evidence. They
16 are the types of things that they will take into account.

17
18 Q. And have you talked to them about the realities of
19 sexual abuse and how people don't report and how there
20 won't be records, and so on?

21 A. Your Honour, rest assured that that is something that
22 we have raised --

23
24 Q. And what's the response?

25 A. -- and I think they would be aware of it.

26
27 Q. What's the response?

28 A. Again, I come back to the issue that they are bound by
29 policies and procedures and they do not have - it seems to
30 me that they do not have the flexibility that the ADF has
31 to adapt to the claims of survivors of abuse.

32
33 MR STEWART: Q. Mr Donaldson, I will explore that with
34 Mr Bayles from DVA in due course, but that lack of
35 flexibility, is that, in your assessment, in the
36 legislation or is it in the policy - in other words, the
37 manner in which the legislation is being implemented or
38 administered?

39 A. I think both. And I can't point you to any particular
40 section, okay, but my experience is that the - I can't -
41 I can't --

42
43 THE CHAIR: Q. I don't have the legislation in front of
44 me, but does it apply a balance of probabilities test or
45 something less?

46 A. It does apply a balance of probabilities test.

47

1 Q. In those words?

2 A. Your Honour, I haven't got - again, I haven't got the
3 legislation, but I know that they apply a balance of
4 probabilities test.

5

6 Q. It is not a reasonable satisfaction test, is it; it is
7 a balance of probabilities?

8

9 MR STEWART: It doesn't actually say, your Honour, but it
10 would seem to be balance of probabilities, yes. It doesn't
11 use those words and it doesn't use "reasonable
12 satisfaction", either.

13

14 THE CHAIR: Q. Are you saying to us that DVA, in your
15 experience, has difficulty accepting that you have passed
16 a threshold of balance of probabilities if all you have is
17 the evidence of the complainant?

18 A. One hundred per cent. One hundred per cent,
19 your Honour. A person's word isn't enough. And, in
20 addition to that, DART - the information gathered by DART -
21 so if you have an affidavit, if you have an apology that
22 has been delivered by Defence, that is still not enough for
23 DVA.

24

25 Q. I think, to understand it correctly, DART didn't apply
26 a balance of probabilities?

27 A. No, they applied plausibility, that's correct,
28 your Honour, and that's the trouble.

29

30 MR STEWART: Q. Just talking briefly about that
31 evidence, you have mentioned medical evidence. Is it right
32 that there are really two types of medical evidence
33 relevant here: the one you referred to is the medical
34 evidence from the time of the incident as part of the proof
35 that the incident occurred; is that right?

36 A. That's correct. That's one type of evidence, yes.

37

38 Q. And the other type of medical evidence would be the
39 contemporary medical evidence as to the nexus between that
40 event and what it is that is being suffered?

41 A. So, just taking up from what his Honour said, we
42 appreciate that - and particularly with young men -
43 invariably, it's taking 20, 30 years for them to come
44 forward and to find the courage to say, "Listen, it did
45 happen to me." We now - we accept that, and it's very
46 important to get contemporary medical evidence to support
47 that.

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Q. So the contemporary medical evidence, typically, is a psychiatrist's report, by way of example, as to what has been said to the psychiatrist about the events, but, more particularly, dealing with the question of the nexus between those events and the condition that is now suffered?

A. That's correct. And, of course, there is another problem there to deal with, because you will appreciate that the abuse may have occurred when they were 15 years of age, and by the time they are making a claim, for instance, to DVA, there may well have been other very traumatic events that have occurred in their life. And then what we are calling upon for a psychiatrist to do is then to try to differentiate what has been the impact of the abuse that occurred here and these other traumatic incidents that have occurred.

THE CHAIR: Q. Is the test applied significant contribution?

A. Yes, that's correct, your Honour.

Q. So it may not be the only cause, but providing it is significant, it will be accepted?

A. Yes, mmm.

MR STEWART: Q. Of course, the susceptibility of the person to the later events may be enhanced because of the original abuse?

A. That's correct.

Q. So the original abuse may mean that someone is more vulnerable to being adversely affected by some other incidents later in life that otherwise they may not have?

A. Exactly, exactly.

Q. The problem that you are finding with DVA about evidence, if you can answer this at all, is it principally to do with sufficient evidence and corroboration of the events having occurred at all, or is it in the contemporary medical evidence about the nexus?

A. I'd say both. You have to remember that the - that the survivors don't, when you come to dealing with Department of Veterans' Affairs, you don't get a choice of which psychiatrist you are going to go and see.

Q. Are you suggesting something there, Mr Donaldson?

1 A. I beg your pardon? No, all I'm saying is, you know,
2 the fact of the matter is that if we were briefing -
3 I believe that the psychiatrists need to be properly
4 briefed when they are reviewing someone and I believe that
5 when they are being reviewed, that they need to make sure
6 that they have got all evidence, not only the evidence that
7 Department of Veterans' Affairs is providing to them, but
8 also the evidence that the survivor may wish to provide as
9 well.

10
11 Q. Is it not the case, at least for contemporary practice
12 from DVA's side, that if a survivor presents their own
13 psychiatric evidence and if DVA is satisfied that a proper
14 job has been done --

15 A. Yes.

16
17 Q. -- then they will not require a further examination?

18 A. That's correct. I am glad you - I stand corrected.
19 That is correct, yes.

20
21 Q. Just returning specifically to the case of
22 Glen Greaves, one of the difficulties the documents seem to
23 indicate that you faced - and you touch on it in your
24 statement - is that you couldn't get figures from DVA in
25 advance of a settlement as to what the claw-back would be;
26 is that right?

27 A. That's correct. And again, I think that comes back to
28 the fact that Department of Veterans' Affairs isn't
29 designed or isn't set up to be dealing with these potential
30 common law claims, to hear these historical claims.

31
32 Q. You have said that a few times, but I'm just trying to
33 understand that, because DVA - if one is going to use the
34 notion of "designed", or "set up" - is to deal with the
35 consequences that flow, as you put it, from the core
36 business of the ADF depending Australia, but part of that
37 core business is the training of the soldiers and sailors
38 and Air Force personnel who are going to be undertaking the
39 defending, and it is typically in that training environment
40 that these incidents occur, so why isn't that part of the
41 core thing that they do?

42 A. Because invariably what happens is that if people are
43 receiving benefits, if they are receiving a TPI, then the
44 benefits that they receive under TPI far outweigh the risks
45 of bringing a common law claim, and so it's very -
46 I suppose it's unusual for them to have to provide
47 a statement of what the refund is going to be. It's not as

1 if - you know, so can I compare it, for instance, to
2 Department of Social Security or to the Health Insurance
3 Commission? So we know that you go to a settlement, that
4 you can get an estimate - there's a formula there and you
5 can work out what the refund is going to be to Department
6 of Social Security; similarly, you get a statement of
7 benefits from HIC that sets out all the items. They are
8 two Federal Government departments, okay, which have got
9 a certain way of dealing with requests in relation to
10 estimates. DVA doesn't or isn't as - doesn't have that.
11 They can't provide that information.
12

13 Q. And you need those figures to be able to assess your
14 position?

15 A. You do. But what we did was we went back and we were
16 able to make a very good or a very educated guess at what
17 we believed that the refunds would be.
18

19 THE CHAIR: Q. But as I understand it, the problem is
20 not just the refunds. The problem is prospective future
21 benefit?

22 A. Correct, your Honour, big time.
23

24 MR STEWART: Q. In some cases, it may be refunds, if
25 there isn't an entitlement going forward. It would just
26 depend on the particular circumstances; is that right?
27

28 THE CHAIR: Q. Well, once you are in, I think you are
29 in, aren't you?

30 A. That's correct, your Honour.
31

32 Q. So there will always be an entitlement going forward?

33 A. Yes.
34

35 MR STEWART: Q. So whether that is the pension or the
36 medical, which might be under a Gold Card or a White
37 Card --

38 A. But if you get the pension you get the Gold Card, and
39 the Gold Card then covers you for all benefits. So, for
40 instance, you have heard from these survivors who have been
41 doing their best to qualify for TPI and they have just been
42 put on hold or saying that they are being held in abeyance.
43 You know, those gentlemen - an immediate fix would be
44 simply to accept their claims and to allow them to receive
45 TPI and to allow them to receive their Gold Card for their
46 benefits. That would be a wonderful outcome.
47

1 Q. Just dealing finally with the mediation, this is in
2 Glen Greaves' case, were any offers actually put by
3 Defence?
4 A. Were they put by us?
5
6 Q. By Defence?
7 A. No, they weren't, because we had a huge issue with
8 respect to the TPI. Client's instructions were, "Whatever
9 you do, don't affect my TPI."
10
11 Q. The mediation took the better part of the day, as
12 I understand?
13 A. That's correct.
14
15 Q. Was that time taken, in the most part, trying to find
16 a solution to get around the TPI problem?
17 A. That's correct.
18
19 Q. And no solution, obviously, was found?
20 A. No, well, I've talked about the best intentions of the
21 people in the room, and I believe that - obviously from our
22 perspective, we were trying, any way, to work out a way
23 that we could get an amount of money that wouldn't affect
24 his TPI, and I believe that Defence were - you know, they -
25 you can't not - hear Glen's evidence and not be affected by
26 it, and I believe that Defence was affected by it as well,
27 and they were trying their darnedest to work out a way
28 around that, but we couldn't. That's the feeling that
29 I had.
30
31 THE CHAIR: Q. So the scheme, as we would now see it in
32 total, would be if you are accepted by DVA, you will get
33 a TPI with all of its benefits?
34 A. Mmm.
35
36 Q. And if you had managed to get yourself inside DART,
37 you may have got an additional ex gratia \$50,000; is that
38 correct?
39 A. That's correct, your Honour.
40
41 Q. That's where we end up?
42 A. That's correct.
43
44 THE CHAIR: That's probably a good point to stop for
45 lunch. We'll adjourn.
46
47 MR FEHRING: Your Honour, I was here to represent my

1 client in relation to Balcombe and I have no questions of
2 the other witnesses in relation to the DVA.

3
4 THE CHAIR: You may go.

5
6 MR FEHRING: Thank you.

7
8 THE CHAIR: We will adjourn.

9
10 **LUNCHEON ADJOURNMENT**

11
12 MR STEWART: Your Honour, in respect to the documents that
13 were produced when Mr McDonald was still in the witness
14 box, the position is that I have nothing further for
15 Mr McDonald, certainly not at this time. I'm happy that he
16 be excused and return to home, which I understand is in
17 Melbourne. In the unlikelihood that he's required to come
18 back, we'll deal with it then.

19
20 THE CHAIR: Mr McDonald, you heard that? What Mr Stewart
21 said is that he doesn't require you for any further
22 questions in relation to the documents that were produced
23 this morning and he's happy for you to be excused, so
24 I will excuse you from further attendance.

25
26 MR McDONALD: Thank you very much, your Honour.

27
28 MR STEWART: Q. Mr Donaldson, there are just two matters
29 that I still wish to deal with. Before I come back to the
30 question of the mediation that we were on earlier, there's
31 this matter, and that's the interaction between the VEA,
32 the Veterans' Entitlements Act, and the SRCA, the Safety,
33 Rehabilitation and Compensation Act. Now, it is explained
34 in the statement of Mr Bayles that both those statutes
35 cover injury, disease or death resulting from - and there
36 are various possibilities, but they include peacetime
37 service?

