Investigation of allegations referred by Parliament’s Legal and Social Issues Committee, arising from its inquiry into youth justice centres in Victoria

September 2018
Ordered to be published
Victorian government printer
Session 2014-18
P.P. No. 446

Accessibility
If you would like to receive this publication in an alternative format, please call 9613 6222, using the National Relay Service on 133 677 if required, or email vocomms@ombudsman.vic.gov.au.

The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.
Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly


Deborah Glass OBE
Ombudsman

5 September 2018
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>4</td>
</tr>
<tr>
<td>Glossary</td>
<td>6</td>
</tr>
<tr>
<td>Executive summary</td>
<td>8</td>
</tr>
<tr>
<td>Investigation scope and methodology</td>
<td>15</td>
</tr>
<tr>
<td>Chapter 1</td>
<td></td>
</tr>
<tr>
<td>The allegations and the key people involved</td>
<td>17</td>
</tr>
<tr>
<td>Chapter 2</td>
<td></td>
</tr>
<tr>
<td>The landscape: youth justice and education in Victoria</td>
<td>27</td>
</tr>
<tr>
<td>Chapter 3</td>
<td></td>
</tr>
<tr>
<td>Significant events from late 2016 to early 2017</td>
<td>37</td>
</tr>
<tr>
<td>Chapter 4</td>
<td></td>
</tr>
<tr>
<td>Allegation 1: an attempt to influence</td>
<td>54</td>
</tr>
<tr>
<td>Chapter 5</td>
<td></td>
</tr>
<tr>
<td>Allegation 2: misleading the Supreme Court</td>
<td>81</td>
</tr>
<tr>
<td>Chapter 6</td>
<td></td>
</tr>
<tr>
<td>Allegation 3: misconduct investigation in reprisal</td>
<td>92</td>
</tr>
</tbody>
</table>
As Ombudsman I am often called upon to decide the truth of an allegation: what really happened between two or more conflicting accounts of events? My role as an inquisitor is to inquire and report, as far as I can, where the truth lies. But as Oscar Wilde famously observed, the truth is never pure and rarely simple.

This report concerns a dispute between the former principal of Parkville College and senior executives from the Department of Education and Training, first aired in the media in April 2017, then at public hearings of the Legal and Social Issues Committee of Parliament, which referred the matter to me in December 2017.

The background was the riots at the Parkville Youth Justice Precinct in November 2016, as a result of which a number of young people were transferred to a hastily configured youth justice and remand centre inside a maximum-security adult prison. The lawfulness of that transfer was immediately the subject of legal proceedings brought by, among others, the Human Rights Law Centre. The principal was being called to give evidence; tensions were high on all sides.

The allegations at the core of this investigation are that the department’s most senior official put pressure on the principal by telling him what the department would like him to say in those proceedings, with the implied threat that funding for Parkville College would not be renewed in the event of an adverse court outcome.

These allegations came about against a background of immense pressure for all the parties involved, responsible for the challenging task of providing education services for young people within the walls of an adult prison. The situation was evolving rapidly, and subject to intense scrutiny by the public, the government, the media and the court. Conversations were held under stressful circumstances; this was not the only high-profile issue on the Secretary’s desk. The principal’s evidence was not favourable to the department, and he was later found to have provided a confidential email to the plaintiffs in the proceedings, with whose advocates he had personal connections.

Ultimately, the allegations were not substantiated. Those against whom the allegations were made denied them in the strongest terms. There is little common ground between the accounts and the evidence is that each person involved, in at least some respects, is wrong or mistaken in their account. Given the context, this is not surprising, and despite lengthy interviews and careful analysis I do not think it is possible to establish exactly who said what.

There is no evidence the government misled the Supreme Court, or that the action later taken by the department against the principal was in retaliation for his evidence against them. There is no doubt the principal provided an email containing confidential information about young people in custody to the plaintiffs in the proceedings, and the department’s initiation of misconduct proceedings against him was reasonable.
There is also no doubt the principal felt intense pressure following the calls from his bosses in the days leading up to his appearance in the court case.

The judgment of all involved can, in different respects, be called into question. All those involved are, however, human, and it is not surprising that human judgments made in the heat of the moment can be questionable.

I have little doubt that all involved in this saga believed they were doing the right thing: that departmental officials not unreasonably wanted answers to complex questions involving the delivery of education services; and that the principal – a passionate social justice advocate – believed he was acting in the best interests of the young people in custody, albeit while breaching his duty to his employer. The principal is not a subject of my investigation and in any event is no longer employed by the department. The conduct of all has been subject to intense – I have no doubt, uncomfortable – scrutiny.

I provide this report to the Committee, and I recommend that the matter be closed with no further action.

Deborah Glass

Ombudsman
Glossary

Parkville College: Parkville College is a specialist Victorian Government school that provides education to students who are, or have been, detained in custody across seven campuses, including Parkville Youth Justice Precinct and Malmsbury Youth Justice Centre.

Department of Education and Training (DET): The Secretary of DET is Gill Callister. Parkville College sits within DET.

Department of Health and Human Services (DHHS): The Secretary of DHHS is Kym Peake. Until March 2017, youth justice was a portfolio of DHHS. In December 2016, Ms Peake was a named defendant in the Certain Children case in the Supreme Court.

Education and Training Reform Act 2006 (Vic) (ETRA): ERTA is the primary piece of education legislation in Victoria.

Victorian Curriculum and Assessment Authority (VCAA): VCAA was established under the now repealed Victorian Curriculum and Assessment Authority Act 2000 (Vic) and continues to operate under the ETRA. VCAA has a number of functions under the Act, including developing courses and curricula, and awarding and issuing the Victorian Certificate of Education (VCE) and Victorian Certificate of Applied Learning (VCAL).

Victorian Registration and Qualifications Authority (VRQA): The VRQA is established under the ERTA and is Victoria's education and training regulator. Every school in Victoria must be registered with the VRQA which requires schools to meet minimum standards set out in the ETRA regulations. Any organisation providing senior secondary education (years 11 and 12) also falls within the VRQA’s regulatory scope, whether they operate in a school or non-school environment. For example, a TAFE institute must be registered by the VRQA to deliver the VCE or the VCAL.

The role of the VRQA is to register entities as school and non-school providers.

Victorian Certificate of Education (VCE): According to the VCE and VCAL Administrative Handbook 2018, the VCE is a senior secondary certificate of education recognised within the Australian Qualifications Framework. It is designed to be completed over a minimum of two years, and includes general education curriculum components (VCE studies) and programs from Vocational Education and Training (VET) qualifications. Satisfactory completion of a VCE unit is based on successful completion of learning outcomes. Satisfactory completion of units is determined by the school, in accordance with VCAA requirements.

Victorian Certification of Applied Learning (VCAL): According to the VCE and VCAL Administrative Handbook 2018, VCAL is a senior secondary certificate of education recognised within the Australian Qualifications Framework. A VCAL program must contain curricula that can be justified against the purpose statements of each VCAL strand, being Literacy and Numeracy Skills, Industry Specific Skills, Work Related Skills and Personal Development Skills. A program must contain a minimum of two VCAL units and may also contain curriculum components from:

- additional VCAL units
- VCE studies
- VET-accredited curriculum or training packages or Further Education-accredited curriculum.

A VCAL unit contains accredited learning outcomes that are generic by nature and enable content to be developed and/or planned at the local level to suit the individual needs of students. Locally developed non-accredited curriculum and activities or structured workplace learning programs can contribute to the achievement of learning outcomes in a VCAL unit. Each VCAL unit is 100 nominal hours in length, and each unit that is successfully completed contributes one credit towards the VCAL at the appropriate award level.
The nominal hours include both scheduled and unscheduled time. VCAL units are available at the three VCAL award levels (Foundation, Intermediate and Senior) to cater for the different needs, abilities and experiences of students.

To be awarded the VCAL, students must successfully complete a learning program that contains a minimum of 10 credits and includes:

- curriculum components to the value of at least one credit, each of which can be justified against the purpose statement for each of the four VCAL curriculum strands
- a minimum of two VCAL units
- one credit for Numeracy Skills
- curriculum components to the value of six credits at the level of the VCAL award (or above), of which one must be for a Literacy Skills unit and one for a Personal Development Skills unit. However, credits classified at Foundation level (VCAL Foundation units, and VET and FE units at Level 1) cannot contribute to Senior level.

**Recognition of prior learning (RPL):** According to the VCAL Unit Assessment Planning Guide, RPL is the acknowledgement of skills and knowledge obtained through any combination of formal or informal training, work experience or general life experience.

RPL is a process to assess successful completion of VCAL learning outcomes through skills, knowledge and experience gained in other settings besides traditional school programs, for example through part-time work or voluntary involvement in a community organisation. RPL can only be applied to the VCAL Work Related Skills (all levels), VCAL Personal Development Skills (all levels) and VCAL Skills For Further Study – Senior units. Decisions regarding RPL for VCAL Work Related Skills, VCAL Personal Development Skills and VCAL Skills For Further Study – Senior units are the responsibility of the enrolling VCAL provider. Where students have been granted RPL, evidence that demonstrates successful completion of the entire unit learning outcomes must be completed and kept by the VCAL provider.

**Vocational Education and Training (VET):**
VET programs provide an education that directly relates to getting a job. The VET subjects and units offered at Parkville College are accredited through Melbourne Polytechnic and include:

- Certificate II in Engineering
- Certificate II in Kitchen Operations
- Certificate II in Visual Arts
- Certificate III in Fitness
- Certificate II in Building and Construction (Carpentry)
- Pre-apprenticeship; Certificate II in Hairdressing
- Certificate II in Music
- Certificate III in Shopfittering
- Certificate III in Warehousing Operations

---

**glossary**

7
Executive summary

Background

1. During 2016 there were several publicised critical incidents in Victoria’s youth justice system – in particular, riots and escapes. In response to widely expressed concerns about these events, on 10 November 2016, the Legislative Council agreed to a motion for the Legal and Social Issues Committee to inquire into and report on issues at the Parkville and Malmsbury Youth Justice Centres.

2. Immediately following this, a number of incidents occurred within Parkville Youth Justice Precinct over 12-14 November 2016. These incidents involved young people rioting and causing significant property damage. Some units and areas were uninhabitable.

3. At this time, the Department of Health and Human Services (DHHS) was responsible for youth justice in Victoria. DHHS immediately started considering options for alternative accommodation, which resulted in the gazettal, on 17 November 2016, of the Grevillea Unit at Barwon Prison (a maximum-security prison for adult males) as a youth justice and remand centre.

4. DHHS also began making arrangements with the Department of Education and Training (DET), which was responsible for Parkville College, to ensure education services could be delivered at Grevillea.

5. On 2 December 2016 an originating motion for judicial review of the decision to establish Grevillea was filed in the Supreme Court by Fitzroy Legal Service working with the Human Rights Law Centre (HRLC), on behalf of the plaintiffs (referred to in this report as the Certain Children matter). The plaintiffs submitted that the detention of young people at Barwon was unlawful, among other reasons because they were not enrolled in a registered school.

6. Brendan Murray, then Executive Principal of Parkville College, was subpoenaed by the plaintiffs to give evidence, and did so on 12 December – the first day of proceedings.

7. On 21 December 2016, the Court found that the Orders in Council establishing Grevillea were invalid. The defendants immediately informed the Court of their intention to seek leave to appeal, and applied for a stay, submitting among other things there was no viable and appropriate facility within youth justice to place the young people who were at Grevillea.

8. The plaintiffs disputed this, producing a copy of an internal DHHS email that had been sent earlier that day, which it was later established had been forwarded by Mr Murray to a friend at HRLC.

9. DET began – but did not complete – an investigation into Mr Murray’s leak of the email. A deed of separation was agreed to and signed by both parties in March 2017.

The allegations and referral

10. The allegations that are the subject of this report were made by Mr Murray in evidence to the Legal and Social Issues Committee in May 2017. They concern his interaction with the Secretary of DET, Gill Callister, and another senior DET official, Stephen Fraser, immediately prior to his (Mr Murray’s) evidence to the Supreme Court in December 2016, and some of the events that followed.

11. They all occur within the context of the gazetting of Grevillea; DET’s establishment, via Parkville College, of education services at Grevillea; the Supreme Court litigation brought on behalf of the young people detained there; and Mr Murray’s involvement in those proceedings.

12. The Committee tabled an interim report into its inquiry on 12 December 2017, referring these allegations to the Ombudsman.
Allegation 1

That during two conversations – a conference call on Friday 9 December with Ms Callister and Mr Fraser, and a follow-up call on Sunday 11 December with Mr Fraser – Ms Callister and Mr Fraser attempted to influence Mr Murray’s evidence, to be given in the Supreme Court proceedings on 12 December.

13. The specific allegation is that the Friday and Sunday telephone calls were an attempt to influence Mr Murray by telling him what the department would like him to say and not say in those proceedings; in the Sunday call, adding the implied threat that funding for Parkville College may not be renewed in the event of an adverse court outcome.

14. The evidence demonstrates the gazetting of Grevillea placed the department, and in particular Parkville College, in unprecedented circumstances. The challenge was not only to deliver education services but also to identify whether there was a pathway to accreditation of learning for the young people at Grevillea, which was not an educational environment that any of the parties had previously had reason to consider. The delivery of education services was being actively explored through the drafting of an MOU between DET and DHHS.

15. The impending court case meant the question of accreditation (how learning at Grevillea could contribute to the awarding of a qualification) would also be considered in the context of litigation and the issue was indeed ventilated during the court proceedings.

16. For the key protagonists, the period in mid-December 2016 was exceptionally challenging. In addition to assisting DHHS to respond to the youth justice crisis, Ms Callister was dealing with other complex and sensitive matters, some of which were also receiving media attention. Mr Murray had personal connections through family and friends to the plaintiffs’ lawyers in the proceedings, which would inevitably have tested his loyalty to his employer.

17. The disputed telephone conversations took place against this context of heightened tensions and competing demands. For DET, the pressure was immense not only to deliver education services, but to be able to say they could deliver education services, in response to the plaintiffs’ allegations that DHHS was failing to meet its statutory duties to provide young people with education in a registered school. While the impending court case and deadline to execute the MOU were coincidental, both brought into stark relief the question of exactly what services DET could provide young people at Grevillea.
18. It was not possible to establish, even on the balance of probabilities, an accurate account of what was said during the Friday conference call. Ms Callister and Mr Fraser both strenuously denied the allegations against them. Both said that the purpose of the call was in reference to the MOU, not the court case. There was little common ground between the accounts given, and the evidence of each person was, in at least some respects, inaccurate or mistaken. Despite an extensive interview and evidence-gathering process, it was apparent that a clear narrative of what was said could not be established to the relevant standard of proof.

19. What can be clearly established, however, are two matters: that Mr Murray felt pressure following the phone call, evidenced by his contemporaneous response to at least four people, and there was a flurry of activity over the weekend following the call, to attempt to find an answer to the question of accreditation at Grevillea.