38 A. Yes.

39
40 Q. But one, the VEA, pays compensation in the form of a
41 lifetime disability pension?

42 A. That's correct.

43
44 Q. And the other one pays a lump-sum, one-off
45 compensation payment; is that right?

46 A. Yes, that's correct.

47

1 Q. So for someone in a, say, Balcombe and Leeuwin
2 situation, so we're dealing with prior to 1 July 2004,
3 where the shift occurs to the MRCA, so we're under the SRCA
4 and also under the VEA, when or how would a person get the
5 entitlement under the VEA rather than the SRCA or vice
6 versa?

7 A. I think you're probably better off asking the
8 Department of Veterans' Affairs about that question.
9 You'll appreciate that what I've been examining is the
10 common law approach and I certainly - I'd feel
11 uncomfortable answering - I don't know. If you gave me
12 access to the legislation I'd go back and I'd be able to
13 tell you about it, but I don't know.

14
15 Q. In any event, possibly those matters are better the
16 subject of a research study than examination in evidence.
17 Thank you. I will go to the matter that I was then going
18 to deal with, which was the mediation. You've dealt with
19 where we got to, but right at the close in the mediation of
20 Mr Greaves case there was a question of costs?

21 A. Yes, that's correct.

22
23 Q. It had become common ground, as it were, that there
24 was no way around the TPI claw-back, is that right?

25 A. That's correct.

26
27 Q. And so Mr Greaves was going to receive nothing in a
28 monetary form from the mediation?

29 A. That's correct.

30
31 Q. And then the issue of costs arose. Can you explain
32 how that arose?

33 A. My recollection is that after we'd actually explained
34 it to Glen that we weren't going to be able to extract an
35 offer that each party would be walking away, it was then
36 that my recollection serves me that the mediator brought up
37 the issue of costs and said given how much work we'd put
38 into it, that they were happy to contribute to our costs
39 and we had to put an amount to them.

40
41 Q. So up until then, the position was that the parties
42 would walk away - in other words, there would be no deed of
43 release?

44 A. No. I think that - I think I may have - in my
45 statement I talk about each party walking away or "walk
46 away", okay, and in a legal connotation what that means is
47 I suspect at that point that each party would be walking

1 away bearing their own costs. I still expected that there
2 would be some form of document coming out of that, but the
3 issue with respect to costs only came up at the end.
4

5 Now, what we did with Glen is that we explained to him
6 that what he could do is that, if he wanted to, he didn't
7 have to sign the document, okay; he could walk away.
8 Alternatively, he could sign it and we would get paid.
9 We'd left him alone - we provided him with the advice, we
10 left him alone with his wife, and then Glen - when we came
11 back in, Glen said that he was happy to sign the document.
12 We had put into the document a clause that said if there
13 was a change to legislation or that there was a different -
14 you know, with respect to another statutory scheme, that
15 that would still be open to it, and that's included in the
16 agreement, but what he would be compromising would be his
17 common law entitlements there.
18

19 But, in saying that, as we've mentioned, Glen had
20 always said to us that he - and he's provided us with
21 instructions that he was not wanting to pursue a common law
22 entitlement because of the impact that it would have upon
23 his statutory entitlements with respect to the TPI.
24

25 Q. Unless he could achieve one of two things: one thing
26 I suppose, and that's to get a payment that didn't have
27 that effect?

28 A. Yes. That wasn't going to happen.
29

30 Q. As you discovered --

31 A. It was not going to happen, yes.
32

33 Q. When you say it was not going to happen --

34 A. There was --
35

36 Q. Mr Donaldson, sorry, would you let me finish my
37 question.

38 A. Sorry.
39

40 Q. When you say it wasn't going to happen, you mean it
41 wasn't going to happen - that's the understanding you came
42 to after spending the day of the mediation trying to find a
43 way to make it happen?

44 A. That's correct.
45

46 Q. So by that stage, then, Mr Greaves was going to get
47 nothing by way of monetary compensation and he could then

1 have walked away; is that right?
2 A. Yes, that's correct.
3
4 Q. So why would he have signed a release in respect of
5 any common law claim that he might have?
6 A. Because we'd been in that - we'd got to a situation
7 there where we'd negotiated it with respect to his common
8 law - whether he would be able to pursue a common law claim
9 and the client provided us with - Glen provided us with
10 instructions that he was happy for us to get paid.
11
12 Q. The principal obstacle to the common law claim at that
13 stage was the claw-back provisions - not so?
14 A. There were a number of other issues that had to be
15 taken into consideration with Glen's claim as well.
16
17 Q. What was an obstacle to it? The limitation would
18 factor in the discount, but what was the actual obstacle to
19 a settlement sum being agreed to be paid?
20 A. First of all, we had an issue with respect to the time
21 limitation. Second issue that we had was that he would
22 have to institute proceedings and to pursue a claim, and to
23 pursue that claim, that he's then going to overcome a
24 number of issues with respect to causation and other issues
25 associated with - which would make his receiving an award
26 that exceeded his statutory benefits very unlikely.
27
28 Q. Limitation is a factor to take into account to
29 discount what one might expect - not so? When you're
30 trying to settle a case, the problems with limitation are
31 factors that you'll take into account to discount what you
32 expect to be paid or expect to be able to settle at?
33 A. It is something you take into account, yes.
34
35 Q. Yes. If there are difficulties with causation that
36 would be something else you would take into account?
37 A. That's correct.
38
39 Q. Why, in this case, no money at all could be paid was
40 because of the benefits that he was receiving and the
41 statutory obligation to --
42 A. That's right.
43
44 Q. -- pay back - not so?
45 A. That's correct.
46
47 Q. You accept that currently, while this Royal Commission

1 is sitting and there's a lot of work being done in the area
2 of child sexual abuse and policy and legislative reform,
3 it's a fluid environment, do you accept that?

4 A. I do accept that and that was one of the reasons in
5 the settlement agreement that we included a clause that
6 said that if there were changes, legislative changes, then
7 that was an exclusion.

8

9 Q. We'll come to that in a minute.

10 A. Yes.

11

12 Q. So do you accept that one of the possibilities in that
13 fluid environment is the claw-back provisions change in
14 some way which would allow a payment to be made to someone
15 in Glen's situation?

16 A. Yes, I accept that, but at that point in time, I - you
17 know that I believe the work of the Commission is just
18 incredible, but I can tell you at that point in time -
19 you're talking about a fluid environment, I haven't seen -
20 up to that date I hadn't seen very many changes coming
21 about in legislation or amendments that would fill our
22 client with any hope.

23

24 Q. Let's look at the saving that was provided for in the
25 deed of release. It is at tab 42 of the tender bundle,
26 exhibit 40-006.

27 A. Yes.

28

29 Q. In mine it is 42. I'm told it might be 39. Is it
30 tab 39? It is the deed of release between the Commonwealth
31 of Australia and [CJI]. That's the deed of release, isn't
32 it, Mr Donaldson?

33 A. That's correct.

34

35 Q. If we go to page 2434, to clause 4, you will see in
36 subparagraph (a):

37

38 *The claimant releases the Commonwealth from*
39 *all obligations, sums of money, actions,*
40 *suits, causes of action ... which he/she*
41 *has or had or may have against the*
42 *Commonwealth arising out of or in any way*
43 *related ... to the facts and circumstances*
44 *described in the Background ...*

45

46 And "the Background" was defined as, essentially, the
47 circumstances of his claim arising at Leeuwin. And then it

1 says:

2

3 *This Deed may be pleaded as a bar to any*
4 *action ...*

5

6 and so on. And then (c) is the clause you're referring to,
7 is it?

8 A. That's correct.

9

10 Q. Then:

11

12 *The release and bar referred to in (a)*
13 *and/or (b) above does not prevent the*
14 *Claimant availing himself of any statutory,*
15 *executive or other redress scheme designed*
16 *to address the facts and circumstances of a*
17 *kind referred to in the Background.*

18

19 What I am suggesting is that that's limited on its terms to
20 a redress scheme and would not include other statutory and
21 policy changes such as a variation in the claw-back
22 arrangements which would allow a lump-sum compensation
23 payment to be made.

24 A. I accept your point.

25

26 Q. So in return for Mr Greaves signing this he received
27 nothing; is that right?

28 A. I don't - you know, from the point of view that we did
29 our darnedest to try to get --

30

31 Q. That's not in issue?

32 A. No. Mr Greaves - we advised him about the document,
33 we advised him about the impact of that. He provided us
34 with instructions that he had no interest in pursuing a
35 common law claim. He provided us with those instructions.
36 We left him in the room with his wife --

37

38 Q. Mr Donaldson, you're not answering my question. I'll
39 come to the question of advice. The question is, he did
40 not get anything in return for this release and waiver that
41 he signed?

42 A. He did not get any monetary benefit, no.

43

44 Q. He didn't get any benefit at all?

45 A. He certainly got an acknowledgment and the apology and
46 the restorative justice that we organised in that day, but
47 of a monetary amount, no he didn't get that.

1
2 Q. He got that at the beginning of the day?
3 A. As part of process.
4
5 Q. This release only came at the end?
6 A. Yes, but it was part and parcel of the process.
7
8 Q. But at the end he could have walked away?
9 A. Yes, he could have, yes. He could have done that.
10
11 Q. So the quid pro quo for the release was that you got a
12 contribution to your fees from the Commonwealth?
13 A. Yes, that's correct.
14
15 Q. And that was justified partly on the basis that it was
16 a test case, you'd done a lot of work on it and it could
17 potentially have affected a number of other people
18 positively?
19 A. Yes, we did put a lot of work into it.
20
21 Q. The difference between Mr Greaves and the other people
22 is that they didn't have to sign any release?
23 A. Well, the costs that were incurred were costs on
24 Mr Greaves' file; they weren't costs on anybody else's
25 file.
26
27 Q. But he had no liability for those costs?
28 A. No, he didn't, no. I want to make this clear.
29 Mr Greaves did not pay one cent. I just want to make that
30 clear. I don't want there to be any suggestion that
31 Mr Greaves --
32
33 Q. That's accepted.
34 A. Yes.
35
36 Q. That's accepted. But the reality is that you left him
37 and his wife in the room to decide whether to sign a
38 release to the Commonwealth or not?
39 A. I can't --
40
41 Q. -- the consequence of which, if he agreed to sign,
42 which he did, was that your costs would be paid or at least
43 a contribution would be made to them?
44 A. Yes, I accept what you're saying.
45
46 Q. In those circumstances, was it not your obligation to
47 advise Mr Greaves that he should get independent legal

1 advice on whether or not he should sign such a release?
2 A. Now you put it like that, in hindsight, perhaps that
3 was - I don't - I look at that and I believe that we did
4 the right thing at the time. I can't take it any further
5 than that.

6
7 MR STEWART: Those are my questions, your Honour.

8
9 THE CHAIR: Yes. Does anyone else have any questions?

10
11 <EXAMINATION BY MS DAVID:

12
13 MS DAVID: Q. Thank you. Thank you Mr Donaldson, my
14 name is David and I appear for Mr Greaves and also for
15 Mr [CJT] who was also at Leeuwin. I just have a few
16 questions for you.

17 A. Yes, for sure.

18
19 Q. Remaining on the topic that Counsel Assisting has
20 referred to - there are some other questions, but whilst
21 we're on that topic - I appreciate it is a difficult one
22 for you, but I just want to say to you that in relation to
23 this, it is quite clear that it was never expected that
24 Mr Greaves pay any costs through out this process, was it?
25 A. No, never.

26
27 Q. Do you agree that it was a somewhat oppressive request
28 on behalf of the Commonwealth that, as part of your
29 obtaining costs, such a deed of release be signed?

30 A. I believe there would have been a deed whether there
31 were costs involved or not. I think that the Commonwealth
32 would have sought a deed at that point. We'd gone through
33 a very long mediation process. I don't think it was
34 oppressive on behalf of the Commonwealth.

35
36 Q. Do you not agree that, as Counsel Assisting has
37 raised, there was no need for Mr Greaves to sign anything;
38 he could have walked away and signed nothing?

39 A. Yes, and we certainly provided him with that advice.

40
41 Q. On that issue, you said in your statement at
42 paragraph 62, "We decided that we had to advise [Glen] that
43 it was in his best interests to walk away." You then go
44 on:

45
46 *At this point, there had been no discussion*
47 *in relation to Shine's fees. It was only*

1 *after we advised [Glen] to walk away, that*
2 *the ADF volunteered to contribute to*
3 *Shine's costs and outlays.*
4

5 I just want to go back to where you say you had advised
6 Glen to walk away. What did he say at that point, when
7 there was no reference to fees, after you'd given him the
8 advice to a walk away?

9 A. I think that I - when I refer to "walk away", there's
10 a legal expression "each party walk away".
11

12 Q. Yes.

13 A. I believed that there may have been a document being
14 prepared about that. I did say - you know, advise Glen
15 that we had to walk away.
16

17 Q. Yes. But just coming back to that, it is not the
18 position, is it, that at the point where you said to
19 Mr Grieves to walk away - that is, he could do absolutely
20 nothing, he was going to get nothing, but if he walked away
21 that would be the end of it - he didn't respond to that,
22 did he?

23 A. He didn't respond?
24

25 Q. What I'm saying is - are you suggesting that he gave a
26 response? When you offered him or put to him the position
27 that he could simply walk away --

28 A. Yes, sorry.
29

30 Q. -- without any reference to a deed of release or your
31 costs --

32 A. That's right.
33

34 Q. -- he didn't respond to that, did he?

35 A. No, he didn't respond.
36

37 Q. Because the reality was, wasn't it, Mr Donaldson, that
38 there were options put to him? It was never given, that
39 option, as a stand-alone - sorry, it was never suggested to
40 him, stand-alone, that he could walk away and there was no
41 reference to fees, was it? That wasn't the case, was it?

42 A. He didn't - we didn't discuss with him fees at that -
43 sorry, I'm missing - I'm --
44

45 Q. I'll try to come at it from another way. You seem to
46 be suggesting that you gave him the advice to walk away and
47 then, subsequent to giving him that advice, you had another

1 conversation that involved him signing the deed of release
2 as if there were two different --

3 A. It was quite fluid at that time. You're in a
4 mediation environment - and I'm going off my best
5 recollection here - we were in the process of advising him
6 with respect to, you know, what it meant, that we hadn't
7 been able to extract an offer. His advice was, "No way, I
8 don't want to go ahead with it", and then I believe that
9 during that time, if my memory serves me correctly, the
10 mediator came in and - I'm basing this on my best
11 recollection, okay, and there was a document being
12 discussed and they were - there was an offer to contribute
13 to our fees.

14
15 Q. I guess what I'm saying - and I'll read to you the
16 evidence that Mr Greaves gave, and you possibly heard it --

17 A. Yes.

18
19 Q. -- but he took exception to what you'd said in your
20 statement about walking away. He said:

21
22 *I know Adair's heart is in the right place.*

23
24 This is at transcript 19340 at line 21. Down to 23:

25
26 *Only one issue on that statement I don't*
27 *agree with, and at the end of his*
28 *statement, he said I was advised to walk*
29 *out - he advised me to walk out. That is*
30 *not correct.*

31
32 That is what I'm putting to you, I'm suggesting it to you
33 and giving you the opportunity to respond, because that's
34 the clear uncontested evidence of Mr Greaves?

35 A. So as I understand it, Mr Greaves has accepted the
36 rest of my statement, agreed with the rest of my statement,
37 and the one thing he has drawn is that remark where he
38 said, "He said I was advised to walk out - he advised me to
39 walk out. That is not correct. We were advised to - we
40 had the option to walk out; we were not advised to walk
41 out."

42
43 Q. That's correct. It was put to you that you only ever
44 gave him two options, which was, one, to walk out; or that
45 at the same time the other option was put to him which was
46 that your fees would be paid if he signed the deed of
47 release?

1 A. I don't remember it that way, with respect to options
2 being given. I remember there was a document - I remember
3 that Glen - I had a very good relationship with Glen and
4 Glen was saying that he was happy for us to get paid.

5

6 Q. By reason of that good relationship, wouldn't you
7 agree that it would put Mr Greaves in a very difficult
8 situation if he knew that you were not going to get fees?

9 A. Well I'm --

10

11 Q. If that option was put to him?

12 A. Well, counsel, I would be terribly upset if that was
13 the case. I can tell you that - counsel, I was - I was
14 there. I had another very experienced solicitor with me.
15 I had experienced junior counsel with me. It wasn't as if
16 I was placing Mr Greaves in any way under duress, and this
17 is the first that I've become aware of that. As I say,
18 I've kept in touch with Glen and I didn't know that that
19 was the way that he felt, and now that you've raised that
20 with me, of course I'm concerned.

21

22 Q. Really, I won't keep pressing the point, but I think
23 it is pretty obvious, with respect to you, Mr Donaldson, as
24 an experienced lawyer, that he has one option to just walk
25 away and not lose any entitlement, and the other is he
26 loses a number of rights and entitlements as referred to
27 and to allow your fees --

28 A. So the entitlement that you're referring to is him
29 having a common law claim and pursuing a common law
30 entitlement?

31

32 Q. Yes.

33 A. Yes. Which he had instructed us that he did not want
34 to pursue.

35

36 Q. But you would agree, clearly, that he was alone with
37 his wife; he was making very difficult decisions as a
38 traumatised person?

39 A. Counsel, in hindsight, I can appreciate that.

40

41 Q. Just in terms of any future collaborative process,
42 would you agree that that sort of situation has to be
43 resolved very clearly and prior to the process so that it
44 doesn't happen again that a person like Mr Greaves --

45 A. Oh, counsel, this was - this was a - we've never run a
46 claim with a TPI again, okay? We've never - and so far as
47 any agreements with respect to costs, et cetera, as

1 required by the Law Society, you know, we impress upon
2 clients that they should be getting independent legal
3 advice and all those sort of things.
4

5 Q. But I'm just suggesting for any other future scheme,
6 there needs to be some very clear statement about that?

7 A. Counsel, I can well appreciate that. Right now, where
8 I'm sitting, I can well appreciate quite.
9

10 Q. And as some recommendation you would recommend that
11 that never be --

12 A. Counsel, I'm taking that well on board.
13

14 Q. Thank you. Just coming back to some other questions,
15 just in relation to the claw-back, I know that it is quite
16 clear, from what you have said, that the TPI and the Gold
17 Card are literally gold to people who have suffered
18 injuries, aren't they?

19 A. Yes, that's correct.
20

21 Q. They bring a great level of security to people that
22 they're never going to have to worry about medical --

23 A. Very much so.
24

25 Q. Yes. So getting a notice of statutory refund is
26 perhaps a little bit out of ordinary or unrealistic in such
27 circumstances, and you've given evidence or suggested that
28 the DVA are not really used to doing it in such
29 circumstances?

30 A. That's correct.
31

32 Q. But what about the circumstance where somebody has a
33 lesser level of pension entitlement and perhaps not the
34 Gold Card but another form of card that doesn't bring with
35 it the extensive benefits --

36 A. Like a White Card or alternatively a lesser pension?
37

38 Q. Yes. So what has been your experience in terms of
39 getting a notice of statutory refund in those
40 circumstances, where there's a very real prospect that
41 common law damages might actually well exceed the
42 entitlements?

43 A. Counsel, in my experience, okay, given what happened
44 with Greaves, matters involving any form of benefits that
45 they're receiving from DVA, I'm not aware that those
46 matters have been resolved. So it is a live issue, it is
47 very much a live issue.

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Q. You would agree that it would be absolutely impossible for someone to make a rational decision about whether or not to accept a benefit, without that very clear information; do you agree?

A. Yes, that's correct.

Q. Just coming back into the situation - you talked before, and I thought your terminology was quite appropriate, but at paragraph 43 of your statement - sorry you mentioned before, you referred to "broken bones and broken minds". Just coming back to paragraph 43 of your statement, I just want to understand, for example, if in the case of Mr Greaves - he had a number of physical injuries and he also had his psychiatrically related injuries that he suffered. If a person, for example, had a TPI entitlement for post-traumatic stress disorder but then they were making a claim for a purely physical disorder, such as a broken bone disorder, to use your terminology, and they'd already received something for the post-traumatic stress disorder, could that disentitle them? For example, in this case, if it was just post-traumatic stress that they had received the TPI and the Gold Card for, if they then wanted to make a claim for another incident against the Department of Defence that related to a broken bone type claim, a purely physical claim, relating to another incident that could be attributed to the Department of Defence, would that put someone like Mr Greaves in that same position, or could you run that separate claim?

A. Perhaps if I could use Mr Greaves' example.

Q. I know his isn't quite as clear-cut.

A. No, it wasn't, but if I could just break that down, because Mr Greaves originally received a part-pension entitlement of 40 per cent and received a White Card, I believe, and that was in relation to a number of other conditions, physical conditions.

Q. Yes.

A. Okay? So he then went on to get the PTSD in relation to the incident that occurred in Vietnam.

Q. Yes.

A. So if we break that down, you know, what happens if he then has to have a refund. The only amount that he has - you know, if he brought a claim in relation to a PTSD

1 associated with sexual abuse, the amount that he would have
2 to refund would be that associated with the psychological
3 condition. Does that make sense? Is that what I --
4

5 Q. Yes. I'm just trying to get some clarity. It is not
6 clear to me, I don't know whether it is to other people,
7 but if you've got two very separate complaints, just to
8 divide them for the sake of hypothesis, one is a physical
9 complaint and one is a psychiatric complaint, they are
10 clearly caused by two very clear, separate incidents. If
11 you've got the TPI for one of those complaints, are you
12 entitled to then claim for another?

13 A. But there's --
14

15 Q. That's what I'm trying to ascertain?

16 A. There's no other benefits that you can receive.
17 You're currently receiving, then, the full benefits. If
18 you're getting 100 per cent TPI, there's no point in then
19 bringing another condition because you're already getting
20 the Gold Card that covers everything.
21

22 Q. But what I'm talking about is a common law claim that
23 wouldn't be a bar, that wouldn't require the claw back of
24 the TPI, is what I'm getting at. Can you run a separate
25 common law claim in relation to those separate damages?