20. While I accept, on balance, that the Friday call was not made with the intention to tell Mr Murray what to say in court, Ms Callister was well aware that he was giving evidence the following week. The terms of the MOU had been finalised on the Friday and no compelling reasons were put forward for the urgency of answering the question of accreditation over the weekend, if not connected to the court proceedings. In all of the circumstances, while the allegation is not substantiated, making a call to Mr Murray at that time was injudicious.

21. The weekend’s activity confirms DET thought it was important for Mr Murray to know there was a mechanism for accreditation of learning at Grevillea prior to his giving evidence. There is a fine line between informing a witness about facts relevant to the evidence they are likely to be examined on and seeking to influence the evidence they are going to give.

22. While Mr Fraser characterised his follow-up call on the Sunday, as far as the court case was concerned, as offering support to Mr Murray, this is unlikely in the circumstances. While the parties disagree on the context, there is no dispute they discussed the possibility of the responsibility for youth justice being moved from DHHS to the Department of Justice and Regulation (DOJR) with an attendant risk for the future of Parkville College.

23. While I do not believe the Sunday call was made with the intention of telling Mr Murray what to say in court, it was made to impart facts relevant to those proceedings, and in a heightened environment of apparently unresolved funding and the potential for adverse outcomes for Mr Murray if the litigation was lost. This would not unreasonably have felt to Mr Murray like an attempt to influence his evidence, and in all of the circumstances, the call was not only injudicious but inappropriate.

24. Both Ms Callister and Mr Fraser point out that Mr Murray had been inaccurate in his evidence in respect of a number of matters and was conflicted in his position, which I also acknowledged.
Allegation 2

That information put forward by the State in the Certain Children matter and subsequent stay application was misleading.

25. During the legal proceedings, Counsel for the plaintiffs argued the State’s position – that the youth justice system was at capacity - was false, and that the leaked email forwarded by Mr Murray was evidence that it was possible to transfer the young people from Grevillea back into Parkville and Malmsbury.

26. It appears this line of questioning was to suggest that young people had been moved from the open units at Malmsbury to secure units to fill spaces and justify the establishment and continued operation of Grevillea.

27. Beyond the leaked email and Mr Murray’s testimony that there had been more young people in open units two months before the riots, the plaintiffs did not present any evidence to demonstrate the information put forward by the State was false.

28. This investigation obtained the numbers and details of young people in the different units across the period in question, both before and after the riots, and found no evidence to support the allegation that the Government or its representatives misled the Supreme Court.

Allegation 3

That Mr Murray was investigated for misconduct by DET in reprisal for:
- making requests to DET for additional funding for Parkville College; or
- giving evidence to the Supreme Court that was adverse to the government’s position.

29. Parkville College was established in July 2012 to operate as a Government school from within Parkville and Malmsbury. By mid-2016 Parkville College had accrued a substantial budget deficit, now widely recognised to be the result of DET’s funding model, which did not recognise a number of the school’s unique characteristics, including its operation 52 weeks a year or the number of children with a disability among its cohort.

30. Mr Murray had been on notice for some time about DET’s concerns regarding the budget deficit, and it was plainly causing him significant stress. He had provided comprehensive reasons why the deficit was not the result of his or the school council’s poor management.

31. Nonetheless he was subject to a local performance management process in June 2016, which would have been genuinely upsetting for Mr Murray, and in circumstances where the causes of the deficit were beyond his control, bureaucratic and inappropriate. However, the evidence does not support a conclusion that the process was commenced as retribution for Mr Murray trying to engage DET in rectifying Parkville College’s budget deficit. When Mr Murray responded to the performance management process by again raising his concerns, the process ceased, and further work was done to resolve the funding problems, which ultimately resulted in the deficit being wiped and the funding model changed.
32. The action following the court proceedings was a separate issue. DET had reasonable grounds to investigate Mr Murray in relation to his providing an email containing confidential lists of young people in custody to the plaintiffs’ lawyers on 21 December 2016.

33. The disclosure of such confidential information was conduct that may have justified termination of Mr Murray’s employment, as the department’s external legal advice confirmed. There are no indications the department took a capricious approach in commencing an investigation, or in its subsequent negotiations with Mr Murray resulting in his separation from DET.

34. On the evidence available there is no apparent course of conduct by DET to penalise Mr Murray for his pursuit of the resolution of Parkville College’s budget deficit and funding, or for other reasons outside of his disclosure of the email.

35. On the evidence, the three allegations subject of this investigation were not substantiated.
Figure 1: Snapshot of key events

- 8 November: A young person escapes from Mainsbury
- 12–14 November: Riots at Parkville
- 24 November: VRQA writes to DET setting out concerns about Grevillea
- 21 December: Mr Fraser tells Mr Murray that Parkville College’s deficit has been wiped
- 9 December:
  - 7:42am: DET legal are finalising the MOU
  - 4:15pm: DPC provide comment on the MOU
  - 4:21pm: DHHS legal tell DET legal that they’re ‘not finished yet!’
  - 4:20pm: Ms Callister and Mr Fraser update the Minister on education at Grevillea
  - 5:06pm: Mr Fraser asks Mr Murray if he is available for a call
  - 5:10pm: Mr Fraser speaks with Mr Murray for 6 minutes
  - 5:45pm: Ms Callister and Mr Fraser speak with Mr Murray for 35 minutes
  - 5:54pm: Ms Johnson advises Mr Fraser that DPC’s queries are resolved
- 9 December ≈ 6:30pm: Ms Johnson provides Ms Callister with a copy of the final MOU
- 9 December ≈ 6:30–7:30pm: Mr Murray recounts his recollections of the call to family and friends
- 10 December: Ms Johnson and Mr Fraser research question of accreditation
- 12 December: Mr Murray gives evidence in the Certain Children matter
- 21 December: Mr Lanyon and Mr Murray give evidence. Mr Murray provides HRLC with ‘the email’
- 21 December: DET and DHHS investigate how HRLC obtained a copy of ‘the email’
- 11 December:
  - 1:46pm: Mr Fraser speaks with Mr Murray for 23 minutes
  - ≈ 2:10pm: Mr Murray recounts his recollections of the call to family and friends
  - 4pm: Mr Fraser texts Ms Callister about raising the ‘justice scenario’
- 24 November: DET decides to wipe Parkville College’s deficit
- 28 November: DET and DHHS exchange letters for education services at Grevillea
- 11 December:
  - 1:46pm: Mr Fraser speaks with Mr Murray for 23 minutes
  - ≈ 2:10pm: Mr Murray recounts his recollections of the call to family and friends
- 8 November: A young person escapes from Mainsbury
- 11 December:
  - 1:46pm: Mr Fraser speaks with Mr Murray for 23 minutes
  - ≈ 2:10pm: Mr Murray recounts his recollections of the call to family and friends
- 17 November: Grevillea Youth Justice Centre established at Barwon Prison
- 2 December: An originating motion for the Certain Children matter is filed in the Supreme Court
- 4 December: Mr Murray receives a draft subpoena from HRLC and advises DET
- 5 December: Mr Murray has a case conference with VGSO lawyers
- 21 December: Mr Howes sends Mr Fraser page 13 of the VCAL Assessment Guide on RPL
- 30 December: DET decides to investigate Mr Murray for misconduct for providing HRLC with ‘the email’
- 2 December: An originating motion for the Certain Children matter is filed in the Supreme Court
- 30 December: DET decides to investigate Mr Murray for misconduct for providing HRLC with ‘the email’
- 17 November: Grevillea Youth Justice Centre established at Barwon Prison
- 2 December: An originating motion for the Certain Children matter is filed in the Supreme Court
- 30 December: DET decides to investigate Mr Murray for misconduct for providing HRLC with ‘the email’
Investigation scope and methodology

**The referral**

36. On 12 December 2017 the Legal and Social Issues Committee of the Victorian Parliament released an interim report on its inquiry into youth justice centres in Victoria and in it, referred a matter to me for investigation under section 16 of the Ombudsman Act. This is the second matter referred to me by Parliament, and the fifth in the history of the Ombudsman's office.

37. Where a matter is referred to my office by a House or Committee of the Parliament, the Ombudsman Act requires that I shall ‘forthwith investigate that matter and report thereon’.

**Information gathering**

38. I commenced my investigation by reviewing publicly available documents, including:

- the transcripts of proceedings from the Committee’s public hearings in its inquiry into youth justice
- relevant media articles
- the legislative and policy framework for the delivery of education to young people in custody, including the Victorian Certificate of Education, the Victorian Certificate of Applied Learning, and credit recognition pathways.

39. To assist the investigation to understand the background and the context of the allegations, Mr Murray gave sworn evidence on a voluntary basis on 16 January 2018. Mr Murray attended another voluntary interview on 4 May 2018 after the investigation had obtained additional information from interviews and other sources.

40. Given the relevance of the Supreme Court’s decision in the Certain Children matter, I obtained copies of the Court File and exhibits and affidavits for the State.

41. I also obtained evidence from the Department of Justice and Regulation (DOJR) in relation to the number of young people housed in secure and open accommodation within the youth justice system in 2016, including the related bed-lists.

**Coercive powers**

42. While it is my practice to use coercive powers sparingly, given the serious nature of the allegations I decided to obtain relevant documentation from DET and DHHS by way of summons.

43. Some of the information provided under summons was highly sensitive and personal to several witnesses, including mobile phone data and text messages. I appointed one Senior Investigator to review the information in its entirety, and to only reproduce relevant materials onto the casefile.

**Legal privilege**

44. Given much of the communication about relevant matters created by or copied to Mr Murray, Ms Callister and/or Mr Fraser involved DET’s and DHHS’s respective legal advisors, it was possible some of the materials that would assist my investigation would attract legal privilege. In this regard I note section 18(4) of the Ombudsman Act 1973 provides that in respect of Ombudsman’s investigations:

> The Crown shall not, in relation to an investigation under this Act, be entitled to any such privilege in respect of production of documents or the giving of evidence as is allowed by law in legal proceedings.
Interviews

45. Having obtained and reviewed the relevant email and text message communications, and other evidence obtained under summons, my investigators prepared for the interview phase of the investigation, which commenced in early March and concluded in May 2018. My investigators explored relevant matters and showed evidence to Ms Callister, Mr Fraser, Mr Murray and other witnesses to obtain their comments and observations. This assisted the investigation to gain a detailed understanding about relevant matters and to test the witnesses’ recollections of events.

46. The interview phase of this investigation was extensive and some of the interviews very long. I thank those people, including Ms Callister, Mr Fraser and Mr Murray, for their co-operation in providing testimony to my investigators in such detail.

Opportunity for response to adverse comments

47. This report contains material that could be perceived to be adverse about Gill Callister, Stephen Fraser, and Brendan Murray. In accordance with section 25A(2) of the Ombudsman Act, I advise that all were provided with a reasonable opportunity to respond to adverse material in a draft report, which included citations to all relevant evidence. Responses were received from all three individuals and have been fairly set out in this report.

48. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable in this report are not the subject of adverse comment or opinion. They are named or identified as I am satisfied that it is necessary or desirable to do so in the public interest, and that identifying those persons will not cause unreasonable damage to their reputation, safety or wellbeing.

49. The investigation is guided by the civil standard of proof, the ‘balance of probabilities’, in making its factual findings, taking into consideration the nature and seriousness of the conduct in question; the quality of the evidence; and the gravity of the consequences for the persons involved in the matters under investigation.

Investigation statistics

50. During the investigation of the matter referred, investigators:

- reviewed over 38,000 items of evidence
- issued six summonses (four to produce documents and two to attend a compulsory appearance)
- issued 17 Confidentiality Notices
- interviewed 15 people, totalling 52 hours and over 1,531 pages of transcripts. Sworn evidence was provided by all persons interviewed. Lawyers were present at eight interviews.
Chapter 1

The allegations and the key people involved

The allegations

51. This report details the Ombudsman’s investigation of three allegations:

<table>
<thead>
<tr>
<th>Allegation 1: an attempt to influence</th>
</tr>
</thead>
<tbody>
<tr>
<td>• In a conference call on Friday 9 December 2016 at approximately 5.30pm Gill Callister, Secretary, Department of Education and Training and Stephen Fraser, Executive Director, Regional Services Group, Department of Education and Training tried to influence Brendan Murray, Executive Principal of Parkville College, prior to his giving evidence to the Supreme Court by telling him what the department would like him to say and not say in those proceedings.</td>
</tr>
<tr>
<td>• In a follow-up call on Sunday 11 December 2016, Mr Fraser tried to influence Mr Murray to give certain evidence in those Supreme Court proceedings by telling him that funding for Parkville College may not be renewed in the event of an adverse court outcome.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Allegation 2: misleading the Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Government or its representatives misled the Supreme Court about the existence of secure beds in other parts of the system to justify the establishment of the Grevillea Youth Justice Centre at Barwon Prison.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Allegation 3: misconduct investigation in reprisal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr Murray was investigated for misconduct by the Department of Education and Training in reprisal for:</td>
</tr>
<tr>
<td>• giving evidence to the Supreme Court that was adverse to the government’s position; or</td>
</tr>
<tr>
<td>• making requests to the Department of Education and Training for additional funding for Parkville College.</td>
</tr>
</tbody>
</table>
52. The allegations came from a matter referred to the Ombudsman by the Legal and Social Issues Committee of the Victorian Parliament (the Committee) during its inquiry into youth justice centres in Victoria.

53. To understand the allegations and the context in which they were made, a brief background is set out below.

**Inquiry by the Legal and Social Issues Committee**

54. During 2016 there were several publicised critical incidents in Victoria’s youth justice system – in particular, riots and escapes. At this time, DHHS was responsible for youth justice in Victoria. This, in conjunction with broader shifts in youth crime and the profile of young offenders caused concern that there were visible signs that the system in Victoria was not delivering for both the community and young offenders.

55. On 10 November 2016, the Legislative Council agreed to a motion for the Committee to inquire into and report on issues at both Parkville and Malmsbury youth justice centres.

56. The Committee was to report by no later than 1 August 2017 (although this date was later extended to 27 February 2018).

**Riots at Parkville Youth Justice Precinct**

57. Immediately following this, a number of incidents occurred within Parkville Youth Justice Precinct over 12-14 November 2016. These incidents involved young people rioting and causing significant property damage. Some units and areas were uninhabitable. In total 62 beds were damaged and unable to be used until repair work was undertaken.

58. As the young people involved in the incidents gradually surrendered in the early hours of 14 November, they were transferred to one of three places:

- other areas of Parkville
- Malmsbury Youth Justice Precinct
- cells at Mill Park Police Station.

59. These arrangements included young people being accommodated on mattresses on floors and in rooms with no bathrooms. In addition, as a temporary measure, two young people were also held in secure vehicles.