26 A. So long as it is not an injury - so long as it is not
27 an injury that's currently being covered by the TPI.
28

29 Q. Yes, that's right.

30 A. For instance, where we have a difficulty with
31 psychiatric injuries with respect to the PTSD, is that you
32 can't have PTSD for sexual abuse and PTSD for the Vietnam
33 experience, that they're getting it all for one, if that
34 make sense.
35

36 Q. Yes, I accept that.

37 A. Yes.
38

39 Q. You could if it was a quite separate --

40 A. Yes, you could, yes. As I understand it, and I know
41 that you've got the expert coming next in relation to
42 Department of Veterans' Affairs.
43

44 Q. Yes, thank you. Also, you talk about a claim for
45 defective administration. I wonder if you could perhaps
46 expand a little bit on what you mean by that?

47 A. Under the - I think it is the Finance Act, there is an

1 ability to bring a claim against the Commonwealth where
2 there have been administration errors. I can't refer you
3 to particular sections, but I can take it on - if it's -
4 I'm not sure what the procedure is, but I can certainly
5 provide that information to the court, if that makes --
6

7 Q. You might?

8 A. Is that okay?
9

10 THE CHAIR: Yes.
11

12 MS DAVID: Q. The other issue, for example - and
13 Mr Greaves is a case in point here - if he had made a
14 claim, he was granted the TPI or the benefit, as I
15 understand it, from 1999. What about the time prior, from
16 the time of the alleged incident - sorry, I say "the
17 incident" - from the time of an incident which caused a
18 trauma or a physical or a psychiatric disorder, what about
19 the time between the cause, or the incident, and the start
20 of the benefits? Would it be open for someone like
21 Mr Greaves to make a claim for that period of time that
22 would not infringe upon his TPI benefit?

23 A. Counsel, in my statement I refer to "fill the gap"
24 claims and that's what I was alive to and that's what I was
25 trying to achieve in Glen's matter, and I was unable to do
26 that.
27

28 Q. What was the bar to that? What was the rationale put
29 forward by the Defence?

30 A. The rationale is, "Okay, so if we come along and we
31 compensate him for that period of time, then you're going
32 to be triggering the refund."
33

34 Q. But why, when you don't receive anything? Do you
35 understand?

36 A. Could I refer you to - you know, this is something
37 that I have looked at at length, okay, it is something that
38 I feel very strongly about. I put together, with the
39 support of Lisa Kinder, a submission to address that
40 submission, and that was on 24 August 2015. I believe that
41 that has been made available to people and I addressed that
42 very issue, to try to address that.
43

44 Defence is alive to that. I think that Defence
45 would - well, I don't know. Defence - that is a - that is
46 an issue, and it's something that I feel strongly about,
47 the fact that you can get abused as 15-year-old boy and

1 when you're 34 years of age you then get a pension but you
2 don't get anything for the violent sexual abuse that
3 occurred when you were young.

4
5 MS DAVID: Thank you. Excuse me for a moment, your
6 Honour. Nothing further.

7
8 **<EXAMINATION BY MR O'BRIEN**

9
10 MR O'BRIEN: Q. My name is O'Brien and I represent
11 [CJU]. I would ask that this document be placed on the
12 screen, DEF.02.0010.005.0092. This was just given to me
13 this morning.

14
15 THE CHAIR: What is the document?

16
17 MR O'BRIEN: It is a letter under the hand of Henry Davis
18 York dated 25 September 2015 to Shine Lawyers under the
19 hand of Kerry Stewart, Special Counsel.

20
21 THE CHAIR: Is it in our bundle of documents?

22
23 MR O'BRIEN: It may not have made it yet. I only got this
24 document this morning.

25
26 MR STEWART: Your Honour, I understand it is an annexure
27 to Mr Lysewycz's statement. It is not in the bundle but
28 I can hand up copies. I'm not sure if the Commissioners
29 have that statement. It came through yesterday. It is an
30 annexure to the statement. And here is the statement.

31
32 (Shown to the Chair and Commissioners)

33
34 MR O'BRIEN: Q. Do you have that document in front of
35 you?

36 A. Yes, I have.

37
38 Q. I want to draw upon your experience as a plaintiff
39 litigator in personal injury claims. I want to ask you
40 this - this document was sent by Henry Davis York, who were
41 defending proceedings by Mr Greaves and others - well, in
42 relation to the claim by Mr Greaves and others against the
43 Commonwealth of Australia and the Department of Defence.
44 They've set out in that document the pieces of legislation
45 that may be applicable in relation to the assessment of
46 quantum of each of the above claims. Do you see that?

47 A. Yes, I do.

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Q. Then they list eight Commonwealth Acts and the relevant Civil Liability Act legislation in the State in which the matter has been pursued. Do you see that?

A. Yes, I do.

Q. So I am led to believe from that letter that if a survivor of child sexual abuse whilst within the armed services were to take a claim against the Commonwealth, there's no less than at least nine pieces of legislation that need to be looked at in order to work out how much their claim is worth. Is that your understanding, or is that what that letter is saying?

A. In theory, that's correct, but in the negotiations that I've seen involved in with the ADF, it has very much been based on common law principles where they're - when I look at that, that looks incredibly onerous --

Q. As a plaintiffs' lawyer and representative of plaintiffs for personal injury matters, have you ever come across any other type of claim that involves the application of so many various pieces of legislation to work out how much a claim is worth?

A. Every case - I take what you're saying - is going to be different. These matters are quite - I mean, they're tough.

Q. Aren't they made overly complicated by the number of legislative regimes which impact on the outcome?

A. Yes, but that's what the current law is.

Q. I'm only asking you to compare --

A. Yes, and I hear what you're saying, okay? It's - I don't feel as if I can comment. I understand where you're going, counsel, I just can't comment on that because, as I say, we come across matters that are very complex where there are lots of pieces of legislation that are involved. If you can compare it, for instance, to a Personal Proceedings Act, where there's one piece of legislation, or an occupational health and safety matter - yes, it does look onerous when you see that and it would be quite daunting for - certainly for a self-represented survivor.

MR O'BRIEN: Thank you.

THE CHAIR: Ms McLeod?

1
2 MS McLEOD: No questions, thank you, your Honour.
3
4 MR STEWART: Nothing further, your Honour.
5
6 THE CHAIR: Thank you, sir, that concludes your evidence.
7 You're excused.
8
9 THE WITNESS: Thank you, your Honour.
10
11 <THE WITNESS WITHDREW
12
13 MR STEWART: Your Honour, I call Mr Neil Bayles.
14
15 <NEIL ROSS BAYLES, affirmed: [2.43pm]
16
17 <EXAMINATION BY MR STEWART:
18
19 MR STEWART: Q. Sir, would you state your full names and
20 occupation for the record?
21 A. Neil Ross Bayles, public servant.
22
23 Q. You have before you a copy of your statement prepared
24 for the Royal Commission dated 15 June 2016?
25 A. Yes.
26
27 Q. I understand there are a few corrections you wish to
28 make to that statement; is that right?
29 A. Yes.
30
31 Q. The first, as I understand it, is at paragraph 14 on
32 page 3?
33 A. Yes.
34
35 Q. You would delete the last sentence in that paragraph;
36 is that right?
37 A. Yes.
38
39 Q. And the next is at paragraph 75, on page 13?
40 A. Yes.
41
42 Q. In the fourth line of that paragraph the line that
43 begins "continuous full-time service", you would delete the
44 word before and replace it with the word "after"; is that
45 correct?
46 A. Correct.
47

1 Q. And the final correction is at paragraph 88(a) on
2 page 15.

3 A. Yes.

4

5 Q. You would delete what's in parentheses in the second
6 line of (a), in other words, "(Or reasonable hypothesis
7 test if that is applicable); correct?

8 A. Correct.

9

10 Q. There is one further correction. At paragraph 112 on
11 page 18.

12 A. Yes.

13

14 Q. In the third line, between inverted commas, there's
15 the word "apportionment", and you delete that and replace
16 it with the words "notional assessment"?

17 A. Correct.

18

19 Q. Subject to those corrections, do you confirm the
20 statement to be true and correct?

21 A. Yes.

22

23 MR STEWART: I tender the statement.

24

25 THE CHAIR: That will be exhibit 40-021.

26

27 **EXHIBIT #40-021 STATEMENT OF NEIL ROSS BAYLES DATED**
28 **15/06/2016**

29

30 MR STEWART: Q. You are the assistant secretary of the
31 Rehabilitation Case Escalation and Military Rehabilitation
32 Compensation Act Review Branch of the Department of
33 Veterans' Affairs; is that right?

34 A. Correct.

35

36 Q. You've held that position since August 2014?

37 A. Correct.

38

39 Q. In that position you are responsible for providing
40 administrative support, research, strategic policy advice
41 and legislative support for rehabilitation under three
42 statutes; is that right?

43 A. Correct.

44

45 Q. Those are the statutes that we have come to refer to
46 as the VEA, the SRCA and the MRCA; is that correct?

47 A. Correct.

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Q. As I understand it, you first joined the DVA - that's the Department of Veterans' Affairs - in 1978; is that right?

A. Correct.

Q. And you've held various positions between then and now?

A. Correct.

THE CHAIR: Q. Are you trained as a lawyer?

A. No. No, your Honour.

MR STEWART: Q. What are your academic qualifications or what is your academic training?

A. My academic qualifications are a Bachelor of Arts degree which was achieved in 1978. That's the only academic qualification I hold.

Q. Thank you, Mr Bayles. In paragraph 16 of your statement you identify, under the heading "Eligibility relating specifically to the areas of interest to the Royal Commission", that survivors of sexual abuse at Leeuwin and Balcombe from the 1960s and 1970s may qualify for compensation, using the word loosely, from the DVA under two statutes; is that right?

A. Correct.

Q. The SRCA and the VEA?

A. It depends on the period of their service. So they are covered under - all covered under SRCA but some also have coverage under the Veterans' Entitlements Act if they completed three years of service between 1972 and April 1994 or, if they had less than three years' service, they were medically discharged or they left the Defence Force because of physical or mental incapacities to perform their duties.

THE CHAIR: Q. I know the statement seeks to explain this, and I tried to master it but I haven't: what's the difference if you qualify under SRCA as opposed to VEA? What's the difference?

A. Okay. The two pieces of legislation are quite different. The Veterans' Entitlements Act is based on the original Repatriation Act of 1920 and provides lifetime compensation and health care. It was originally designed to cover service in wartime, operational services, and has

1 progressively been expanded to various wars and conflicts
2 in which Australia has been involved.

3
4 The SRCA, on the other hand, is the Commonwealth
5 workers compensation scheme and it has been in existence,
6 in effect, since 1930 and has had three different Acts, a
7 1930 Act, a 1971 Act, and the 1988 present Act. It
8 provides compensation in the form of a lump sum
9 compensation for conditions, for permanent impairment, and
10 can provide economic loss compensation in the form of a
11 regular payment, as well as health care for an accepted
12 condition.

13
14 So the two schemes are different but in 1972 the
15 government of the day decided to extend what was then the
16 Repatriation Act, subsequently the Veterans' Entitlements
17 Act, to peacetime service, and that created a situation
18 where those people eligible at that time who meet those
19 criteria in my paragraph 16 - they would have dual
20 eligibility. So they'd have entitlement to claim under
21 SRCA and an entitlement to claim under the VEA from
22 7 December 1972, and that dual eligibility was not removed
23 until 1994 for that peacetime service.

24
25 Those who were survivors who were at Leeuwin in the
26 1960s and 1980s - they'd all have SRCA coverage, but some
27 will have both VEA and SRCA.

28
29 Q. And the Gold Card - eligibility for that comes only
30 from VEA?

31 A. Correct, your Honour.

32
33 Q. Otherwise, under SRCA, payment in relation to
34 identified medical conditions as a result of what happened
35 when in service?

36 A. Correct, your Honour.

37
38 Q. If you qualify under the VEA and you say you may also
39 be eligible under SRCA, does that mean you can get a lump
40 sum under SRCA and a pension under the VEA? Is that the
41 way it works?

42 A. You could conceivably get both, but, if you do, the
43 compensation paid under SRCA is offset against the
44 disability pension you may have under the VEA.

45
46 Q. You can't double-dip?

47 A. You can't, that's right. The purpose of that

1 offsetting is to prevent someone from receiving double
2 compensation for the same incapacity or death of a member.

3
4 Q. Is the test to get compensation under either scheme
5 the same?

6 A. No, your Honour. There are differences. In relation
7 to peacetime service, the standard of proof that applies is
8 the same. It is a balance of probabilities of test of the
9 question of the causation between something that happened
10 on service and an injury or disease. However, the heads of
11 liability are different between the two Acts. The VEA has
12 a much broader set of liability provisions, whereas the
13 SRCA requires --

14
15 Q. You mean events which might trigger entitlement?

16 A. Yes. So, for example, under SRCA an injury has to
17 occur in the course of employment or arising out of
18 employment. In relation to a disease, the disease has to
19 have been contributed to significantly by service.

20
21 The Veterans' Entitlements Act has several other
22 statutory heads of liability under which you can accept
23 something is related to service. That's a broader set of
24 criteria.

25
26 Q. Just give us an example.

27 A. An example would be a "but for" provision in the
28 Veterans' Entitlements Act, which would be - we describe it
29 as a "but for" provision, which means, for example, if
30 someone happened to be serving in Australia in a tropical
31 environment and they contracted a disease as a result of,
32 say, an insect bite, it would have only occurred in that
33 area of Australia and they subsequently develop a disease
34 as a result of that insect bite, we can accept liability
35 because the individual was there at that place but would
36 not have been there but for their service. So we can
37 accept that liability arises in that situation.

38
39 Q. I'm not sure that I think there's a difference, but,
40 anyway, that's the way you're looking at it?

41 A. Yes.

42
43 MR STEWART: Q. I want to go a bit further on this
44 question of the burden of proof, Mr Bayles, which you
45 discuss at paragraph 52 and onwards of your statement - or
46 the standard of proof - and you identify it in certain
47 respects and relevantly as being on the balance of

1 probabilities. I want to use SRCA as an example and just
2 examine what that means.

3
4 I ask if we can have on the screen section 5A of SRCA.
5 It will be on, I think, page 26. It is in part 1. It is
6 5A of the next section. "Definition of injury". To
7 qualify under SRCA in respect of an injury as opposed to a
8 disease - and I'll come to that in a moment - one has to
9 satisfy this definition; is that right?

10 A. Yes, that's correct.

11
12 Q. It is in respect of this that you say - and I'm not
13 contesting - that the balance of probabilities applies?

14 A. Correct.

15
16 Q. So, as it says there:

17 *injury means:*

18
19
20 *(a) a disease suffered by an employee; or*

21
22 *(b) an injury (other than a disease)*
23 *suffered by an employee, that is a physical*
24 *or mental injury arising out of, or in the*
25 *course of, the employee's employment; or*

26
27 *(c) an aggravation of a physical or mental*
28 *injury (other than a disease) suffered by*
29 *an employee (whether or not that injury*
30 *arose out of, or in the course of, the*
31 *employee's employment), that is an*
32 *aggravation that arose out of, or in the*
33 *course of, that employment;*

34
35 *but does not include ...*

36
37 et cetera.

38
39 THE CHAIR: Q. That's a very strange exception. It is
40 providing compensation for injury suffered in the course of
41 employment, but then it has a potentially large exclusion?

42 A. For diseases, your Honour, do you mean, or --

43
44 Q. "Does not include a disease, injury or aggravation
45 suffered as a result of reasonable administrative action
46 taken in a reasonable manner". Many people will be injured
47 in a work environment in the ordinary course of doing

1 what's reasonable, but there's an injury.

2

3 MR STEWART: It may not be administrative action, your
4 Honour.

5

6 THE CHAIR: It may not be, but, nevertheless, this is
7 "suffered as a result of reasonable administrative action"
8 which means being asked to do something.

9

10 THE WITNESS: It defines some examples but, as you say, it
11 is not an exclusive list, but it is in relation to things
12 such as disciplinary action or performance appraisal or -
13 the examples that are given there, those are the nature of
14 the exclusions. They've been there - those provisions have
15 been there for some years.

16

17 THE CHAIR: Q. Are they used, are they reliable?
18 A. They occasionally arise, yes, your Honour.

19

20 THE CHAIR: All right.

21

22 MR STEWART: Q. Then the next definition, which is
23 peeping up at the bottom of the screen, is the definition
24 of a "disease", and it sets out:

25

26 *(a) an ailment suffered by an employee; or*

27

28 *(b) an aggravation of such an ailment;*

29

30 *that was contributed to, to a significant*
31 *degree, by the employee's employment by the*
32 *Commonwealth or a licensee.*

33

34 So one would have to bring oneself into one or other of
35 those definitions in order to then get to the next
36 consideration of an entitlement; is that right?

37

38 A. Correct.

39

40 Q. Mr Bayles, it is an assessor acting as a delegate of
41 the Commissioner who actually makes these decisions; is
42 that right?

43

44 A. That's correct, except and unless it has gone to an
45 appeal, in which it may be an appeal body such as the
46 Administrative Appeals Tribunal.

45

46 Q. Yes, and one intermediate review as well. Is there a
47 review tribunal?

1 A. There is an internal - a process in between, which is
2 called the internal reconsideration, and that is by a
3 delegate of the Military Rehabilitation Compensation
4 Commission, correct.

5
6 Q. Have you ever acted in the role of being an assessor
7 to assess and make decisions on these claims?

8 A. I am not in a position at the moment where I make
9 regular decisions on claims. I occasionally make decisions
10 under SRCA or VEA, but they are not frequent instances.
11 They are usually cases of significance that I may well be
12 involved in handling, but not as a regular matter - not a
13 regular part of my duty.

14
15 Q. Has it been part of your duty to train the assessors
16 who make the decisions on these claims?

17 A. I'm not - I haven't been in a training role, but
18 I provide policy advice to decision-makers and I also
19 handle some difficult, complex cases where I need to
20 provide guidance to decision-makers about the way forward
21 with a very complex set of circumstances. That may, for
22 example, involve eligibility across multiple Acts. So I do
23 have that as part of my role.

24
25 Q. Accepting, of course, that you don't have formal
26 academic legal training, obviously you have a huge amount
27 of experience in this legislation. Are you familiar at all
28 in the application of what's referred to as the Briginshaw
29 test for proof on the balance of probabilities?

30 A. Sorry, could you ask that question again?

31
32 THE CHAIR: I'm not sure many lawyers would be able to
33 answer as to what it means, Mr Stewart.

34
35 MR STEWART: I am sure that most lawyers would answer the
36 first question "yes", at least, which is that they they're
37 familiar with it.

38
39 THE CHAIR: Yes, but where are we going?

40
41 MR STEWART: We're going to look in a moment at whether
42 the policy of the department matches up to the requirement
43 of the law, that's where we're going.

44
45 THE CHAIR: What does Briginshaw have to do with it?

46
47 MR STEWART: Your Honour, I can put Briginshaw to one

1 side.

2

3 Q. Mr Bayles, the reality of it is that there are really
4 two aspects that have to be satisfied: one is that the
5 event, whatever it is, that's said to have given rise to
6 the injury or disease occurred; and then, secondly, the
7 nexus between that event and the injury or disease; is that
8 right?

9 A. Correct.

10

11 Q. And that's assuming that it was within employment and
12 so on.

13 A. (Witness nods).

14

15 Q. Principally, the latter aspect, the nexus aspect, is
16 dealt with by expert medical evidence; is that right?

17 A. In relation to SRCA?

18

19 Q. Yes.

20 A. Yes.

21

22 Q. I'm just confining us to SRCA for now, because you
23 can't do all of them. The former aspect, in other words
24 the incident or event that gave rise to it, that is,
25 obviously, in the first instance, the evidence of the
26 person who is claiming who says, "This is what happened to
27 me"; is that not so?

28 A. That's usually the first piece of evidence that we may
29 receive, would be with the claim, the claimant will make a
30 statement that, "This happened on service" and may give the
31 incident in which it happened.

32

33 THE CHAIR: Q. That comes in a written document, does
34 it?

35 A. Yes, the claim form must be a claim in writing, yes.

36

37 Q. Does anyone from the department, in the process of
38 making a decision, interview that person?

39 A. We normally contact a claimant first up, as soon as we
40 receive the claim, to discuss how we will proceed with that
41 claim and ask the claimant if they have any evidence they
42 wish to provide to us. We also explain to them what the
43 process will be, which could include obtaining medical
44 evidence.

45

46 Q. I understand that, but if you get a statement, a
47 written document, saying, "This is what happened to me",

1 does anyone sit down and formally talk to the person about
2 what they have said in their written statement?
3 A. Usually not a claims officer, unless they wish to seek
4 clarification.

5
6 Q. So they're doing it off the paper?
7 A. Usually they take it off the paper, but applicants are
8 frequently represented by ex-service organisation advocates
9 who would normally have sat down with the applicant before
10 the form is lodged with the department and frame the
11 application accordingly, or the applicant will be
12 represented by a lawyer who would assist them in the same
13 way.

14
15 Q. Where I'm going is that in order to satisfy yourself
16 that someone is telling you the truth, it is very common -
17 and, indeed, very helpful - to actually meet with them face
18 to face and talk about it. You don't do that?
19 A. Not as a matter of course, no, not at the primary
20 decision-making level. We determine these questions of
21 liability in two of our offices, so a practical
22 face-to-face meeting is difficult for every client, but
23 given it is a high-volume determination of primary
24 decision, it doesn't normally involve a face-to-face
25 communication.

26
27 Q. No doubt there are many that go through with approval?
28 A. Mmm.

29
30 Q. But you don't have a face-to-face meeting if you're
31 contemplating rejection?
32 A. Possibly not. Possibly not. There should be a
33 conversation, a phone call, from the claims assessor to the
34 claimant to say, "Look I'm going to reject the claim. I've
35 got nothing", or "There's no basis for the claim.
36 I haven't got sufficient evidence", before they actually
37 send the decision out, but, no, not a face-to-face, your
38 Honour.

39
40 MR STEWART: Q. The position, as I understand it from
41 your statement, is that there's no burden of proof in the
42 sense that there's no burden on the claimant to satisfy the
43 requirement; the DVA must investigate and come to a
44 position; is that right?