**Establishment of Grevillea Youth Justice Centre**

60. Also on 14 November, DHHS immediately started considering options for alternative and additional accommodation following the incidents. Several emergency meetings between representatives of DHHS and the Department of Justice and Regulation (DOJR – responsible for adult correctional services) occurred on 14 November 2016 to identify an appropriate location. DHHS had considered and decided on a number of ‘non-negotiables’ that any alternate facility had to provide:

- a) a facility must have anti-ligature points to be compliant and safe;
- b) there could be no contact between adult prisoners and young persons;
- c) the facility needed to have 60 available beds to replicate a ‘like for like’ alternative;
- d) the facility had to have its own recreational space, program and education areas, as well as its own visitor centre; and
- e) the facility should be a public prison not a private prison...
61. Later that day the only suitable place identified by DOJR was the Grevillea Unit at Her Majesty’s Prison Barwon. This is a maximum-security prison for adult males with protection and high security units. The Grevillea Unit was at the time used for adult prisoners in protection. Although the Grevillea Unit could not accommodate 60 young people as requested by DHHS, it did meet other criteria, had its own visitor centre and outdoor space, and could separate sentenced young people from those on remand.

62. On 17 November 2016, Orders in Council published in the Victorian Government Gazette established the Grevillea Unit at Barwon Prison as a youth justice and remand centre for emergency accommodation. This was also the first date DHHS accessed Grevillea. From 17-21 November 2016 DHHS focused on logistics and making Grevillea ready to receive young people. According to an affidavit prepared by Ian Lanyon, Director of Secure Services - DHHS, part of those arrangements were ‘negotiations with representatives from Parkville College to discuss the accreditation process required for Grevillea to ensure education services could be delivered as soon as possible’.

63. By the afternoon of 21 November 2016, one wing of the Grevillea Unit was ready for the first group of remanded young people to arrive. They arrived later that evening.

The VALS proceedings

64. On 22 November the Victorian Aboriginal Legal Service (VALS) commenced proceedings in the Supreme Court alleging the detention of Aboriginal and Torres Strait Islander young people at Barwon was unlawful.

65. On 29 November the matter settled when Kym Peake, Secretary, DHHS, undertook to the Court that she would not authorise or cause the removal of any Aboriginal or Torres Strait Islander young person to any youth justice or remand centre established at Barwon Prison for a period of 18 months, unless in exceptional circumstances.

First legal proceedings to stop the use of Grevillea

66. On 2 December 2016 an originating motion for judicial review of the decision to establish Grevillea was filed in the Supreme Court by Fitzroy Legal Service on behalf of the plaintiffs (certain children by their litigation guardian Sister Marie Brigid Arthur). The defendants were the Minister for Families and Children, the Secretary – DHHS and the State of Victoria. This case (Certain Children by Litigation Guardian Sister Marie Brigid Arthur vs Minister for Families and Children [2016] VSC 796) is referred to in this report as the Certain Children matter.
67. The plaintiffs submitted that if the Barwon Prison Orders were not lawfully made, the detention of the plaintiffs and any other young people at Barwon was unlawful. The grounds for the argument related to the powers and duties of the defendants under the Children, Youth and Families Act 2005 (Vic) (CYFA), the Education and Training Reform Act 2006 (Vic) (ETRA), the Working with Children Act 2005 (Vic) and the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter). The plaintiffs submitted the second defendant (the Secretary – DHHS) had not complied with the statutory duties, the ETRA duties and the WWC Act duties and at all relevant times was not able to make transfer decisions in compliance with those duties.

68. In particular, the plaintiffs claimed that the Secretary, DHHS failed to:

- determine or properly determine the form of care, custody or treatment in the best interests of each person detained
- ensure the developmental needs of the plaintiffs were catered for, and
- ensure children in her custody were enrolled in a registered school and were in attendance at all times the school was open for instruction.

69. In addition, the plaintiffs submitted there had been errors or failures in the decision to make the Orders in Council (to gazette Grevillea as a youth justice and remand centre), and to transfer young people to Grevillea.

70. Legal proceedings commenced on 12 December 2016 before Justice Garde AO. Mr Walters QC, Mr Morrissey SC, Mr Albert, Ms Fitzgerald and Mr McBeth appeared on behalf of the plaintiffs. In addition to the Fitzroy Legal Service, the Human Rights Law Centre (HRLC) was responsible for coordinating the legal team for the plaintiffs. The defendants were represented by Ms Richards SC, Ms Robertson, Mr Brown and Mr Bayley and the Victorian Government Solicitor’s Office (VGSO).

71. Brendan Murray, then Executive Principal of Parkville College – DET was subpoenaed by the plaintiffs to appear and give evidence and did so on 12 December - the first day of proceedings. Mr Murray’s evidence was primarily about the provision of education services, although he also gave evidence about bed availability at Malmsbury. Mr Murray’s testimony is discussed further in Chapters 3 and 4.

72. On 21 December 2016, the Court found among other things, that the Orders in Council establishing Grevillea were invalid and of no effect, and that the Minister’s recommendation to make the Orders in Council failed to give proper consideration to the human rights of the young people to be detained at Grevillea.

73. Immediately following the judgment on 21 December 2016, the defendants informed the Court that the State would seek leave to appeal the orders made by Justice Garde requiring the removal of young people from Grevillea by 4pm the following day. Accordingly, the State applied for a stay which the Court agreed to hear that day.
74. In the stay application, the defendants submitted:

- The youth justice system was under pressure, particularly in relation to the 15-18 year-old remand cohort (at Grevillea).
- This cohort had presented particular risks of violence and aggression, and required placement in facilities which were secure in terms of being ligature proof, able to be locked and secured to prevent access to ceiling spaces.
- Parkville and Malmsbury were beyond capacity in relation to secure sites, and there was no viable and appropriate facility within youth justice to place the young people currently at Grevillea.

75. The plaintiffs disputed that there was nowhere else for the young people at Grevillea to go and produced a copy of an internal DHHS email that had been sent at 10.39am that day (the email). The email set out where the young people at Grevillea would go if the Court ordered their removal. The plaintiffs submitted this as evidence of the availability of alternative accommodation, while the State argued that it was a contingency only, and that the suggested arrangements involved housing young people in secure facilities that were not appropriate.

76. Mr Murray was again called by the plaintiffs to give evidence on 21 December. Mr Murray gave evidence about the difficulties of offering education services at Grevillea over the December/January period. He also gave evidence that he had never seen the open units at Malmsbury so empty.

77. The Court granted the stay application pending the appeal.

The appeal and the decision to re-gazette Grevillea

78. On 28 December 2016 the appeal was heard, and the State was unsuccessful. The Court of Appeal upheld Justice Garde’s finding that in establishing Grevillea as a youth justice and remand centre, the Minister and Governor in Council had failed to have regard to mandatory considerations relating to the young people’s rights and the State’s obligations under the Children, Youth and Families Act 2005 (Vic). (However, the trial judge’s finding that the Minister had acted for an improper purpose in establishing the facility was overturned.)

79. The Government then re-gazetted Grevillea on 29 December 2016 in an attempt to address the issues the Court had identified with the original orders. Young people on remand continued to be housed at Grevillea until May 2017.

DET investigation into Mr Murray and his resignation

80. On 10 January 2017, Mr Murray was advised he was subject of investigation under Division 10 of the Education and Training Reform Act 2006 (Vic). It was alleged that Mr Murray had improperly released a sensitive DHHS email (the email) to the plaintiffs on 21 December 2016. While preliminary assessments were made by the Integrity and Assurance Division of DET, the investigation was never finalised and Mr Murray and DET entered negotiations which resulted in a deed of separation being agreed to and signed by both parties on 9 March 2017. Mr Murray’s resignation became effective and he separated from DET on 10 March 2017.
Mr Murray’s allegations are made public

81. On 4 April 2017 an article in The Age reported that Mr Murray had resigned from DET because he assisted the human rights lawyers in their case. It quoted Mr Murray as stating, ‘The government 100 per cent misled the [public]’ and reported that Mr Murray was party to internal discussions about how to avoid using Barwon. Mr Murray was quoted as saying ‘Barwon did not need to be used for the children. I suspect it needed to be used by the government for political reasons and for people to hold onto their jobs.’ The article also reported that Mr Murray had been suspended from his position in January but was later cleared of wrongdoing for sending an email to HRLC lawyers that suggested there were alternative facilities to house young people if the Court ordered their removal.

82. The article went on to report that Mr Murray claimed he had been pressured by DET officials to tell the Court that education could be adequately delivered at Barwon, despite his belief to the contrary.

83. There were subsequent articles reporting Mr Murray’s allegations which he reiterated during an interview on the ABC’s 7.30 Report. The media did not report specific details about what information DET allegedly wanted the Court to hear and not hear.

Second legal proceedings to stop use of Grevillea Unit (May 17)

84. Young people on remand continued to be accommodated at Grevillea until a further court challenge in May 2017. On 11 May 2017 Justice Dixon found that the State had acted incompatibly with the Charter and ordered that the Secretary, DHHS and the State be restrained from detaining, or continuing to detain, young people at Grevillea.

Evidence at public hearings of Parliamentary Inquiry

85. In March 2017 the Committee began public hearings as part of its inquiry. On 30 May 2017, Mr Murray gave evidence, repeating the allegations he had reportedly made in the media with additional details, including:

- He identified that it was Gill Callister, Secretary – DET and Stephen Fraser, an Executive Director – DET, who called him on Friday 9 December.
- The call commenced ‘under the guise’ of discussing a Memorandum of Understanding about the delivery of education at Grevillea, but then moved into an attempt to convince him ‘that we [DET] could lawfully provide qualifications and accreditation at Grevillea that were equal to what could be provided at Malmsbury and Parkville’.
• He had received a follow-up call on Sunday 11 December from Mr Fraser who had tried to convince him that Recognition of Prior Learning (RPL) could be applied to learning at Grevillea and ‘I pointed him to the documents and to the Act and said that that is not the case and that is not what I would be saying in court the next day.’

• He was aware that a particular unit at Malmsbury known as ‘Admissions’, which provided secure beds, was full of clients who could be accommodated in the open part of the site (where there were 30-40 beds available). During the daytime the young people in Admissions walked freely in minimum-security and it was a ‘sleight-of-hand trick’ used by the Government during the court proceedings that there were no secure beds available in the youth justice system.

• Before the Court decision was handed down he had discussions with James McCann, DHHS who had a role in the transfer of young people, and they ‘discussed that children could be returned to Admissions from Grevillea as an option and that they would be secure within there and that those within Admissions, who were able to walk within the open facility during the daytime, could go into the Coliban [open] unit, for example, which was vacant throughout that period.’

86. Mr Murray also gave evidence regarding the DET investigation into his conduct.

Referral of allegations to the Victorian Ombudsman

87. On 12 December 2017 the Committee issued an Interim Report. In that report, the Committee noted the seriousness of the allegations made by Mr Murray and determined to refer the allegations to the Ombudsman pursuant to section 16(1) of the Ombudsman Act 1973 (Vic). The decision to refer the matter was based on the following reasons:

The Committee has already experienced delays in conducting its Inquiry and reporting to the House. An investigation into this matter would add further delays.

The Committee is not resourced in a way that would permit a full investigation into this matter.

88. The Committee framed Mr Murray’s allegations as follows:

That staff from DET twice tried to influence Mr Murray prior to his giving evidence to the Supreme Court.

That Mr Murray was told what DET would like him to say in his evidence.

That the Supreme Court was misled by DET regarding the suitability of the Grevillea Unit of Barwon Prison for use as a youth justice facility.

That Mr Murray was told that funding for Parkville College may not be renewed in the event of an adverse court outcome.

That soon after Mr Murray informed DET of his decision to resign the funding concern was resolved. Mr Murray was then told that he would be investigated for misconduct.
89. Having received the matter referred by the Committee, Ombudsman investigators interviewed Mr Murray on 16 January 2018 to clarify the details of his allegations. Accordingly, the Ombudsman investigated the allegations as clarified by Mr Murray and set out at the beginning of this chapter.

The key people involved

90. The first allegation concerns interactions between three people, namely Mr Murray, Ms Callister and Mr Fraser.

Mr Murray, Executive Principal, Parkville College

91. At the relevant time, Mr Murray was the Executive Principal of Parkville College and an employee of DET. Mr Murray is now a founding Director at ‘Article 26’ an education consultancy started with his partner, Ully Merkel. He is described on Article 26’s website as ‘an educationalist, a justice advocate and a human rights proponent with a particular interest in inclusive schools, education directed to the full development of the human personality and justice systems that accord its prisoners with respect and dignity for the betterment of its society’.

92. Mr Murray has worked as a senior policy adviser to the Victorian Government, as a school teacher and principal, and as a leader in the community services areas. He was Executive Principal of Parkville College between 2012 and 2017. Mr Murray has received a number of awards for his work, including the Victorian Education Excellence Award for the Outstanding Secondary Teacher of 2009.

93. Ms Merkel, Mr Murray’s partner, is a solicitor and the daughter of Ron Merkel QC, former federal court judge and human rights advocate. Mr Merkel was Counsel for the plaintiffs in the originating application to the court that later became the VALS proceedings to have Aboriginal young people removed from Grevillea in November 2016. Mr Merkel did not act as Counsel for the plaintiffs in the VALS proceedings.

94. Mr Murray has a friendship with a Director at the Human Rights Law Centre, the group that with the Fitzroy Legal Service led litigation against the State in the Certain Children matter in December 2016.

Ms Callister, Secretary of the Department of Education and Training

95. At the relevant time, Ms Callister was (and remains) the Secretary – DET. Ms Callister manages a $12 billion budget and leads 2,300 corporate staff to deliver and improve early childhood, school education, and vocational and higher education services across Victoria. She employs a further 55,000 staff in government schools.

96. Prior to joining the Department, Ms Callister was the Secretary of the Victorian Department of Human Services (2009-14), where she was responsible for the delivery of child protection, disability, youth, housing and family violence services. Parkville College was established during Ms Callister’s time as Secretary of the Department of Human Services.

97. Ms Callister is friends with Kym Peake, Secretary – DHHS, who at the relevant time was responsible for youth justice in Victoria and a defendant in the Certain Children matter in December 2016.
Mr Fraser, Executive Director, Implementation, Department of Education and Training

98. At the relevant time, Mr Fraser was the Executive Director, Implementation – DET.

99. Prior to that, in 2014 Mr Fraser was seconded from DET to the Deputy Premier’s office as a Senior Advisor. On his return to DET in mid-2015, Mr Fraser was Acting Director in the Office of the Secretary, under Ms Callister.

100. In mid-2016 Mr Fraser commenced as Acting Executive Director for Implementation in the Regional Services Group. He was substantiated in that position in September 2016. As Executive Director, Implementation, Mr Fraser was responsible for annually reporting, through the Deputy Secretary, to the VRQA on the status of registration of Victorian government schools. Mr Fraser also had liaison responsibility with youth justice and the Koori Courts.

101. In mid-2016, Mr Fraser started working with Mr Murray to resolve longstanding budget and funding model issues at Parkville College.

102. In February of 2017 Mr Fraser took long-term leave and worked in the United Kingdom. He returned to DET in March 2018.

Other key people

103. A number of other people are relevant to this investigation: some are identified through relevant documentation, and others appeared as witnesses in the investigation.
The list below identifies the position held by these people as at November-December 2016.

<table>
<thead>
<tr>
<th>Table 1: Key people and positions held</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Department of Education and Training</strong></td>
</tr>
<tr>
<td>Bruce Armstrong</td>
</tr>
<tr>
<td>Kathryn Johnson</td>
</tr>
<tr>
<td>Murray Bruce</td>
</tr>
<tr>
<td>David Howes</td>
</tr>
<tr>
<td>Amanda Hubber</td>
</tr>
<tr>
<td>Tony Bugden</td>
</tr>
<tr>
<td><strong>Parkville College (DET)</strong></td>
</tr>
<tr>
<td>Matthew Hyde</td>
</tr>
<tr>
<td>Simon Lenten</td>
</tr>
<tr>
<td>Marg Hamley</td>
</tr>
<tr>
<td><strong>Department of Health and Human Services</strong></td>
</tr>
<tr>
<td>Kym Peake</td>
</tr>
<tr>
<td>Ian Lanyon</td>
</tr>
<tr>
<td>James McCann</td>
</tr>
<tr>
<td><strong>Mr Murray’s family</strong></td>
</tr>
<tr>
<td>Ully Merkel</td>
</tr>
<tr>
<td>Ron Merkel QC</td>
</tr>
</tbody>
</table>
Chapter 2

The landscape: youth justice and education in Victoria

This chapter provides an overview of Victoria’s education framework and education within the youth justice system, to provide context for the phone calls at the centre of Allegation 1.

Youth justice facilities in late 2016

105. Prior to November 2016 and the establishment of Grevillea, DHHS operated custodial facilities for young offenders in Parkville and Malmsbury. At the time, the system could accommodate 257 young people across both facilities; 123 at Parkville and 134 at Malmsbury.

106. Grevillea was gazetted as a youth justice centre in November 2016, following the riots and damage caused at Parkville. It has two wings, its own visitor centre and an exercise yard, and can accommodate 36 young people.

107. The changing demographic of young people in Victoria’s youth justice system has been reported on publicly during the recent past. For example, in its final report into youth justice centres in Victoria, the Committee noted that youth offending rates had declined by 37 per cent between 2006 and 2015. However, it noticed three concerning trends:

- an increase in violent crimes against the person
- an increase in serious first-time offending
- an increase in the number of charges per case.

108. In addition, there has been a significant increase in children and young people held on remand.

109. In its final report, the Committee noted the increased number of young people on remand can create volatility in youth justice centres.
110. At interview, Ian Lanyon, former Director of Secure Services - DHHS, told investigators that this manifested on the ground in escalated behaviour, which in turn highlighted infrastructure failings:

There’s this revolving door for them. They feel really uncertain in their futures and they act out. … you’re also getting kids coming in there that have got the lingering impact of ice and other drugs.

So the whole behaviour changed in the cohort and we saw lots more escalated behaviour, a lot more violence, a lot more damaging behaviour and the infrastructure … wouldn’t withstand some of these behaviours and once the young people know that your infrastructure is vulnerable that word goes around very quickly.

Accommodating young people in late 2016

Legislative requirements

111. Section 482 of the Children, Youth and Families Act 2005 (Vic) sets out the form of care, custody or treatment for young people detained in a remand centre, youth residential centre or youth justice centre. The Act specifies that young people on remand should be separated from sentenced detainees, and that young people under the age of 15 should be separated from detainees over the age of 15.

Parkville Youth Justice Precinct

112. The Parkville Youth Justice Precinct houses males 10-18 years old and females 10-20 years old over two separate facilities: the Parkville Youth Residential Centre and the Melbourne Youth Justice Centre. The Parkville Youth Residential Centre has three units and can accommodate 37 young people. The Melbourne Youth Justice Centre has four units, accommodating 60 young people, and two remand units with an additional 26 beds. After the riots, the bed capacity at Parkville was reduced to 63 and 36 beds were added at Grevillea.

Figure 2: Map of Parkville Youth Justice Precinct

Malmsbury Youth Justice Centre

113. The Malmsbury Youth Justice Centre consists of a Senior Youth Justice Centre for 18-20 year old males (the senior ‘open’ site) and a Secure Youth Justice Centre for 15-20 year old males (the secure site).

114. The secure site has three 15 bed secure units (Deakin, Monash and La Trobe) all within a secure perimeter wall. Each unit has its own secure exercise yard and can be separately locked down. Individual bedrooms have lockable doors and reinforced walls and ceilings.

115. The senior ‘open’ site has three open units (Coliban, Lauriston and Campaspe), two secure units (Admissions and Ulaburra) and an Intensive Secure Annex (ISA) with four beds. It has traditionally been used to accommodate ‘dual track clients’.

116. Victoria’s unique dual track system under the Sentencing Act 1991 (Vic) allows adult courts to sentence young offenders (aged under 21 years) to serve custodial sentences in youth detention instead of adult prisons. According to the Sentencing Advisory Council, dual track is intended to prevent young people from entering the adult prison system at an early age. For a young offender to qualify for youth detention under the dual track system, the court must be convinced that the offender has reasonable prospects of rehabilitation, or that he or she is particularly impressionable, immature, or likely to be subjected to undesirable influences in an adult prison.

117. On 3 November 2016 there were 77 young people accommodated at Malmsbury; 26 in the secure site (12 in Monash and 14 in Latrobe) and 51 in the senior ‘open site’ (10 in Ulabara, 11 in Admissions, 14 in Campaspe, 12 in Lauriston and 4 in the ISA Unit).

Secure units in the senior ‘open’ site at Malmsbury

118. The Admissions unit is a ‘medium security’ secure unit with 18 beds. It is the entry point for young people coming into Malmsbury and is the entry point for the dual track system.

Open units on the senior ‘open’ site at Malmsbury

119. The Coliban unit is an example of an ‘open’ unit, also with 18 beds. While the unit is locked at night, and one youth justice worker is present, bedroom doors are not locked or lockable. Accordingly, the assessment about whether a client needs to be in secure accommodation, or in a secure unit or not, is an important consideration.

Figure 3: Map of Malmsbury Youth Justice Centre

Movement of young people across the senior ‘open’ site at Malmsbury

120. The accommodation placement of any young person can change, and someone once assessed as being suitable for an ‘open’ unit may be moved back into a secure unit. The placement of clients, and their ability to access the open site (gradual integration) is therefore assessed regularly.

121. However, the changing demographic of the youth justice system had an impact on the ratio of young people requiring secure accommodation. Mr Lanyon told investigators that:

> the offending was becoming more violence related rather than property related or driving related ... we were seeing an increase in personal violence, you know, that was ice driven ... so the kids that were coming through were not really suitable for the open site and those open conditions because they were actually presenting as security risks.

The education framework in Victoria

122. Under the Education and Training Reform Act 2006 (Vic) (ETRA) there is no specific obligation placed on the State to provide students of compulsory school age an education. However, a principle of the Act is that ‘universal access’ to education is provided by the State through ‘the establishment and maintenance of a government education and training system’.

123. Section 2.1.2 of ETRA places an obligation on parents to enrol their children at a registered school and to ensure attendance, unless there is a ‘reasonable excuse’, such as an unforeseen event, an unavoidable cause or a requirement to comply with another law. This can include a period of imprisonment.

124. Part 2.2 of ETRA provides for the establishment of government schools. Section 2.2.1(4) states:

> (4) The Minister may arrange for the provision of educational instruction and services in ways other than through Government schools.

125. Oversight and regulation of the education and training sector in Victoria involves several statutory authorities, including the Victorian Curriculum and Assessment Authority (VCAA) and the Victorian Registration and Qualifications Authority (VRQA).

Child safe standards

126. Since 1 August 2016, VRQA has had a key role in monitoring and enforcing compliance with Ministerial Order No 7, 870 which embeds child safe standards in Victorian schools. As a minimum standard for school registration under the ETRA, schools must take action to manage and reduce the risk of child abuse.

VCE and VCAL

127. In Victoria there are two senior secondary certificates available to young people, the VCE and VCAL. The VCE is used by students as a pathway to university, whereas the VCAL focuses on ‘hands-on learning’ for students more interested in training at TAFE or doing an apprenticeship.
Table 2: Parkville College – key events

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 2012</td>
<td>Parkville College is established</td>
</tr>
<tr>
<td>January 2013</td>
<td>Operations begin at Parkville and Malmsbury, delivering VCE and VCAL</td>
</tr>
<tr>
<td>February 2014</td>
<td>Operations begin at DFATS [Disability Forensic Assessment and Treatment Service], Fairfield and a Flexible Learning Centre (transitional campus) is created at Parkville</td>
</tr>
<tr>
<td>April 2014</td>
<td>Parkville College provides VET subjects at Malmsbury</td>
</tr>
<tr>
<td>June 2014</td>
<td>The ‘Education Justice Initiative’ begins at the Melbourne Children’s Court to support young people with education pathways</td>
</tr>
<tr>
<td>October 2014</td>
<td>Operations begin at the Maribyrnong and Ascot Vale Secure Welfare campuses</td>
</tr>
<tr>
<td>January 2015</td>
<td>Operations begin at the expanded Malmsbury Precinct</td>
</tr>
</tbody>
</table>

128. In July 2012, the Minister for Education established Parkville College to operate as a Government school from within Parkville and Malmsbury, 52 weeks a year. Parkville College has continued to evolve since then.

129. The majority of Parkville College students are enrolled in VCAL. The VET subjects and units offered at Parkville College are accredited through Melbourne Polytechnic and include:

- Certificate II in Engineering
- Certificate II in Kitchen Operations
- Certificate II in Visual Arts
- Certificate III in Fitness
- Certificate II in Building and Construction (Carpentry)
- Pre-apprenticeship; Certificate II in Hairdressing
- Certificate II in Music
- Certificate III in Shopfitting

Parkville College funding and budget deficit

130. For a number of years, DET and Parkville College held concerns about the budget and funding model for the school. By mid-2016 Parkville College had accrued a substantial budget deficit, having incurred a deficit of $2.6 million in the 2015 financial year. The total operating deficit Parkville College had accrued from 2014 was $7.59 million.

131. The deficit was the result of problems with the DET funding model.

132. On 6 June 2016, Bruce Armstrong, Deputy Secretary, Regional Services, DET wrote to Mr Murray putting him on notice about his concerns regarding the budget deficit, and outlining the steps DET intended to implement to monitor and review Parkville College’s financial situation. Mr Murray responded to this letter on 16 June and provided comprehensive reasons why the deficit was not the result of his or the school council’s poor management.
Education within the Victoria Youth Justice System

133. In August 2016, Mr Murray met with senior DET staff, including Ms Callister and Mr Fraser, to discuss, amongst other things, the budget and funding for Parkville College. Mr Fraser began working closely with Mr Murray from this time to progress and resolve the issues.

134. The funding model for Parkville College and the deficit that had accrued, caused significant stress to Mr Murray for a number of years. He told investigators he was ‘desperate for school funding to be resolved’. According to Mr Merkel, his father-in-law, the impact of the funding issue was weighing on Mr Murray:

That was destroying years and years of work that he’d fought for.

Education at Grevillea

135. Although established as both a youth justice and remand centre, Grevillea only ever housed young people on remand and, accordingly, individuals were detained there for, on average, 38.8 days.

136. A government school was never registered at Grevillea. Instead, an agreement was made between DET and DHHS on 28 November 2016 for educational services to be provided there. This agreement (or letters of exchange) was expanded on in a Memorandum of Understanding signed on 12 December 2016.

137. Education services were to be provided by Parkville College at Grevillea; and according to the agreement, were to be consistent with what would be provided in a school.

138. The agreement also contained an obligation to ‘seek to achieve and implement the minimum standards of school registration required under the ETRA regulations – in particular, the implementation and compliance with child safety standards’. It was a registration requirement that instruction be provided for at least 25 hours per week.

139. According to the ‘teaching and learning plan at Grevillea’ prepared by Parkville College:

The teaching and learning spaces within the Grevillea Unit at HM Prison Barwon are undoubtedly challenging. However, there is reasonable space to deliver a teaching and learning program within the constraints of the unit. There is a single classroom, which can accommodate up to eight students at one time that is available for use for the school throughout each day. The classroom is equipped with whiteboard and sufficient tables and chairs for teaching and learning purposes.

Critical to the operation of Parkville College at the Grevillea Unit within HM Barwon Prison is the use of communal central space to engage in teaching and learning, in the same manner as an open classroom might operate within an ordinary Victorian Government School or within a Building Education Revolution school premises across Australia.

An outdoor yard allows for outdoor activities including Physical Education and Personal Training, which is incredibly important for children and youth detained in custody to experience natural light and to enjoy physical exercise.
Photo 1: Grevillea Unit at HM Barwon Prison

Photo 2: Teaching space at Grevillea

Photo 3: Teaching space at Grevillea

Photo 4: Outdoor space at Grevillea
140. As noted by Justice Garde in the first *Certain Children* matter, however, there were obstacles that would prevent a campus of Parkville College from being registered at Grevillea, including ‘insufficient classroom space and uncertainty about Barwon Prison’s compliance with child safety standards’:

> There are limited resources for teaching available at Barwon, inhibiting the ability to conduct classes in physical education, art, and trade skills. Comparatively, the Parkville campus has the full range of resources expected at any government school.

141. In his evidence to the Court, Mr Murray said the significance of not operating as a school at Grevillea was that the young people could not be provided with any accreditation or qualifications for education undertaken at the site.

How education services at Grevillea differed from education at a registered school

142. The education services offered at Grevillea enabled the young people there to maintain important teacher-student relationships.

143. However, there were two significant differences between the education services at Grevillea and what was being delivered at Parkville and Malmsbury in late 2016.

144. The first, and perhaps most significant, difference was that the education services at Grevillea could not be directly counted toward the awarding of a certificate or unit or subject completion, even though the services followed a school curriculum. This is because Grevillea was not a registered school.

145. The second difference was the physical and resource limitations at Grevillea.

146. Due to these limitations, a typical program for a young person at Grevillea at this time was as indicated in Table 3 on the next page.

**Recognition of Prior Learning (RPL) for young people at Grevillea**

147. Although the education services being delivered could not directly count toward qualification, it was possible to obtain Recognition of Prior Learning (RPL) for certain learning outcomes after a young person from Grevillea had moved on and enrolled at another registered school (such as Parkville College or another school) or a registered non-school provider (e.g., TAFE) accredited to provide senior secondary courses.

**RPL for VCAL units**

148. Under section 4 of the VCAL Unit Assessment Planning Guide, if a young person left Grevillea and enrolled in a registered school (or non-school provider), the new school or provider would be responsible for determining the application of RPL to VCAL learning outcomes.

149. However, RPL can only be applied to:

- VCAL Work Related Skills (all levels)
- VCAL Personal Development Skills (all levels) and
- VCAL Skills for Further Study (senior units).