45
46 THE CHAIR: I don't understand him to be saying that.
47

1 MR STEWART: Paragraph 45, your Honour.
2
3 THE CHAIR: But if the test is balance of probabilities
4 and he has to bring forward a claim, it is inevitable that
5 the burden is falling on the claimant.
6
7 THE WITNESS: Your Honour, what we do is we do attempt to
8 investigate and obtain what evidence we can.
9
10 THE CHAIR: Q. Yes, that's right.
11 A. So we take that onus, I guess, on us. We do ask the
12 claimant to provide what evidence they can provide, but we
13 would go to sources such as the Department of Defence or to
14 a medical provider or to a third party to try to obtain
15 evidence. So we take on the role of investigating in a
16 sort of inquisitorial fashion and obtain what evidence we
17 can to make a decision.
18
19 Q. But you still apply a test whereby you have to be
20 satisfied on the balance of probabilities that the claimant
21 has got over the line?
22 A. Correct, your Honour, yes.
23
24 THE CHAIR: Yes.
25
26 MR STEWART: Q. As I understand it, you say that it's
27 the DVA who takes on the responsibility, at least at some
28 level, to actively investigate and make inquiries?
29 A. Correct.
30
31 Q. And so you don't only depend on what the claimant
32 gives you; you'll make inquiries of Defence or potentially
33 other parties if those might be relevant?
34 A. Correct.
35
36 Q. The position is that there's a SRCA liability handbook
37 which guides the assessors to make these decisions; is that
38 right?
39 A. Correct.
40
41 Q. That handbook is published, I take it, by DVA?
42 A. Yes. Our manuals, policy manuals, are available
43 publicly on our website through a system we call CLIK as a
44 tool for claimants and for their representatives so that
45 they can see what policy we will be applying as we process
46 a claim.
47

1 Q. Who decides - at what level is it decided what's in
2 the handbook? At what level is it authorised?
3 A. In really matters of significant substance, a policy
4 will be determined by the Commission - one of the two
5 Commissions, the Military Rehabilitation Compensation
6 Commission or, in relation to the VEA, it would be the
7 Repatriation Commission. So if a matter is a matter of
8 significant policy, it is determined at that level. If it
9 is procedural or a very minor policy question, it will be
10 possibly determined at my level in the organisation and
11 reflected in the manual.
12
13 Q. Is there, to your knowledge, a statutory basis to the
14 manual or is it a departmental policy that really stands
15 outside the statute?
16 A. It is to support the statute. It can't override the
17 statute. It is to assist claims assessors apply the law,
18 because that's what their job is.
19
20 Q. Yes.
21 A. It cannot override the law.
22
23 Q. We can take it as accepted that it can't override the
24 statute. My question is whether it has a statutory
25 foundation - in other words, to your knowledge, is there a
26 provision in the statute which empowers someone
27 specifically to make policy in the form of a handbook like
28 this?
29 A. The Commission has the power to make guidance to
30 decision-makers, so yes.
31
32 Q. So it comes under that power?
33 A. That's correct.
34
35 Q. One can have a look at that handbook at tab 114.
36 That's the beginning, chapter 1 of the handbook. Do you
37 recognise that?
38 A. I recognise it as the liability handbook.
39
40 Q. Yes. If we go to page 0067, there is the heading of
41 chapter 15, "Injury". One sees on that page, 67, it sets
42 out - do you see where it says just above the first
43 emboldened part:
44
45 *Nevertheless, the following general*
46 *principles and guidelines can be given:*
47

1 So these are setting out guidelines for the decision
2 makers; is that right?

3 A. Yes.

4

5 Q. Do you see the first one under the heading
6 "Unsupported client assertion is not sufficient evidence",
7 it says:

8

9 *The proposition that a medical condition*
10 *has an employment-related origin must be*
11 *supported by independent evidence, and may*
12 *not be accepted only on the unsupported*
13 *assertion of the claimant. Even a*
14 *statutory declaration by the claimant*
15 *should not be regarded as sufficient to*
16 *accept liability in the absence of other,*
17 *independently corroborating evidence.*

18

19 Are you able to explain why that's the position --

20

21 THE CHAIR: I would like to know what it means, actually.

22

23 Q. If there is a claimant who supports a claim and
24 there's a supporting doctor's report, where the doctor
25 opines that the injury was suffered in the course of
26 employment, is that sufficient?

27 A. Your Honour, it would not be sufficient in all
28 aspects. There are several aspects that have to be met.
29 First of all, the incident or the accident or the
30 happening, the event, has to be established. Secondly --

31

32 Q. Just a minute.

33 A. Yes.

34

35 Q. So is this clause 1 saying that in order to establish
36 that event, it is not sufficient --

37 A. Correct.

38

39 Q. -- however honest --

40 A. Correct, your Honour.

41

42 Q. -- that the claimant says, "This is what happened to
43 me"?

44 A. Correct, your Honour. It's not sufficient.

45

46 Q. That's a rule that is being applied?

47 A. That's correct, your Honour.

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Q. Have you talked it out amongst yourselves as to whether or not that's a proper application of the law?

A. I don't - I'm not aware of any discussion recently on that particular point.

Q. You see, there will be many cases in the criminal and civil courts where the only evidence that something has happened is the evidence of the claimant, and it can be accepted?

A. In respect of claims by survivors of Defence abuse, that has been discussed within the MRCC around what is the sufficient level of evidence, and the Commission has recently decided that it will use what is now called cluster data from the Department of Defence as corroborative evidence, but in that decision that it has made recently, it has considered this issue around statutory declarations not being sufficient to establish fact, but there is a need for further corroborative evidence to accept that an incident happened. It is not sufficient just to have a statutory declaration.

Q. The point I'm making to you is that that decision-making process will not comply with the Act because the Act doesn't say you have to have corroborating evidence. All the Act says is that you have to be satisfied.

A. To a balance of probabilities.

Q. Yes.

A. Yes. As I said, your Honour, I'm not a lawyer.

Q. No.

A. I can't comment on that question. I would be happy to take it on notice.

Q. You would know yourself, from your own experience, that when you sit down and talk to someone, very often you can establish in your own mind whether they're telling you the truth or not, can't you?

A. Yes, normally, your Honour, that's true, but we are required to apply the law and we require more than simply a statement or an assertion that something happened. We need something to confirm it. That could be in several forms. It could be an eyewitness statement, someone who was there at the time and saw it; it could be just Defence confirming that that event took place; or it could be someone who was

1 there who was, at the time, advised by the claimant that an
2 incident occurred and that information was relayed to
3 another person, such as, for example, a family member, but
4 I appreciate that in this Commission --

5
6 Q. If the law only requires you to be satisfied on the
7 balance of probabilities, you can do that by just accepting
8 the claimant's statement, can't you?

9 A. Well, I would take it on notice, your Honour. My
10 understanding is we need to have corroborative evidence for
11 any assertion; an assertion on its own is not enough.

12
13 Q. And that comes out of these guidelines?

14 A. Correct, your Honour, yes.

15
16 MR STEWART: Q. It goes one step further, doesn't it,
17 Mr Bayles, because it is recognised in these guidelines
18 that this is beneficial legislation, is that not so?

19 A. The legislation is beneficial in the sense that it
20 provides benefits and compensation and health care, but the
21 standard of proof that's applicable to deciding on a claim
22 under SRCA is balance of probabilities. The beneficial
23 nature of the legislation doesn't change the fact that the
24 standard of proof is the balance of probabilities.

25
26 Q. If we look at page 11 of this document, it will come
27 on the screen for you, at the foot of the page, this is in
28 Chapter 2, "Initial liability", you will see under 2.3.6
29 that "Standard of Proof" is the heading and then if you go
30 over the page, in the second paragraph on the next page,
31 the direction to delegates is that:

32
33 *[They] should also be guided by the*
34 *long-standing principle that the*
35 *compensation Acts have been established for*
36 *the benefit of the employee - i.e. it is "*
37 *beneficial legislation". This means if,*
38 *after the above "probability test", the*
39 *employee's case remains indeterminate (i.e.*
40 *where issues are finely balanced and*
41 *involve contradictory evidence of*
42 *apparently equal weight) the employee may*
43 *be given the benefit of the doubt.*

44
45 But notwithstanding that, it goes on to say:

46
47 *This principle definitely does not operate*

1 *in the absence of independent evidence*
2 *supportive of the employee's case.*
3 *Applications which founder upon the absence*
4 *of (or inadequacy of) supporting evidence*
5 *should be decided in the negative.*
6

7 Do you see that?

8 A. Yes. So if the matter is finely balanced then it can
9 tip towards the veteran, but it does say that we need to
10 have evidence, corroborative evidence - you can get
11 contradictory evidence, that's the case, and sometimes it's
12 a difficult judgment around weighing each part of that
13 evidence and determining which evidence is stronger than
14 other evidence.

15
16 Q. That's the irony here. You might have a situation
17 where there's more than just the claimant's evidence in
18 support of the incident having occurred. There may be some
19 contradictory evidence and in those situations are finely
20 balanced with "can't really be decided", the benefit of the
21 doubt would be given to the claimant, but in situations
22 where there's no contradictory evidence, there's only the
23 claimant's evidence and it is credible and believable, the
24 claimant must fail under these guidelines; is that not so?

25 A. Correct.

26
27 Q. You see that that's a problem, don't you?

28 A. I understand the point you're making, but in these
29 cases evidence is very difficult to get and in many cases
30 we have no other evidence apart from the statement of the
31 survivor. We attempt to obtain other evidence to support
32 the claim but the evidence, as you've heard in the
33 Royal Commission, is that often there was no reporting of
34 the incident, for good reasons, if there was a record, the
35 record doesn't exist any more, and in many cases there was
36 no record kept.

37
38 Q. I suggest in the case of sexual abuse, and in
39 particular child sexual abuse, there are two features which
40 operate particularly, which mean that these provisions
41 operate particularly harshly against those survivors. One
42 is that there's very often no other witness, that this is
43 something which takes place where the person or the child
44 has been taken away from the possibility of there being
45 another witness, and secondly, by its very nature, it's
46 something that might only be reported years and even
47 decades down the track.

1 A. Yes. We're aware of the evidentiary difficulties that
2 survivors have and, as I said, we've tried to work very
3 closely with Defence and with DART to obtain extra evidence
4 and, as I said, we've agreed with DART that they would
5 provide us with this cluster information and the Commission
6 has recently been - has recently considered how it would
7 use that cluster information. We have been working very
8 closely with Defence on trying to find extra evidence to
9 support claimants, so we do endeavour to find evidence and
10 we ask the claimant if they could provide a witness
11 statement. I appreciate that witness statements may not be
12 possible in many cases, so we're often left with the
13 witness, the survivor's statement and cannot obtain any
14 other evidence at all. Those cases cannot be accepted.

15
16 THE CHAIR: Q. They can't be accepted because of these
17 guidelines, that's all.

18 A. Yes.

19
20 MR STEWART: Q. To your knowledge, has anything been
21 done to revisit these guidelines that have this harsh
22 effect?

23 A. No, but given what has happened at this
24 Royal Commission this week and the evidence that has been
25 provided, given it has highlighted the abuse that took
26 place and the circumstances in which it happened and the
27 effect that it has had on the individuals, I would
28 undertake to take back to the policymakers, which is,
29 effectively, the two Commissions, and to the incoming
30 government that the question of evidence for this group
31 needs to be considered. We know how difficult it is to
32 obtain the evidence and we have many cases, as I said,
33 where we don't have any other corroborating evidence; so
34 I would agree, undertake to take that back to the
35 policymakers and to the incoming government.