150. RPL cannot be applied to VCAL Literacy and Numeracy Skills.
### Table 3: A typical program for a young person at Grevillea

<table>
<thead>
<tr>
<th>Time</th>
<th>Literacy</th>
<th>Music</th>
<th>Art</th>
<th>Physical Education</th>
<th>Personal Training</th>
<th>Numeracy</th>
<th>Art</th>
<th>Music</th>
<th>Personal Development Skills Unit 1</th>
<th>VCE Foundation Mathematics: Unit 1</th>
<th>VCE Legal studies</th>
<th>VCE Philosophy</th>
<th>Personal Development Skills Unit 2</th>
<th>VCE Legal studies</th>
<th>VCE Philosophy</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.30am – 10.30am</td>
<td><strong>Literacy</strong></td>
<td><strong>Music</strong></td>
<td><strong>Art</strong></td>
<td><strong>Physical Education</strong></td>
<td><strong>Personal Training</strong></td>
<td><strong>Numeracy</strong></td>
<td><strong>Art</strong></td>
<td><strong>Music</strong></td>
<td><strong>Personal Development Skills Unit 2</strong></td>
<td><strong>VCE Foundation Mathematics: Unit 1</strong></td>
<td><strong>VCE Legal studies</strong></td>
<td><strong>VCE Philosophy</strong></td>
<td><strong>Personal Development Skills Unit 2</strong></td>
<td><strong>VCE Legal studies</strong></td>
<td><strong>VCE Philosophy</strong></td>
</tr>
<tr>
<td></td>
<td>Literacy Skills Reading and Writing (1)</td>
<td>CUSMCP301A Compose simple songs or musical pieces (.35)</td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td>Personal Development Skills Unit 1 (1)</td>
<td>Industry Related Skills – VET</td>
<td>Numeracy Skills (1)</td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td>CUSMCP301A Compose simple songs or musical pieces (.35)</td>
<td>VCE Foundation Mathematics: Unit 1</td>
<td>VCE Legal studies</td>
<td>VCE Philosophy</td>
<td>Personal Development Skills Unit 2</td>
<td>VCE Legal studies</td>
<td>VCE Philosophy</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Literacy Skills Oral Communication (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td>Numeracy Skills Unit 2 (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Personal Development Skills Unit 2 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>VCE Philosophy (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10.30am – 11.30pm</td>
<td><strong>Literacy</strong></td>
<td><strong>Physical Education</strong></td>
<td><strong>Numeracy</strong></td>
<td><strong>Personal Training</strong></td>
<td></td>
<td><strong>Art</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Literacy Skills Reading (1)</td>
<td>Personal Development Skills Unit 1 (1)</td>
<td>Literacy Skills Reading (1)</td>
<td></td>
<td></td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Literacy Skills Oral Communication (1)</td>
<td></td>
<td>Personal Development Skills Unit 2 (1)</td>
<td></td>
<td></td>
<td>VCE Philosophy (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Personal Development Skills Unit 2 (1)</td>
<td></td>
<td>VCE Legal studies (1)</td>
<td></td>
<td></td>
<td>VCE Foundation Mathematics: Unit 1</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11.30am – 12.30pm</td>
<td><strong>Physical Education</strong></td>
<td><strong>Personal Training</strong></td>
<td><strong>Numeracy</strong></td>
<td><strong>Art</strong></td>
<td><strong>Music</strong></td>
<td><strong>Art</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Personal Development Skills Unit 1 (1)</td>
<td>Industry Related Skills – VET</td>
<td>Numeracy Skills (1)</td>
<td></td>
<td></td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Personal Development Skills Unit 2 (1)</td>
<td></td>
<td></td>
<td>VCE Philosophy (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12.30pm – 1.00pm</td>
<td><strong>Lunch</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>VCE Foundation Mathematics: Unit 1</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.00pm – 2.00pm</td>
<td><strong>Numeracy</strong></td>
<td><strong>Art</strong></td>
<td><strong>Music</strong></td>
<td><strong>Lunch</strong></td>
<td><strong>Personal Development Skills</strong></td>
<td><strong>Numeracy</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Literacy Skills Reading (1)</td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td>CUSMCP301A Compose simple songs or musical pieces (.35)</td>
<td></td>
<td></td>
<td>Numeracy Skills (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Personal Development Skills Unit 2 (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td>VCE Philosophy (1)</td>
<td>VCE Foundation Mathematics: Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.00pm – 3.00pm</td>
<td><strong>Art</strong></td>
<td></td>
<td><strong>Music</strong></td>
<td><strong>Personal Development Skills</strong></td>
<td><strong>VCE Foundation Mathematics</strong></td>
<td><strong>Numeracy</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>CUVPRP201A Make simple creative work (.4)</td>
<td></td>
<td>CUSMCP301A Compose simple songs or musical pieces (.35)</td>
<td></td>
<td></td>
<td>Numeracy Skills (1)</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.00pm – 4.00pm</td>
<td><strong>Personal Development Skills Unit 1 (1)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>VCE Foundation Mathematics: Unit 1</td>
<td>Work Related Skills Unit 1 (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
151. In the context of Grevillea, RPL could have been applied in the following way:

**Hypothetical scenario:**

Robert was transferred to Grevillea from Malmsbury and engaged in the education services being offered. Robert was at Grevillea for 21 days and during this time achieved learning outcomes 1, 2 and 3 of a VCAL Personal Development Skills unit, evidence of which was recorded by education staff at Grevillea. On his return to Malmsbury, Robert was re-enrolled in Parkville College and achieved the remaining learning outcomes (4, 5 and 6) of this VCAL unit. Robert then applied to Parkville College for formal recognition of the learning outcomes achieved at Grevillea and Malmsbury, and completion of the unit. If Parkville College assessed his evidence of prior learning at Grevillea as meeting the required standard, Robert would successfully complete one of the 10 units required for his VCAL.

### RPL for VET units

152. An RPL application can also be made in relation to VET components of the VCAL. The limitation in relation to Grevillea was the difficulty in accessing tools and equipment required for the VET components typically taught at Parkville College, such as the tools required for a Certificate II in Building and Construction (Carpentry).

153. From the example program on the previous page, it appears the only VET component delivered at Grevillea in November and December 2016 was Personal Training.

154. Like VCAL units, applications for RPL can be made in relation to any VET unit. The application process for VET is the same as VCAL and is made to the institution that is certified to deliver those particular units and certificates, which in the case of Parkville College is Melbourne Polytechnic.

155. While the RPL process allows for students to, in some circumstances, gain accreditation for learning outside a school setting, it is dependent on the assessment of a registered school or non-school provider.

156. Young people who did not return to Parkville and Malmsbury from Grevillea and re-enrol in Parkville College (ie were released) could make their application at the next school they enrolled in or through the Flexible Learning Centre, a transitional campus of Parkville College.

157. As it happened, a number of young people did re-enrol at Parkville College after leaving Grevillea. The current Executive Principal, Matthew Hyde, told investigators that records of learning undertaken by young people at Grevillea were maintained and those students received RPL.
Chapter 3

Significant events from late 2016 to early 2017

This chapter provides a chronology of significant events leading up to, during and immediately after the two phone calls (Allegation 1), the Supreme Court proceedings (Allegation 2) and the misconduct investigation of Mr Murray (Allegation 3).

Late November 2016

Obstacles to campus registration application for the Grevillea Unit

158. Incidents at Parkville over 12-14 November resulted in the establishment of Grevillea on 17 November as a youth justice and remand centre for emergency accommodation.

159. DHHS then began discussions with representatives from Parkville College about the process required to register the facility as a campus of Parkville College.

160. Mr Fraser told investigators that as Executive Director, Implementation – DET he had primary responsibility for the campus registration application process for the Grevillea Unit.

161. On 24 November, Lynn Glover, Director – VRQA wrote to DET raising her concerns about how Grevillea could meet its registration requirements to provide 25 hours of required instruction over a school week; how the campus could meet its duty of care to students; and how it would comply with Ministerial Order 870 – Child Safe Standards:

> I recognise that the intention of the DET and the DHHS is to provide some educational continuity for children in detention. However, it is unclear how the Grevillea Unit would meet all the requirements of the Minimum standards for school registration in order to be registered as a school campus.

162. Ms Glover also noted her concerns that the modified VCAL program did not reflect a full VCAL program and ‘there is a very limited capacity for the VET components of a VCAL program to be delivered from the facility’. She stated that any application would also need to provide evidence that the risks to the Grevillea clients (particularly safety related) had been addressed.
163. According to Mr Fraser, DET had already independently assessed the likelihood of registration and had identified the same issues as Ms Glover. Mr Fraser said Ms Glover’s letter highlighted that registration of Grevillea as a campus of Parkville College ‘would be extremely difficult, if at all possible, and that we [DET] should pursue another avenue’.

**DET wipes Parkville College’s deficit**

164. Also on 24 November, DET’s Budget and Finance Management Committee met and decided to wipe the deficit of Parkville College, including the forecasted accrued debt to 30 June 2017. Mr Murray was not advised of this decision until 21 December, despite being the Executive Principal of the college.

**Urgency to ensure education could continue**

165. Given there were already young people at Grevillea, there was a sense of urgency and pressure to continue to find a way to ensure education continuity. At interview, Mr Fraser agreed it was a fair characterisation that at this point, following receipt of Ms Glover’s letter, a decision was made to focus energy and resources into finding an expeditious alternative for delivering education at the Grevillea Unit.

166. Mr Fraser told investigators that around this time ‘there were a lot of people saying that registration had been knocked back’. Mr Murray, for example, told investigators that Mr Fraser had told him ‘there’s no way we’re going to be able do it [register Grevillea as a school]’ and ‘we will not be registering the campus’.

167. In response to the draft report, Mr Fraser denied saying this to Mr Murray and submitted he was clear that ‘registration would be kept open as a possibility but would be extremely difficult so that other pathways for delivering education had to be considered.’

168. Mr Fraser recalled discussing the registration difficulties with a number of people, to the effect that while school registration was intended to be pursued in the longer term, it would be very difficult to achieve in the short term. Mr Fraser told investigators that his comments or discussions may have been misinterpreted.

169. What ensued over three days from 25 to 27 November was a flurry of emails as those involved sought clarity around the status of Grevillea’s registration.

**Mr Murray proposes distance education as solution – this option is not pursued**

170. Mr Murray said at interview that he spoke at this time to Mr Fraser about his proposal for Grevillea students to enrol in distance education and that Mr Fraser agreed this would be an effective solution.

171. Mr Fraser said he could not recall having a conversation with Mr Murray about distance education, nor could he recall why distance education was not considered as a viable option.

**Letters of exchange signed as interim alternative to deliver education at Grevillea**

172. On 25 November, the Deputy Secretary, People and Executive Services Group – DET advised Ms Callister via text message that Mr Fraser was progressing a proposal that involved DHHS asking Parkville College to provide education services at Grevillea via a Memorandum of Understanding (MOU).
173. As a first step towards an MOU, DET explored the option of letters of exchange for two reasons:

- It was an expedient response – described in an email by Mr Fraser as ‘a potentially quicker path’, which could then be followed by a formal MOU.
- It appeared to be allowed under the *Education and Training Reform Act 2006* (Vic) (ETRA), which states the Minister may arrange for the provision of educational instruction and services in ways other than through Government Schools (section 2.2.1(4)).

174. After being drafted over the weekend, the letters of exchange were signed on Monday 28 November by Ms Peake and Ms Callister.

175. The letters of exchange set out the obligations of DHHS and DET, noting that ‘if you agree with the high-level terms on which these services will commence we will seek to document a more detailed memorandum of understanding (MOU) by 9 December 2016’.

176. The letters recorded that DET would provide staff to give instruction to young people at Grevillea and would work with DHHS to achieve and implement the minimum standards of school registration required under ETRA regulations (with particular reference to Child Safe Standards).

177. The letters specified the requirement to provide the following instructions to students:

- that is based on Parkville College’s trauma-informed practice approach;
- that is a culturally diverse and inclusive teaching and learning program, including in relation to indigenous matters;
- that operates for at least 25 hours per week and some hours on weekends; and
- in the eight key learning areas specified in Schedule 1 of the ETRA, consistent with the program operating at Parkville College modified to the extent necessary given the operational requirements of Grevillea, including the delivery as a senior secondary provider. The eight key learning areas are: English, mathematics, sciences, humanities and social sciences, the arts, languages, health and physical education and information and communication technology and design and technology;

178. The letters did not refer to VCAL, VET or VCE, nor to the awarding of qualifications, assessment or grading of any education undertaken.

**Mr Murray’s input to the letters of exchange**

179. Later that night on 28 November, Mr Fraser emailed Mr Murray (and others), a final signed copy of the letters of exchange.

180. In that email, Mr Fraser thanked Mr Murray for his support. Mr Fraser told the investigation he could not specifically recall writing that but it indicated to him that he had ‘at least some conversation with Brendan about the contents of the letter[s]’ and that ‘we’d had phone calls about the content’. At interview, Murray Bruce, Manager, Commercial and Property Law – DET, also thought Mr Murray had been consulted about the content of the letters of exchange but most likely only on 28 November, after they had been finalised.
Mr Murray’s concerns about the letters

181. Mr Murray told investigators he did not believe he was consulted about the content of the letters of exchange because if he had been he would have raised his view that the key learning areas referred to in it (from Schedule 1 of ETRA) did not apply to young people doing senior secondary studies.

182. On 29 November 2016 Mr Murray sent a text to an Australian Education Union (Victoria) official describing the DET and DHHS arrangement as ‘unorthodox’ and indicating that he would like to discuss it with the union.

183. Mr Murray told investigators he made this contact because of his concerns about the letters of exchange (he had never seen or heard of this mechanism for providing education services), about the occupational health and safety risks for staff, and about whether staff were authorised or permitted to work at a non-registered site.

Teaching staff commence at Grevillea

184. Although Parkville College teachers began attending Grevillea from Thursday 24 November 2016, they did not start formal classes while they were awaiting the campus registration to be approved by VRQA. This changed when it was realised that significant changes were necessary before a successful campus registration application could be progressed, and the letters of exchange were signed by the secretaries on 28 November.

185. Teaching commenced at Grevillea on 5 December 2016.

December 2016

Legal representatives and teachers on site at Grevillea

186. On 2 December 2016 the originating motion for judicial review was filed in the Supreme Court.

187. As alleged by the plaintiffs, one of DHHS’s failures to comply with its statutory duties was that it had not ensured young people at Grevillea were enrolled at a ‘registered school’ and in attendance at all times that the school was open for instruction.

188. During this period, lawyers attended Grevillea to meet with the young people there and also interacted with the Parkville College teachers on site. The lawyers included those from the Human Rights Law Centre (HRLC).

189. Mr Murray told investigators that he accepted the decision had been made to place young people in Grevillea, but he was starting to have concerns with the way in which the young people were being treated.

190. Mr Murray also said that he would often speak with the lawyers on the young people’s behalf because they couldn’t always access them.