36
37 THE CHAIR: Q. While you're doing that what you should
38 take back to them is advice that a system which is
39 operating on the balance of probabilities but excludes any
40 possibility of succeeding in a claim unless there is
41 corroborative evidence, is not in accordance with the law.

42 A. I will take that back, your Honour.

43
44 MR STEWART: Q. Mr Bayles, the DART Report, for example,
45 has been around, it was published in 2014, and I'm not sure
46 how long it has been publicly available but it's certainly
47 publicly available now, it is on the internet for anyone to

1 find. That's evidence enough, surely, to corroborate in
2 respect of time periods and places where complaints have
3 been made?

4 A. Sorry, which report?

5
6 Q. The DART Report?

7 A. The DART Report. Yes, we have the DART Report. The
8 reports that are publicly available we're aware of, but
9 what we have asked DART to do is to provide much more
10 detailed data by location, by year of the plausible
11 incident, by the age range of the individual, what activity
12 they were doing at the time, their sex, and the year in
13 which the incidents occurred and the number of incidents in
14 that year.

15
16 What we have got from DART is, it is de-identified, so
17 we don't know the names, but we have data of that level of
18 information that will assist in determining these claims,
19 which have been ones that are held in abeyance and are
20 still on hold or outstanding. The Commission has agreed to
21 use that cluster data and that decision was only made
22 recently and we are about to commence to use that data.
23 However, as I said before, I will take back to the
24 policymakers the issue that has clearly come through this
25 Royal Commission around the difficulties of evidence being
26 obtained.

27
28 Q. Mr Bayles, doesn't that merely set up a new set of
29 criteria or obstacles that someone is going to have to meet
30 and that is that they're going to have to bring themselves
31 within your cluster information with respect to place,
32 time, age, sex, et cetera, all the factors you've
33 mentioned?

34 A. The cluster data - the Commission has agreed the
35 cluster data can be used as corroborative evidence to
36 accept a claim provided there is other supporting evidence,
37 but not to be used to reject a claim.

38
39 Q. Yes, but you're still going to be in the situation
40 where a survivor comes forward and they don't fit within
41 one of those clusters, they still have an entirely credible
42 story to tell, there's no contradictory evidence
43 whatsoever, they're still going to be rejected?

44 A. Under the current approach, yes, they would be, but
45 the cluster information we have from DART I think covers
46 about 120 locations and is continuing to be provided to us,
47 so it is quite extensive data. It doesn't cover every

1 situation of physical or sexual abuse and so there will be
2 some locations where we don't have the data. DART did not
3 give us some information where the number of plausible
4 incidents is so small that it would be possible to identify
5 the individual concerned from that data, so we don't have
6 every location covered by that data.

7
8 Q. Are you aware whether independent legal advice has
9 been sought with regard to the consistency of this
10 guideline handbook with the statutory requirement?

11 A. No. I'm aware that we have sought legal advice in
12 relation to the impact of apology letters from the
13 Department of Defence, but I'm not aware of requesting
14 legal advice in the nature that you just said.

15
16 Q. I appreciate you're not a lawyer and may not feel by
17 way of authority and otherwise to answer this. I'll say it
18 anyway and you can if you can. I suggest that this needs
19 to be looked at as a matter of some urgency because it
20 seems that requirements that are set out by the handbook
21 guidelines are beyond what the law requires?

22 A. I will take that back to the policymakers, counsel.

23
24 Q. And it is the case, of course, that many many cases or
25 claims would have been refused on the application of these
26 provisions, which is, effectively, a two-witness rule?

27 A. Yes, some claims would have been rejected on the
28 absence of corroborative evidence.

29
30 THE CHAIR: Q. Have you come to understand, through the
31 work of DART and through the work of the Commission, that
32 the Defence Force has had a culture which has accepted
33 initiation processes?

34 A. Yes, your Honour.

35
36 Q. Have you come to understand that those initiation
37 processes have plainly deteriorated to physical and sexual
38 abuse of young people coming into the armed services?

39 A. Yes, your Honour.

40
41 Q. It is in that context, isn't it, that you start to
42 look at someone who comes forward and says, "I was sexually
43 or physically abused"?

44 A. Yes, your Honour. We are aware of these
45 circumstances, although your Commission has certainly
46 highlighted the difficulties that people have in providing
47 any evidence of an incident. Certainly, the evidence given

1 at this Royal Commission has been confronting.

2

3 MR STEWART: Q. I want to move on and deal with the
4 question of compensation offsetting. In each of these
5 three statutes there are different provisions which might
6 be referred to as compensation offsetting; is that right?

7 A. That's correct, yes.

8

9 Q. And in the VEA, in the context of Mr Greaves's claim,
10 which I'm sure you're familiar with, the particular section
11 that has been referred to is section 93; is that right?

12 A. Yes.

13

14 Q. Nevertheless, there are also compensation offsetting
15 provisions in SRCA?

16 A. Correct.

17

18 Q. Are those the ones in section 48?

19 A. I think so. Can we confirm that by bringing it up
20 or --

21

22 Q. Yes, we can pull that up, section 48 of SRCA. I think
23 that's not SRCA.

24 A. I think you've got the wrong Act; that's the
25 Veterans' Entitlements Act.

26

27 Q. While we are looking for that, at your paragraphs 115
28 to 117 you deal with this and you seem to follow the
29 statutory provision more or less.

30 A. Yes.

31

32 Q. Is it your understanding that under SRCA if an award
33 has been made, and that could be a lump-sum award because
34 it's under SRCA, and subsequently there's a common law
35 damages award, the offsetting will apply?

36 A. Yes.

37

38 Q. There is an exception though, isn't there, in respect
39 of non-economic loss?

40 A. I would like to see the legislation.

41

42 Q. There is a technical problem on that aspect for a
43 moment.

44 A. Sure.

45

46 Q. We will do something else while we wait for it. We
47 can give you a hard copy. It doesn't help your Honour or

1 the Commissioners.
2 A. (Handed to witness)

3
4 THE CHAIR: We have a bundle of legislative provisions.

5
6 MR STEWART: Q. Do you have 48 there which is headed
7 "Compensation not payable where damages recovered",
8 Mr Bayles?

9 A. Yes, yes, I see it.

10
11 Q. In particular, subparagraph (3) provides that:

12
13 *If, before the recovery of the damages by,*
14 *or for the benefit of, the employee or*
15 *dependant, any compensation under this Act*
16 *was paid to, or for the benefit of, the*
17 *employee in respect of the injury, loss or*
18 *damage, or to, or for the benefit of, the*
19 *dependant in respect of an injury that*
20 *resulted in death of the employee, as the*
21 *case may be ...*

22
23 And then, operatively, it then says:

24
25 *the employee or dependant is liable to pay*
26 *to Comcare an amount equal to:*

27
28 *(a) the amount of that compensation; or*

29
30 *(b) the amount of the damages;*

31
32 *whichever is less.*

33
34 A. Correct.

35
36 Q. Then you will see it is provided at (4A):

37
38 *Subsection (3) does not apply if the*
39 *damages were recovered in an action for*
40 *non-economic loss or by way of a settlement*
41 *of such an action.*

42
43 What I am asking in your experience would that be applied
44 in such a way that a payment of non-pecuniary damages, such
45 as the pain and suffering, would not be clawed back?

46 A. My understanding is that it would - non-economic loss
47 compensation for pain and suffering, if damages were

1 awarded for that and compensation has been provided in the
2 form of a lump sum, that there would be recovery.

3

4 Q. Perhaps we're back into the area of the effect of the
5 legal provisions which is not going to be that helpful to
6 debate. I suggest there may be some question at least
7 about that.

8 A. Maybe I could take that on notice, counsel.

9

10 Q. Perhaps that would be another one, yes. If one has
11 regard to the VEA and the provision that applies there,
12 I don't know if you have that available to you. This will
13 be the last one I'll take you to, I'm sure, section 93.
14 I'm not sure that it will come up yet. I think you've got
15 the statute there. This was the section that was applied
16 in the case of Mr Greaves.

17 A. I have the SRCA and I have the VEA. This volume stops
18 at 94. No, it starts at 94 and this volume --

19

20 Q. It is section 93. I see that, the volume starts at
21 94.

22 A. This volume starts at 94, counsel.

23

24 Q. We will try again. I will leave that to one side for
25 now, Mr Bayles, and I am going to come to the question --

26

27 THE CHAIR: Mine has the same problem. What has happened?

28

29 MR STEWART: Q. Mr Bayles, you heard the evidence
30 earlier today about the need that claimants and their
31 lawyers have for the figures of what might be clawed back.
32 Did you hear that evidence?

33 A. Yes.

34

35 Q. Is there a reason why the DVA has not been able to
36 provide that information to claimants?

37 A. With the Veterans' Entitlements Act offsetting, an
38 individual veteran may have many conditions which result in
39 a rate of disability pension and then they receive
40 compensation, either under SRCA or common law, for say one
41 of those conditions, such as, for example, PTSD. We need
42 to establish what portion of the disability pension would
43 then be related to PTSD. That would be a decision which
44 would be made by a delegate based on medical evidence, so
45 we need to establish what I'd call a notional assessment of
46 how much of the disability pension is related to the
47 condition for which damages have been provided and that's

1 an important element of the calculation of the offset.

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331

1 said, "We won't provide the figures until settlement has
2 actually been reached"?

3 A. I don't know the detail of this particular individual
4 case and what interactions occurred between Defence and
5 DVA, but you could interpret that to say that DVA would not
6 provide a final figure until there has been a settlement,
7 but my understanding is that we can and do provide
8 estimates of the possible offsetting when we are asked for
9 that information. As I said, it can sometimes be difficult
10 because where multiple conditions are involved, we have to
11 do what is called a notional assessment and work out how
12 much of the disability pension is attributable to the
13 condition for which damages are being sought.

14
15 Q. If we look at the next tab, 31, you will see there's
16 an email from Frank White to Jane Favretto who is at Henry
17 Davis York. In the third paragraph he says:

18
19 *Unfortunately I was not able to obtain any*
20 *further information about why treatment*
21 *lists were not provided for ...*

22
23 Three people, including [CJA]:

24
25 *However, the guiding principle in*
26 *[section] 93 of the Veterans' Entitlements*
27 *Act ... is that if a claimant obtains*
28 *compensation for a condition through either*
29 *a settlement or award of damages, the*
30 *Department will seek to recover the*
31 *treatment costs which it has outlaid in*
32 *respect of that condition. This should*
33 *prompt the claimants to consider whether*
34 *they have obtained treatment for any*
35 *condition for which they now seek*
36 *compensation, and factor this in to their*
37 *decision making.*

38
39 And then critically:

40
41 *If a claimant obtains compensation, they*
42 *should notify the Department because at*
43 *this point the Department will perform*
44 *calculations to determine the amount, if*
45 *any, which would be recoverable under*
46 *[section] 93.*

47

1 Again, that seems to suggest that it is at the point of
2 obtaining the compensation that the calculation will be
3 made and provided.