A Director of the Human Rights Law Centre advises Mr Murray legal action has commenced

191. On 2 December 2016 a Director of the HLRC sent Mr Murray a link to an HRLC media release announcing the launch of legal proceedings in the Supreme Court to stop the Government from sending young people to Grevillea. Mr Murray told investigators he thought the Director sent the text to advise him as the person in charge of Parkville College and because they were friends outside of work.
Mr Murray subpoenaed, advises DET and has a witness briefing with the Victorian Government Solicitor’s Office

192. On 4 December 2016 Mr Murray received an email from another lawyer at HRLC. Attached to the email was a letter from Fitzroy Legal Service advising Mr Murray of the legal proceedings. A draft subpoena was also enclosed requiring Mr Murray to attend and give evidence at the Supreme Court hearing. Mr Murray informed Mr Fraser of this that evening.

193. On 5 December, a teleconference was organised by Mr Bruce for Mr Murray to meet with Ms Richards SC (then Crown Counsel) and lawyers from the Victorian Government Solicitor’s Office (VGSO). The teleconference was a witness briefing to provide information and canvass issues and evidence that may arise in the court proceedings.

Mr Murray agrees to give evidence on behalf of the plaintiffs

194. Mr Murray told investigators that he spoke with the young people in Grevillea and they asked, ‘Can you give evidence?’ and ‘Will you be our witness?’ to ‘tell the truth about what was happening here [at Grevillea]’. Mr Murray said he was not asked to provide an affidavit at this time, only if he would appear and give evidence on behalf of the plaintiffs. He indicated to them that he would do whatever they wanted:

Mr Murray: For me I’d give up anything. ‘Look at me, like I’ll do whatever you want.’

‘The stakes are high’

195. On 4 December 2016 Mr Murray made clear in a text message to a number of his teachers that staff needed to be on site, on time each school day and that a failure to do so ‘will be used in court’. ‘The stakes are high gentlemen’, he wrote. ‘Just because DHHS do not allow kids out of rooms, we cannot collude and just stroll in when we feel like it. Please take this extremely seriously’.

196. When investigators asked why this issue was important to the court case, Mr Murray said he had received feedback that DHHS staff might suggest that teaching was not going ahead at Grevillea because of teacher absence rather than lockdowns. Mr Murray said he was concerned that DHHS would assert this in court to explain why they could not deliver education and he wanted to ensure that did not happen.

DET and DHHS Legal draft the MOU

197. On 3 December, DHHS lawyers sent Mr Bruce a copy of the draft MOU for his review, advising that DHHS may wish to make further changes and that ‘DPC will wish to review the MOU prior to it being finalised’.

198. Mr Bruce responded on 4 December noting that ‘the main concern of DET pertains to addressing, as far as possible, the risk issues identified in the arrangements that existed at Parkville College prior to it being registered as a Victorian government school, including reaching a better understanding of each parties’ respective roles at a shared facility’.
199. The MOU went through several iterations that week between DHHS and DET as the wording was finessed. For example, in one version of the MOU, DHHS had inserted the word ‘schooling’ and inserted a reference to delivering ‘Victorian Government curriculum’. These were viewed by Mr Bruce as ‘potential stumbling blocks’ as Grevillea was not registered with VRQA as a school, nor as a registered campus of a school. To refer to it as such was, Mr Bruce wrote to DHHS lawyers, ‘misleading and confusing’. Mr Bruce also highlighted that the reference to delivering the Victorian Government curriculum was inaccurate ‘as we may not be delivering VCE qualifications to all Recipients at Grevillea Unit’.

Mr Murray and the MOU

200. Mr Bruce told investigators that he consulted with Mr Murray on the MOU content maybe three to four times that week (including in the case conference with VGSO on Monday 5 December).

201. When asked by investigators to identify which sections of the MOU he would have consulted Mr Murray on, Mr Bruce said there were several sections. He recalled discussing issues around teacher registration and who was actually attending the Grevillea site; about whether Working with Children Checks were required; and about the services and responsibilities of DET. Mr Bruce recalled that Mr Murray was also concerned about the responsibilities of DHHS.

202. By Wednesday 7 December, Mr Murray described the MOU (version 4) to Mr Bruce as a ‘very workable document’, subject to the inclusion of ‘reasonable excuse reporting for non-attendance of DHHS clients’.

Events of 9 December 2016

This section describes the events during the day leading up to the conference call between Ms Callister, Mr Fraser and Mr Murray.

7.42am – MOU and brief finalised for Ms Callister to sign

203. On 9 December 2016 at 7.42am, Mr Bruce sent an email to Kathryn Johnson, Executive Director, Legal – DET attaching what he thought was the final version of the MOU from DHHS. He noted that it needed to be proofed before being attached to the brief for the Secretary, which was already prepared.

204. In a subsequent email, Mr Bruce advised Ms Johnson that ‘Brendan does not need to have any further input as I spoke with him about those changes yesterday before I replied to DHHS’.

3.30 to 4.30pm – Ms Callister meets with the Minister for Families and Children

205. In the afternoon of 9 December Ms Callister and a number of her staff met with the Minister for Families and Children.

206. According to the meeting’s agenda, Mr Fraser and Ms Callister were listed to provide the Minister with an update on education at Grevillea. At interview, Mr Fraser could not recall attending the meeting with the Minister, however, Ms Callister did recall him being there. Ms Callister’s recollection is supported by the text messages exchanged between them.
4.14pm – DPC and DHHS not ready to sign off on the MOU

207. At 4.15pm (around the time Ms Callister and Mr Fraser were meeting with the Minister), DPC sent an email to DHHS lawyers querying the definition of ‘education services’ in the MOU:

An understanding of the Services to be provided by DET relies on an understanding of the Parkville College program and cannot be determined by reference solely to this MOU.

The definition of Services refers to delivery as a senior secondary provider, however it is not clear whether the Services comprise delivery of an accredited senior secondary course or any other accredited program.

208. At 4.21pm Legal Counsel, DHHS emailed another DHHS lawyer and Mr Bruce, asking them to consider the comments and the best way forward.

209. At 4.27pm, Mr Fraser received a message from Ms Callister’s Executive Coordinator asking whether they were still expecting the MOU, so it could go home with Ms Callister that night. The message suggests that Ms Callister did not yet have a copy of the MOU at the time.

4.50pm – Mr Fraser is back at DET, but not with the Secretary

210. At 4.50pm, in response to a text from a colleague about his whereabouts, Mr Fraser advised that he was in the A/Director, Implementation’s office ‘but on the phone’.

211. Mr Fraser then engaged in a series of text messages between 4.58pm and 5.03pm with a colleague planning where they should meet before heading to another colleague’s farewell event. They settled on a meeting place at 5.02pm, and at 5.03pm Mr Fraser wrote ‘See you there’. At 5.07pm Mr Fraser’s colleague sent a final text saying, ‘Am here’.

212. These communications suggest that as at 5.03pm, Mr Fraser was not intending to be at work for much longer that evening.

213. In response to the draft report, Mr Fraser said that his ‘participation in the call of 9 December occurred spontaneously and was not the result of any pre-arrangement with the Secretary because for example, they had spent time together that afternoon with the Minister’.

5.04pm: Mr Fraser asks whether the MOU is being signed tonight and contacts Mr Murray

214. At 5.04pm Mr Fraser sent a text to Ms Johnson asking ‘is Mou going tonight?’

215. At 5.06pm Mr Fraser sent a text to Mr Murray asking ‘any time for a call?’.

216. At 5.07pm Mr Fraser missed two calls, one from Ms Johnson and one from Mr Murray. Ms Johnson left a voice message that was converted to text advising that there had been a ‘hiccup’ and the MOU had not been signed off, and that she was going to speak to DHHS in the next five minutes.

217. Also at 5.07pm Mr Murray sent Mr Fraser a text saying ‘available’.

Mr Fraser arranges for Mr Murray to speak with Ms Callister

218. Around 5.10pm on 9 December (as efforts were continuing to have the MOU finalised), Mr Fraser called Mr Murray. At interview Mr Fraser said in that call he had advised Mr Murray that Ms Callister would like to ‘chat with you directly to confirm that what she’s about to sign up to can in fact be delivered on the ground’. Mr Murray told investigators the MOU was never mentioned during this call and that he asked Mr Fraser specifically if the call was going to be about Parkville College funding.
219. At 5.45pm Mr Fraser called Mr Murray with Ms Callister and they spoke for approximately 35 minutes. Details of the varying accounts of this call are described in the following chapter in the context of Allegation 1.

DET and DHHS agree to delay signing the MOU until Monday 12 December

220. Approximately five minutes before Ms Callister and Mr Fraser called Mr Murray, DET and DHHS agreed the MOU would be signed on Monday 12 December with a commencement date of 9 December 2016.

221. In response to the draft report, Mr Fraser submitted he does not believe he was aware of this at the time, or that any information was shown to him by investigators to establish that he did know. On this point, two emails were put to Mr Fraser at interview. The first was an email to Mr Fraser (and others) at 5.36pm on 9 December 2016 in which Mr Johnson proposed that the MOU be signed on 12 December. The second was an email sent by Mr Fraser three minutes later, at 5.39pm, where he responded ‘I think that’s workable Kathryn’. When the emails were put to Mr Fraser at interview, he did not dispute their authenticity or the proposition that his reply of ‘workable’ must have been with Ms Callister’s authority.

222. Mr Fraser further submitted that it did not occur to him ‘that this signified a concluded agreement between DHHS and DET’ about when the document would be signed and when it commenced.

Ms Johnson delivers the finalised MOU to Ms Callister

223. Ms Johnson finalised the MOU, having resolved the issues raised by DPC; and she told investigators she left it at Ms Callister’s workstation ‘some time between 6.30 and 7.15’.

224. Later that evening, Ms Johnson sent an email to Mr Bruce with Mr Fraser copied in. In that email, she stated that Ms Callister had been enquiring during the day about accreditation issues at Grevillea and went on to suggest that Mr Bruce call Mr Murray to discuss this and that an email response be sent to Ms Callister by midday on Monday.

When providing the MOU in relation to Parkville to the Secretary today she asked if students at Grevillea were able to use some of their education at Grevillea towards VCAL or other accredited certificates.

At that time, Stephen indicated that he thought that this was a matter that Murray [Bruce] was looking into. However, in hindsight I wonder if this is an issue that Brendan Murray is best to respond to. Perhaps Legal Division might then be able to review that answer to make sure that it is legally accurate.

Murray - [original emphasis] do you think you can call Brendan to discuss this - as I note that this has been an issue at the interview you attended and when drafting the MOU. Perhaps you can then discuss with Elena and/or Burt to test the answer legally. And Stephen, perhaps you could test the response with VCAA??

I should also indicate that I had Murray’s notes of his meeting with Brendan and I noted Murray’s comments that Brendan had stated that: all students are provided education services at senior certificate level (VCAL) with some VCE components … It is still possible to get the qualifications …

I propose that an email response is sent to Stephen so that a response is with the Secretary by midday Monday – which is what she requested this evening. I am happy to discuss the legal analysis at any stage, but if this is relatively less complex – please just cc me to your response.
225. At 11.15pm Ms Johnson sent an email to a VGSO lawyer and copied in Mr Fraser, Mr Bruce and a DHHS lawyer advising that she had not yet confirmed if the MOU was signed by both Secretaries that day.

Mr Murray’s actions after the conference call

226. Mr Murray told investigators that during the conference call he was travelling from Parkville to Fitzroy on his Vespa with his headphones in. Mr Murray was on his way to a family dinner at his parent-in-law’s house and the conference call with Ms Callister and Mr Fraser ended after he had arrived:

Mr Murray: ... I went inside, and I spoke with Ron, who is my father-in-law, I said, ‘I’ve just got off the phone to the secretary and this guy Stephen Fraser’...I said I was just on the phone with the two of them where they were telling me what they would like me to say in the Supreme Court.

227. Mr Murray said he spoke with Ron Merkel immediately after ending the conference call and that initially they spoke about it for about 10 minutes. However, they were sitting next to each other at the dinner table and likely discussed the conference call throughout the evening. Mr Murray’s partner, Ully Merkel was also present.

228. Mr Merkel told the investigation that to the best of his recollection, Mr Murray said Ms Callister had indicated he should say certain things in court:

Mr Merkel: Brendan said that he had been talking to Gill Callister about his evidence that was to come on in the court the following week, that she was indicating to him that she was expecting him – seeking to persuade him, I can’t remember which – to, in effect, say certain things to the court about the education that was being provided to the children that were in Parkville College who had been transferred to Grevillea, pretty much on the basis that the education at Grevillea would be much the same and have much the same legal status or standing as education that could qualify for whatever the children were standing for.

229. At interview, Ms Merkel described Mr Murray’s demeanour as ‘being shocked and stressed or probably distressed’ and attributed this to Brendan having communicated ‘quickly’ that Ms Callister ‘had talked about what he should say in evidence’.

230. At 7.27pm Mr Murray called Simon Lenten, Director of Strategy and Services, Parkville College and they spoke for just over 10 minutes. According to Mr Lenten:

Mr Lenten: ... Brendan was pretty clear in how he was recounting it to me, that he was being asked to tow a particular line that he felt was dishonest.

Investigator: Okay. And what was the line?

Mr Lenten: That it – you know, that it was - there were no problems with Grevillea, that Grevillea could be run as a school and curriculum could be delivered and there’s no – just those general issues that everything was okay and we’ll be able to find – he should be able to find a way through.

231. At 8.08pm Mr Murray called Matthew Hyde, Principal of Schools, Parkville College and they spoke for just over 11 minutes:

Mr Hyde: Look, in my recollection of the conversation ... Brendan was adamant that he was being asked to say something that he - that didn’t sit with him [about accreditation and educational services].

232. At 8.44pm Mr Murray sent a text message to Mr Lenten and Mr Hyde saying ‘Unbelievable! In disbelief’.

www.ombudsman.vic.gov.au
Events of Saturday 10 December 2016

Mr Murray’s proof of evidence

233. On Saturday morning, a lawyer from the HRLC emailed Mr Murray a four page ‘proof of evidence’. Mr Murray reviewed the proof of evidence and emailed his amendments (the removal of references to a staff member which he stated he only knew about second hand) back, saying:

Here is version that is accurate and I am happy for you to have.

234. Mr Murray later told investigators he had not requested this proof of evidence be sent to him and did not have input into its content despite it being written in the first person.

235. The final page of the ‘proof of evidence’ document has a section that states:

Availability of beds

- I have an understanding about bed availability because it correlates identically to enrolment capacity for Parkville College.
- I know that currently there are 140 possible enrolments at the Malmsbury Youth Justice Precinct and that we currently have 96 children and young people enrolled.
- In my five years as Executive Principal of Parkville College, I have never seen the current level of capacity in the open facility at Malmsbury. This is to say that the Malmsbury Senior Site (or the Open Site) has never had such low numbers in my memory.
- Ordinarily, there are [sic] would be at least 40 young people enrolled at the school who were residing in the Open Units at Malmsbury, but currently there are around 15 young people enrolled in the school at those units.
- The Parkville Campus, with its readjusted enrolment capacity after ‘the riot’, continues to not meet 100% enrolment demand.

236. This appears to be the first time that it was asserted in writing that there was capacity at Malmsbury to accommodate the young people sent to Grevillea.

The question of accreditation

237. Meanwhile, Mr Fraser and Ms Johnson exchanged a series of text messages seeking clarification on the status of VCAL qualifications. In one message, Mr Fraser advised that he had just spoken with Ms Callister who was ‘keen to follow up on VCAL question in mou’.

238. Mr Fraser subsequently made contact with Mr Bruce and David Howes (Acting Assistant Deputy Secretary, DET at the time, but previously Executive Director, Curriculum at VCAA and later VCAA CEO). At interview, Mr Bruce recalled speaking with Mr Fraser that afternoon about how accreditation and qualifications could be delivered in the Grevillea context although no clear answer to the question of how this would be achieved was reached.

239. Throughout Saturday, Ms Johnson continued to seek clarity around the issue of compliance with requirements and late Saturday afternoon advised Mr Fraser by email that ‘it seems that registration would be required for this to be a non-school senior secondary school. So presumably we are delivering this under Parkville registration – so issue is whether that meets legal/VRQA registration and other requirements’.

240. Ms Johnson continued to research issues related to education services at Grevillea well into the night and early morning.
Events of Sunday 11 December 2016

Ms Johnson suggests an auspice arrangement

241. In the early hours of Sunday 11 December, Ms Johnson sent an email to Mr Bruce (later sent to Mr Fraser) in which she concludes that if Mr Fraser ‘is looking for something definitive by Sunday morning’ that ‘it looks like Parkville teachers at Grevillea can deliver VET courses through the Melbourne Polytechnic arrangements and this can be used towards VCAL.’ However, Ms Johnson added that:

I don’t think that we can give definitive advice on whether Parkville can provide the entirety of VCAL as a senior secondary provider at Grevillea because this is unlike other arrangements ... that I am aware of and was not an issue that we had been asked to consider as part of the draft MOU.

So, as I understand it either: Parkville would need to be registered to deliver VCAL at Grevillea if that is a requirement imposed by VRQA as part of Parkville’s current registration for delivery of VCAL, Grevillea would need to be registered itself to provide VCAL, or Brendan would need to explore whether Melbourne Polytechnic is able and willing to contract DET to provide VCAL at Grevillea, noting that I am not sure if VRQA registration of Melbourne Polytechnic presumably as a non-school senior secondary provider can be extended to allow that.

242. At 9.25am that same morning, Ms Callister sent a text message to Ms Peake, stating ‘Another long series of calls re grevillea y’day a’noon, complicated re quals but getting there. Will let you know when definitive’.

Mr Howes sends Mr Fraser the VCAL Assessment Guide on RPL

243. At 10.15am Mr Howes sent an email to Mr Fraser attaching a copy of the VCAL Assessment Guide 2014 and drawing attention to page 13, which addressed RPL for VCAL.

244. The content on page 13 suggested to Mr Fraser that a mechanism was in place to count the learning at Grevillea towards VCAL units. Mr Fraser sent an email to Ms Callister (copying in Ms Johnson and Mr Armstrong) to advise them of such. Mr Fraser also spoke to Mr Murray to advise him of this on 11 December. That call relates to Allegation 1 and is discussed in the next chapter.

245. Later that afternoon, Mr Fraser sent the following text message to Ms Callister:

Mr Fraser

Spoke with Brendan – I think we’re about as clear as we can be. I went through the justice scenario with him.

11 December 2016, 4.00pm

246. Ms Callister did not appear to reply to this text.
Mr Murray calls Mr Lenten and speaks to Ms Merkel

247. Immediately after getting off the phone from Mr Fraser, Mr Murray called Mr Lenten. Mr Lenten described Mr Murray to investigators as ‘worried’, ‘concerned’, ‘distressed’ and ‘really nervous’ about appearing in court the next day:

Mr Lenten: … he was a little – was incredulous, I think, about the idea of having this challenge. He was uncertain. He was worried and concerned and stressed. I was concerned for him in the same way. His demeanour was probably, unfortunately, the same as it was for a long time where he was under a lot of pressure at that time, but I think he was, remained really nervous and worried about the following day because you – well, I think becoming resolved to the fact that, ‘I know what I have to do here, but it’s going to have implications.’

248. Ms Merkel told investigators that Mr Murray also spoke to her about his call with Mr Fraser shortly afterwards:

Ms Merkel: Brendan told me that Stephen Fraser had said the outcome of the Grevillea litigation could mean that, that Parkville College might not even continue. Now, I can’t recall … that Brendan told me Stephen Fraser said that it won’t be funded. … I think it was more along the lines of, well, if they lose it, Corrections could take over and the future of Parkville College might be in jeopardy anyway, but because of a long period of really difficult interactions and representations … and conduct on the part of departmental officials over a long period of time Brendan didn’t have a lot of confidence that the funding issue was going to be resolved, … and Stephen Fraser knew that so I felt Brendan was upset by that reference because it was intended as a veiled threat in the context of the conversation that Gill Callister and Stephen Fraser had had on the Friday night about the evidence. That conversation on the Friday night had set the scene for, ‘Your evidence might affect the outcome,’ so being told by Stephen Fraser, ‘Well, Parkville College’, which was Brendan’s life and he’d put four or five years into giving life to this school, … that was something that we spoke about immediately because that was distressing to him.

Events of Monday 12 December 2016

Mr Murray texts Ms Hamley

249. Before attending court, Mr Murray had the following text message exchange with Marg Hamley, President of the Parkville College school council:

Mr Murray

I am in the Supreme Court today to give evidence about education at Barwon Prison. As if our predicament could not be worse, Gill contacted me on Friday night to let me know what she would prefer the court to hear when I provide evidence. Unbelievable! And would you believe no funding decision until post trial. Thought I should let you know.

Brendan

Ps. Hope you are well

12 December 2016, 8.54am

Ms Hamley

Seriously? Is there an implied threat here? What a crazy way to finish the school year, especially when everything was on the improve. Hope it isn’t too gruelling today. All you can do is answer the questions honestly! Let me know how it goes, Marg.

12 December 2016, 8.57am

Mr Murray

Yes implied threat.
I will be honest.
Will update later.

12 December 2016, 9.04am
Mr Murray gives evidence in the Supreme Court proceedings

250. On 12 December 2016, Mr Murray gave evidence to the Supreme Court and was asked about bed availability by Mr Walters QC for the plaintiffs. He responded that to his knowledge the secure beds in the open security section at Malmsbury were ‘essentially full’ but that the open side of Malmsbury had ‘low numbers’ – the lowest he had seen.

251. In response to a question about a school having been established at Barwon, Mr Murray stated ‘there is no school that I’m aware of established at Barwon’.

252. Mr Walters asked Mr Murray about the significance of Grevillea not being a school for the education of the young people involved. Mr Murray replied there were implications for their accreditation towards a qualification:

> I don’t think that we can currently provide them with accreditation or qualifications for any education that’s undertaken on the Barwon site.

253. Mr Murray also made the following points in response to questioning by Mr Walters (paraphrased from the court transcript):

- Parkville College does its best to compile an evidence base for students, but it is unlikely that the next registered school or training organisation would give them RPL.
- There is a risk that the students who are at Barwon would need to repeat a year because they’re currently not in a school.
- Parkville operates VCAL, VCE and VET subjects in an auspice arrangement with Melbourne Polytechnic, TAFE. This means particular subjects, or units of competency within a certificate, can be delivered for students at our registered campuses. This does not include Barwon, as Barwon is not a registered campus.

254. Mr Murray stated he believed it would be an offence under ETRA to run a school on a non-registered site.

255. Mr Murray also responded to Mr Walters’ questions about the learning environment, describing it as ‘not very good’ given the challenges of a high stimulus environment coupled with a lot of unpredictability and the fact they were teaching children who may have experienced trauma.

Mr Murray is cross examined and asked about the agreement on 11 December about RPL

256. In cross examination, Ms Richards SC for the State asked Mr Murray about an agreement ‘that there is now, as of yesterday, an understanding with Melbourne Polytechnic that they will recognise prior learning undertaken at the Grevillea unit?’

257. Mr Murray replied on both occasions that he was unaware of such an arrangement.

Ms Peake and Ms Callister exchange text messages while Mr Murray is giving evidence

258. While Mr Murray was being questioned by Ms Richards, Ms Peake and Ms Callister exchanged text messages:
We sorted out y’day they can get senior certificate vcal through rpl via polytechnic. Brendan knows that.

12 December 2016, 4.08pm

Says he doesn’t know if G complies with the child safe standards either.

12 December 2016, 4.02pm

So no major surprises - I’d warned Melinda [Ms Richards] about issue of accreditation/qualifications. Not sure Brendan is qualified to discuss child safe standards...

12 December 2016, 4.03pm

Referred to not being able to get school registered and this will mean kids don’t get any accreditation or qualifications from any education they receive at G. At Parkville they are enrolled at year 11, VCAL or TAFE qualifications

12 December 2016, 4.02pm

I’ll flick on 3 texts from Kirsty

Brendan’s saying the most hours any kid in G attended educational services since it began on 5 December is 13 hours. This was last week.

Most do much less hours (down to 0 hours done by 3 kids, 1 kid on 2 hours). The kids have access to 25 hours but may be some in cells and others in court during the times the services operate.

12 December 2016, 4.02pm

Ms Callister

Saying what?

12 December 2016, 4.01pm

Ms Peake

Brendan going pretty hard

12 December 2016, 3.59pm

Reflected on not being able to get school registered and this will mean kids don’t get any accreditation or qualifications from any education they receive at G. At Parkville they are enrolled at year 11, VCAL or TAFE qualifications

12 December 2016, 4.02pm

Has just said he’s having difficulty getting programs up at G because despite asking dhhs management, apparently too hard to get past CV [Corrections Victoria]. Achievement to even get a guitar in, let alone a hammer.

12 December 2016, 4.08pm
259. At 4.44pm, just as the court proceedings were concluding for the day, Ms Peake sent the following text messages to Ms Callister:

Ms Peake

I got a message to Melinda and she raised RPL option in cross. He said wasn’t aware of this! Melinda said she expected he would find out and confirm tomorrow.

12 December 2016, 4.44pm

Ms Peake

In re-examination, he says he’d had daily discussions with Scott [Scott Jacques, DHHS] about getting equipment in and there’s been a process getting these approved to come in by CV.

12 December 2016, 4.47pm

Ms Peake

He’s just finished but his last comments were that there was a 2 hour lockdown today because dhhs staff had a 2 hour Union meeting followed by a 1 hour dhhs staff lunch. Lockdowns occur every day. Finished for the day now. Ian [Lanyon] and Matthew tomorrow.

12 December 2016, 4.47pm

260. In response to the draft report Ms Callister told the investigation that she only responded twice to Ms Peake’s nine text messages and was not monitoring the events taking place in the court because she was engaged in other important work at the time.

After Mr Murray gave evidence on 12 December

261. At 6.26pm that evening, Mr Murray called Ms Hamley and they spoke for over 25 minutes. At interview Ms Hamley recalled Mr Murray telling her about the conference call on 9 December with Ms Callister and Mr Fraser:

[he said] they had a conversation about the government’s desire to locate young people from secure facilities to the Grevillea unit at Barwon Prison and our particular interest I guess as a school was that the government was very keen to demonstrate that the school program that the young people were receiving within Parkville College could also occur in the prison. So a lot of the conversation, as I recall, was about Gill and Stephen trying to – well, that Brendan felt that they were trying to encourage him to say publicly in the Supreme Court that the young people would be receiving the same kind of program as they were receiving at Parkville and Brendan felt very – I shouldn’t say how he felt, but I gained the impression that he felt very uncomfortable about saying that on oath because he believed that to be incorrect.

DET legal proposes to counteract Mr Murray’s evidence to the court on RPL

262. At 9.24pm on 12 December, Ms Johnson sent an email to Mr Fraser and Mr Bruce stating ‘I assume we want a curriculum expert to counteract the evidence around recognition of prior learning – perhaps David Howes or someone at VCAA?’ An affidavit was subsequently drafted for Mr Fraser; however, it was not signed nor was it submitted to the Court.
On 14 December, Mr Fraser sent an email to Ms Johnson saying he had made a number of attempts to progress the affidavit with VGSO but had never heard back. He therefore assumed that an affidavit was no longer required. Ms Johnson confirmed this on 15 December.

Further events of 13-20 December 2016

The MOU is signed, but questions remain around accreditation

On 13 December, Mr Bruce emailed a copy of the MOU signed by Ms Callister to DHHS.

Despite the MOU being finalised and signed, the issue of whether the education services delivered at Grevillea could contribute to a qualification continued to be a live issue for DHHS and DET throughout the week of the court proceedings. So much so, that Ms Peake and Ms Callister were directly involved in finding a solution.

On 19 December, Mr Fraser was asked to draft a letter from Ms Callister to Ms Peake outlining arrangements for how the education services being delivered could contribute to a qualification. Mr Fraser was advised that Ms Callister wanted this letter to be sent by 21 December (the final day of the court proceedings). Mr Fraser drafted a letter, which was provided to the Secretary’s office on 21 December. The letter was finalised on 3 March 2017.

Mr Murray is informed that Parkville College’s deficit has been removed

Also on 19 December, and separate to the Budget and Finance Management Committee’s decision in November to wipe the budget deficit, DET’s Policy and Implementation Committee met and agreed on an interim solution to Parkville College’s funding model. The Committee confirmed an additional $5.7 million into Parkville College’s budget for the 2017 school year.

Mr Fraser informed Mr Murray of this decision by text message that afternoon and later confirmed (on 21 December) in response to Mr Murray asking him, that Parkville College’s deficit had been fully removed.

Events of 21 December 2016

The Certain Children case – intention to remove young people from Grevillea

On 21 December 2016, Mr Murray attended the Court to hear Justice Garde’s decision in the Certain Children matter.

Justice Garde had indicated his intention to order that the young people be removed from Grevillea and placed in other facilities within the youth justice system in Victoria. The State’s response was to make an application to stay the order pending the State’s appeal of his decision. The plaintiffs opposed the State’s application.
The State submits there are no secure beds

271. Mr Lanyon’s sworn affidavit dated 20 December 2016 was submitted by the State in support of its application to stay the decision to move the young people. The State submitted there were insufficient secure beds and, therefore the State was unable to comply with the Court’s order.

A sensitive DHHS email is released, suggesting otherwise

272. That same morning, James McCann, Head of Operations (Youth Justice), sent an email to a group of DHHS manager stakeholders, copying in Mr Lanyon. The email was titled Fwd: Client Movement Panel – meeting 21 December 2016 (the email).

273. The Client Movement Panel had been established at the start of December 2016 by DHHS to provide high level oversight of decisions about who was placed in Grevillea. While the Panel was a multi-disciplinary panel that made recommendations about placement of young people at Grevillea, Mr Lanyon was delegated to decide the placements.

274. The email provided the list of young people who were located at Grevillea as at 21 December 2016 and proposed secure units within the youth justice system where they could be moved ‘subject to 11am court ruling’. The names of 15 young people were listed. Seven of the suggested units were isolation units. This was confidential information to DHHS.