4 A. I'm not familiar with this exchange of correspondence,
5 this is the first time I've seen it, but the provision that
6 exists in section 93 is about recovery of healthcare costs
7 that have been incurred by the department in paying for
8 that accepted condition for which damages are going to be
9 provided. We can in relation to the disability pension
10 work out what the offset will be, depending on the size of
11 the damages. As for recovery of healthcare costs, we would
12 need to establish what health costs have been incurred for
13 that accepted condition and we would need to interrogate a
14 number of systems to gain that information. In some cases
15 it may not be straightforward. For example, if a person
16 has gone to a general practitioner, we may not know what
17 was the reason for going to the general practitioner. Was
18 it a physical condition or was it a mental condition? What
19 was it? We may not know if they have a Gold Card. They
20 can receive treatment for any condition, whether related to
21 service or not. Usually there's quite a fair degree of
22 investigation and calculation required to work out how much
23 is recovered in relation to healthcare costs; it's not very
24 straightforward.

25
26 Q. I think that can be accepted, Mr Bayles. Do you
27 accept that the DVA should be doing what it can to assist
28 claimants by providing estimates and figures prior to them
29 making final decisions on compensation?

30 A. Yes, we should and we do normally do that, but yes, we
31 should.

32
33 MR STEWART: Those are my questions, your Honour.

34
35 MS McLEOD: If it is of assistance to my learned friend,
36 section 93, as the witness has just indicated, is the
37 repayment of the health or medicals provision. Sections 74
38 and 78 deal with the recovery of compensation and damages.

39
40 THE CHAIR: Do either of you two have any questions?

41
42 MR O'BRIEN: Just very briefly on one topic, if I may.

43
44 **<EXAMINATION BY MR O'BRIEN:**

45
46 MR O'BRIEN: Q. O'Brien is my name and I represent
47 [CJU]. [CJU] gave his evidence earlier today. I expect

1 that you were here and heard that?

2 A. I did.

3

4 Q. He spoke about a social worker calling him out of the
5 blue, as it were, asking him about his claim and asking
6 him, in particular, about the details of what had happened
7 to him. Can you tell us whether that's standard conduct
8 within your office?

9 A. The department has set up a dedicated claims team to
10 handle sexual and physical abuse claims. That team is in
11 Melbourne. It is a small team of decision makers supported
12 by a social worker. The social worker provides a
13 professional who can talk sensitively to Defence abuse
14 survivors and part of that social worker's role is to keep
15 up the communication with the survivors who have claims
16 being handled by that team; so it would not be unusual for
17 the social worker to call a claimant.

18

19 I don't know the exact circumstances around that
20 particular call. I don't know whether there was a warning
21 given to the claimant. I would have expected that if we
22 were to have a substantial discussion with the survivor
23 then I would have expected that the survivor would have had
24 some warning of that conversation happening, if it was to
25 be a substantial conversation and the person offered the
26 ability to have someone in support. In light of the
27 evidence that was delivered this morning we will - I will
28 take back to the department the fact that we need to
29 consider how we engage with the survivors. We operate
30 through phone calls, a lot of our business is done through
31 phone calls, but I can appreciate the concern that was
32 raised that the survivor had no warning of the call and
33 wasn't given the opportunity to have someone else
34 participate and be there for them, I appreciate that.

35

36 Q. I also wanted to ask on his behalf this issue of
37 claims being held in abeyance and we've heard a lot about
38 it and I don't want to regurgitate that same material, but,
39 as I understand it, you were awaiting a set of data
40 described as cluster data, so demographic information about
41 places that the Commission is now interested in considering
42 themselves. Has that cluster data been made available to
43 you in any form?

44 A. I have seen some of it. The department has the
45 cluster information now for about 120 locations. We have
46 asked the Military Rehabilitation Compensation Commission
47 how to use that data. We have trained the staff on how to

1 use it on the basis of the Commission's decision and we
2 were about to commence using that data to finalise the
3 cases held in abeyance. However, as I said earlier, given
4 the evidence that has been submitted to this Commission,
5 I will go back to the Commission and ask them to reconsider
6 its use of the cluster data in the light of the evidence
7 given.

8
9 Q. That covers my second --

10
11 THE CHAIR: Q. At the moment, as I understand it, you're
12 in the position where if someone has lodged a claim but the
13 cluster data, as you put it, doesn't have any information
14 in relation to that location, the claim would be rejected?

15 A. Yes, your Honour, it would be, and the claims were
16 held in abeyance because of the fact that we would have
17 rejected, so we needed to wait until we had the cluster
18 data and then the Commission decide how it would be used.

19
20 MR O'BRIEN: Q. Finally, has that cluster data been
21 produced to this Commission?

22 A. I don't think so. I don't know for sure. I cannot
23 answer that question.

24
25 Q. Can that be produced with any --

26
27 THE CHAIR: It is not within his control, it's DART's.

28
29 THE WITNESS: It's not within my control; it's DART's
30 information.

31
32 MR O'BRIEN: Q. It is coming to you, isn't it?

33 A. Yes, we have it already, yes, we do have it. I can't
34 see why we should not provide the information --

35
36 Q. That data, as I understand it, would cover the type of
37 claim to give in evidence before these proceedings and the
38 type of institutions that this Commission is interested in
39 learning about?

40
41 THE CHAIR: It will, Mr O'Brien.

42
43 MR O'BRIEN: Thank you, your Honour.

1 <EXAMINATION BY MS DAVID:

2
3 MS DAVID: Q. Thank you. My name is David and
4 I represent Glen Greaves and also [CJT] who served at
5 Leeuwin and were subjected to abuse there. Just a couple
6 of questions - in the case you have been shown some
7 documentation in relation to Mr Greaves about this issue of
8 trying to understand what the statutory repayments might
9 require and I understand it is a very resource intensive
10 process to go back and figure out how much people would
11 have to pay back. Just to be clear, if you give a figure
12 around the time of settlement, is there then a more
13 rigorous process of investigation that's conducted after a
14 settlement, on your understanding?

15 A. Yes.

16
17 Q. I am trying to understand how it might vary.

18 A. Yes. It would have to be a more rigorous process
19 because then that will affect the payment of ongoing
20 disability pension and also recovery of possible
21 overpayment of the treatment.

22
23 Q. There is really no certainty at all at that settlement
24 stage?

25 A. We can provide an estimate on the best evidence we
26 have at the time, but usually a solicitor representing the
27 client would say, "Right, if we take, say, \$200,000 worth
28 of damages for this condition, what would be the impact?"
29 If we can do - as I said, multiple-injury cases are a
30 little bit more complex and a bit difficult because we've
31 got - well, we do a notional assessment, that can be a
32 complicating factor, but we can provide an estimate and
33 say, "The best estimate we can give at this time, given
34 these assumptions", and then when a settlement occurs, we
35 would go back and do a more accurate figure.

36
37 Q. Just on that issue, do you envisage or see any way of
38 trying to resolve that so that there's some clarity in the
39 future? For example, if somebody with a Gold Card went to
40 the doctor, that there could be some separation at that
41 point as to whether it was a condition relating to their
42 recognised injury or some other non-related injury?

43 A. Normally we would provide - rely on our own medical
44 advisers to give us that assessment. If they can't then we
45 may have to go to the treating doctor, say a GP or other
46 specialist, so it would depend on the medical information,
47 so it can be a bit uncertain. We will look at whether or

1 not there's any way we can make that process easier for
2 clients and provide a bit more certainty. However,
3 I think, at the end of the day, you can only - if you
4 haven't got complete information you can only provide an
5 estimate based on certain assumptions.
6

7 Q. Just briefly, just to be clear, in relation to the
8 double-dipping issue that you've referred to before under
9 the different acts of VEA and SRCA, if, for example,
10 somebody had a completely unrelated injury, that they were
11 receiving benefits under the VEA for one type of injury
12 relating to one incident and they came with a completely
13 different injury relating to a completely different
14 incident, would that still invoke that double dipping?

15 A. Only if they've received compensation from another
16 source for that condition. They could still claim another
17 condition. If they're on special rate, that's a maximum
18 payable under the VEA. If they get another condition
19 accepted, it's not going to increase the VEA compensation
20 because it's a lifetime payment and that's the maximum.
21

22 MS DAVID: I have nothing further. Thank you.
23

24 MS McLEOD: One matter of clarification.
25

26 **<EXAMINATION BY MS McLEOD:**
27

28 MS McLEOD: Q. The TPI was mentioned by Mr Donaldson for
29 his client of around \$54,000 per annum. Is that a tax-free
30 amount?

31 A. Yes, the special rate is non-taxable.
32

33 Q. He indicated that was for life?

34 A. It is payable for life, as long as the person
35 continues to be unable to work.
36

37 Q. Just in relation to the questions you were just asked
38 about injuries, the assessment is of incapacity rather than
39 the injury, is it not?

40 A. Correct. In relation to VEA offsetting it is
41 incapacity that matters, so incapacity of the overall
42 effects of the condition, the effects on bodily impairment,
43 lifestyle, pain and suffering, so yes, it is the incapacity
44 that matters, not the injury or disease; it is the
45 incapacity from the injuries or disease that matters.
46

47 MS McLEOD: Thank you very much.

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THE CHAIR: Mr Stewart?

MR STEWART: Your Honour, I do have a matter to clarify.

<EXAMINATION BY MR STEWART:

MR STEWART: Q. You mentioned section 93 of the VEA. I am hoping it is going to come up on the screen. It is in respect of medical costs, that's costs of treatment, recovery of costs of treatment. Is it your understanding that, as a matter of course, the Commonwealth will claim those as offsets?

A. Yes, that's my understanding with recovered costs.

Q. The statute actually provides that the Commission may cause a notice to be served on the patient. Are you aware of whether advice has been sought on whether that gives the Commonwealth a discretion as to whether to claim that?

A. I'm not aware of any request for legal clarification on that provision.

MR STEWART: Those are my questions, your Honour.

THE CHAIR: Yes. Thank you, Mr Bayles, that concludes your evidence and you're excused.

<THE WITNESS WITHDREW

MR STEWART: I tender the statement of Lisa Marie Flynn which should be at tab 19. It is not my intention to call Ms Flynn to give evidence. I just tender her statement.

THE CHAIR: That will become exhibit 40-022.

**EXHIBIT #40-022 STATEMENT OF LISA MARIE FLYNN
DATED 14/06/2016**

MR STEWART: Your Honour, there is one further witness for this part of the case study: that's Mr Michael Lysewycz. I am assuming we will not deal with him now. He will be available on Monday. I think we would finish with him by the morning adjournment and we should --

THE CHAIR: He is not capable of being dealt with in 20 minutes?

1 MR STEWART: No, your Honour.
2
3 THE CHAIR: Very well. All right. When do you want to
4 adjourn to, 10 o'clock?
5
6 MR STEWART: 9.30, if that's possible.
7
8 THE CHAIR: Probably not.
9
10 MR STEWART: 10 o'clock, your Honour.
11
12 THE CHAIR: We will say 10 o'clock on Monday, but we may
13 have to sit earlier on subsequent days. Very well. We
14 will adjourn until 10 on Monday.
15
16 **AT 4.00PM THE COMMISSION WAS ADJOURNED TO MONDAY, 27 JUNE**
17 **2016 AT 10.00AM**
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