275. Mr Lenten was one of the recipients. He forwarded the 21 December email to Mr Murray at 10.55am.

Mr Murray is implicated in the release of the email

276. At 12.00pm that day, Mr Murray forwarded the email to a Director at the Human Rights Law Centre.

277. At 12.05pm that day Mr Lanyon was called to be cross examined about his evidence in his affidavit. Under cross examination Mr Lanyon maintained there were not enough secure beds elsewhere in the youth justice system to relocate the young people from Grevillea.

278. Immediately after the lunch recess Mr Lanyon was recalled, at the plaintiffs' request, for further cross examination at 12.46pm. Four minutes earlier, at 12.42pm, Mr Murray had forwarded the email from his iPhone to Mr Lanyon. A question mark was the only character in the forwarding message – ‘?’. The plaintiffs contended during Mr Lanyon’s further cross examination that the email was evidence there were lawful and secure beds available within the youth justice system for the Grevillea young people to be returned to. This contradicted Mr Lanyon’s affidavit.

279. When the investigation interviewed Mr Lanyon on 13 April 2018, he said he felt he had been ‘ambushed’ by Mr Murray forwarding him the email immediately before his being recalled for further cross-examination.

DET commences an investigation into the release of the email

280. DET commenced an investigation into the release of the email to the HRLC. This investigation is discussed in chapter 6 in the context of Allegation 3.
Chapter 4

Allegation 1: an attempt to influence

That during two conversations, a conference call on Friday 9 December and a follow-up call on Sunday 11 December, Ms Callister and Mr Fraser attempted to influence Mr Murray’s evidence, to be given in the Supreme Court proceedings on 12 December.

The conference call on Friday 9 December 2016

Introduction

281. There is no dispute that the conference call between Ms Callister, Mr Fraser and Mr Murray occurred on Friday 9 December 2016 at 5.45pm and lasted 35 minutes. It is also not disputed that the conversation was largely between Ms Callister and Mr Murray, and that Mr Fraser’s contribution was minimal.

282. Mr Murray told the investigation that when he received the call he was in the office but then travelled to Mr Merkel’s house on his Vespa for a family meal. It appears that the bulk of the phone call occurred while he was travelling from work to Mr Merkel’s house.

283. Ms Callister and Mr Fraser both confirm the call to Mr Murray was made at a meeting table located near Ms Callister’s desk. The call was made on speaker phone using Mr Fraser’s mobile phone. Both Ms Callister and Mr Fraser confirm that no other person was present during this call.

284. None of the parties made an audio recording of this phone call. Ms Callister and Mr Fraser both made notes of the call and submit they made them contemporaneously. Mr Murray did not make any written account of the call at the time and did not do so until January 2017. As outlined in the previous chapter, Mr Murray did, however, recount his recollection of the call to his family and colleagues immediately afterwards.
Each witness provided their account of what occurred to the investigation:

- **Mr Murray’s account** is largely drawn from a written statement to the Ombudsman on 22 December 2017. Mr Murray also submitted relevant extracts from a statement he prepared (with legal assistance) in January 2017. Mr Murray participated in two interviews with investigators, on 16 January and 4 May 2018.

- **Ms Callister’s account** is drawn from her interview with investigators, which was conducted on 18 April, 20 April and 30 April 2018. Ms Callister also referenced her contemporary handwritten notes of the telephone conversation.

- **Mr Fraser’s account** is drawn from his interview with investigators on 16 April 2018 and he also referenced his contemporary typed notes of the telephone conversation.

**Mr Murray’s account**

286. Mr Murray said Ms Callister opened the telephone discussion saying that because Grevillea was an ‘incredibly overheated situation’ that both she and Ms Peake wanted to ensure ‘we were on the same page about the MOU’. Mr Murray said he was surprised that Ms Callister was calling him about the MOU as he had not received a copy, nor had he been involved with discussions about it.

She said that there was a concern with Secretary Peake (DHHS) about a lack of clarity that she wanted to resolve about the Supreme Court case. She said she wanted to make sure I understood that we could in fact provide qualifications and accreditation to children at the Grevillea unit based on the exchange of letters and MOU.

287. Mr Murray said Ms Callister then read out the eight key learning areas listed in the letters of exchange and said based on those learning outcomes DET could provide accreditation and qualifications. She then raised a concern that this was not Mr Murray’s position:

She said, what I am hearing from my DHHS counterparts is that you and the school are saying that is not possible and I want to make sure we are clear on that now.

288. Mr Murray stated he pointed out to Ms Callister that these key learning areas apply to children from prep to year 10, but not to senior secondary certificates in Victoria. Mr Murray said Ms Callister responded by saying she was aware there were regulations in place but she thought DET could provide qualifications for anything other than the VCE.

289. Mr Murray said he then told Ms Callister that to provide secondary certificates including VCAL, the school must be registered. Mr Murray said Ms Callister did not know what VCAL was and that he had to explain to her that all the young people remanded at Grevillea were enrolled in VCAL prior to exiting Parkville and Malmsbury. He told Ms Callister that although they were not authorised to do so, Grevillea was offering VCAL subjects in literacy, numeracy, personal development/PE, music, art, work related skill and philosophy. Mr Fraser also said they were offering legal studies.

290. Mr Murray said Ms Callister responded saying ‘I am sure that we can provide qualifications and accreditations for them even if it is not a registered campus’ and she used, as an example, students attending TAFE colleges one day a week or on flexible timetables who achieve vocational and educational outcomes that are subsequently accredited as part of their VCAL or VCE.
291. Mr Murray said he then asked Mr Fraser to explain to Ms Callister that those TAFE providers were Registered Training Organisations registered by the VRQA. Mr Murray told Ms Callister that this was overseen by VCAA to ensure that compliance is met with the accreditation and qualification:

I said that they need to look at Education and Training Reform Act under the section called accreditation and qualifications. There is a section there that says who can issue qualifications. And it says that a school that is registered may recognise the completion of an accredited course or part of [a] course that it is registered to provide. If you look at our accreditation on the VRQA website that we are entitled to provide qualifications for senior secondary certificates which includes VCAL.

292. Mr Murray stated Ms Callister said she found this hard to believe and that Mr Fraser needed to speak to VCAA over the weekend and have it resolved before Monday. Mr Murray also stated Ms Callister said it was important that he let the court know that DET was offering 25 hours of instruction at Grevillea.

293. Mr Murray said he told Ms Callister that he would be saying that because that was what they were doing. Ms Callister responded that was good because DHHS were ‘worried the Court would hear that not to be the case’.

294. Mr Murray also said he told Ms Callister that he would answer differently if he was asked how many hours clients were actually in attendance - he said he told her of children being locked down for up to 23 hours a day and that things were bad at Grevillea and the worst he had ever seen.

295. Mr Murray said he told Ms Callister that none of the young people involved in the rioting were transferred to Grevillea and it was only remandees there. He told her that he thought it would be unlawful to set up a youth justice centre to punish young people for something a court has not found to be an offence, and that those young people who did cause the destruction were put before the Youth Parole Board for transfer to an adult prison, which was rejected.

296. Mr Murray said an exchange then took place with Ms Callister urging him to tell the court that similar behaviours happened frequently at Malmsbury and Parkville, so the court did not think this was peculiar to Grevillea.

297. Mr Murray said young people at Malmsbury and Parkville were frequently locked down and unable to attend classes - but the difference was those children could still be educated as Malmsbury and Parkville were registered campuses:

…and if they are locked down we can [go] to their rooms, take books, and teach them there – it’s not enough but it’s better. At Grevillea this can’t happen.

298. Mr Murray said he also told Ms Callister that at Grevillea, DHHS walks educators off site at lunchtime and then locks the children down. In their first week of operation, he told her, ‘not one child met what we were supposed to be offering’.
According to Mr Murray, Ms Callister repeated that we needed to establish over the weekend that ‘Grevillea kids are getting the same and all the things that are happening at Grevillea can be happening at Malmsbury and Parkville and we are working towards resolution of VRQA and will get there’. He recalls her saying that ‘it would be such a pity if the court heard the children didn’t receive the education they deserve’.

She said I really can’t impress upon you enough how important it is for the court to know these things, we are giving 25 hours, these things happen at Malmsbury and Parkville.

Mr Murray said he told Ms Callister and Mr Fraser that he intended to get in and out of court as fast as he could and provide answers that were sharp, short and truthful. He said he also told her ‘I just want this to be over’. Mr Murray said the call finished with an agreement that Mr Fraser would call Mr Murray over the weekend.

Ms Callister’s account

Ms Callister kept a contemporary record of the phone call in a notebook, which is shown at Figure 4 on the next page.

At interview, Ms Callister described the purpose of the phone call as an opportunity to seek Mr Murray’s views on the MOU:

So I – we talked – we opened it up by saying to Mr Murray that we were very close to signing the MOU and asked him if he’d seen it and I told him that the purpose of the phone call was to really get his view as the expert on the ground, as the principal of the college, of how things were going in Grevillea in the delivery of education services and whether they really wanted his view about whether this was a workable and appropriate situation both currently and going forward – - - the whole phone call was about taking a great deal of account of his opinion and his view to me about what was going on in order to give me some confidence about the MOU.

Ms Callister told investigators she believed Mr Murray indicated during the call that he had seen a copy of the MOU and the notion of an MOU was not a surprise to him.

Ms Callister said her recollection of the conversation after she told Mr Murray why she was calling turned to his concerns that DHHS did not see the school as a registered school:

So he talked about – he started off by saying, ‘It’s a very volatile environment. There’s quite a bit of panic.’ I said, ‘What do you mean? Who’s panicking?’ He said, ‘Oh, it’s the corrections staff here. They don’t really know how to deal with these young people.’ …

He said that there was concern about it not – on the DHHS side about it not being a registered school and what did that mean. He did say to me, ‘It’s not registered yet, but don’t worry, teaching won’t change, even though it’s not registered’. He was quite assured about that and he pointed out that it wasn’t a school. And I said to him, ‘So tell me what difference that makes? What is the difference if it’s not a school?’ And he said, ‘Well, it’s the qualifications and accreditation issue’.

Ms Callister said they put the question of qualifications and accreditation to one side. She told investigators that neither she, Mr Murray, nor Mr Fraser ‘had absolute knowledge of how to resolve the issue of accreditation and qualifications other than we were clear that VCE – that recognition of prior learning wouldn’t apply to anyone doing a VCE subject’.

Ms Callister recalls the conversation turned to whether Parkville’s registration could extend to Grevillea – - this was an outstanding matter to be resolved between Mr Murray and Mr Fraser over the weekend.
Brendan Murray

Melville - Basic

My day - beneath deep & - periods

not being a req. course.

not required yet.

Teaching doesn' change.

a school.

Qual: Laiden
dition.

Evaluations needed in 2016 - not

complete studies by Choy, top

chain with those.

11 + 12.

NERA secondary.

Year 11 + 12.

Murray response: theirs.

Can feedback begin award to

Question.

Ph. with NER - Murray Bruce.

Relaxing, very complex.

Teaching doesn' change.

same education.

Diff is - not a school.

what is debt - tests - half of

- but, nurr, certificate.

Art, music, PE, legal,

very limited.

landscaping, engineering, graphic,

design.

to kids into a classroom.

5 kids at a time.

- ISA - ve usually seen as too

restrictive aren' qualities.

Can deliver full lust of in that

environment everyday.

May could be chance having

believe - have confidence

of toll.
307. She gave an account of Mr Murray talking about how ‘deliberately placed’ teachers who knew the children worked with them effectively by building relationships.

He said the teaching doesn’t change. They’re the same educators. He said, ‘The difference is it’s not a school,’ and so I said, ‘What is different? Tell me what is different,’ and he said, ‘Well, we can’t – we don’t have all the tools for all the VET subjects. We can deliver about half of the curriculum, literacy, numeracy, half of the certificate, art, music, PE, legal.’ I said, ‘Why is it more limited? What can’t you do?’ ‘We can’t do landscaping. We can’t do engineering. We can’t do graphic design because the tools that we need, the computers, et cetera, are not yet possible to be brought into the facility.’

308. Ms Callister recalled to investigators that Mr Murray spoke with ‘great confidence’ along the lines of ‘We’ll get all this under control. We’ve dealt with these high intensity situations before’.

So the overall impression was someone who had put a lot of effort into establishing the ability to deliver education services to those young people, who was aware that it was limited by the lack of registration and the inability to bring all the tools in for VET, but who was working on a plan as to – if Grevillea stayed open as to how that would happen into the future and who felt above all, because we did explore this in a bit more detail, that having the same educators and building those relationships was critical for those young people in that environment.

309. She said during the call there was discussion about the fact that Mr Murray said he’d been called to give evidence in the Court proceedings the following week:

He said he was anxious about that. He was anxious about giving evidence. I said, ‘Have you been given some support? I understand you’ve met with the VGSO.’ He said, ‘Yes. That’s been helpful.’ Stephen said, ‘We can be in court with you.’ He said, ‘Yes, I need all the support,’ you know, I can get,’ … ‘I wish I didn’t have to do this.’

He presented as anxious about the evidence. He did not present as anxious about his role as principal and delivering the education. He presented as quite confident and having thought that through.

310. Ms Callister told investigators she asked Mr Murray if he believed she should proceed with signing the MOU and if he thought the MOU appropriately reflected what he was trying to do at Grevillea. She said Mr Murray said to her:

‘You can count on us. We will be here and we will deliver. You can have confidence re the MOU.’

311. Ms Callister said toward the end of the conversation there was some discussion about rumours as to whether the government would transfer youth justice from DHHS to DOJR to take a more hard-line approach to youth justice. Ms Callister said she thought it was Mr Murray who raised it and he said he had heard it as a rumour. Ms Callister said she had also heard that rumour.

312. At the end of the call Ms Callister said she recalled Mr Fraser saying ‘I’ll talk to Lee Watts [Assistant Deputy Secretary, VET Reform, Higher Education and Skills Group, DET]. I’ll talk to – I’ll follow up. We’ll talk to the VCAA’ and ‘I will talk to you, Brendan.’ Ms Callister said that Mr Murray said ‘Thank you. That would be great’.

313. Ms Callister was asked by investigators if Mr Murray stated to her during the call that to provide senior secondary certificates, including VCAL, the entity had to be registered as a school. Ms Callister’s response was:

Only in relation to VCE. The rest was a question mark. So I think we were clear that unless it’s a registered school, you can’t provide the VCE, but the question of VCAL and whether Parkville’s registration could extend to Grevillea was a question that had to be resolved.
314. Ms Callister was asked to further qualify this answer given it was known by 9 December that registration of Grevillea as a campus of Parkville was not possible at that time, to which she responded:

I think what that means is that whether the registration could extend to Grevillea for the purposes of RPL, so recognition of prior learning for the VCAL, for some of the VCAL or VET subjects …

So the fact that it was still happening under the auspice of Parkville College, the question in the discussion was: Could Parkville College’s registration allow RPL for some of the VCAL or VET subjects?

315. Ms Callister was also asked if she stated to Mr Murray during the call that qualifications and accreditations could be given even though Grevillea was not a registered campus:

No, I did not because I didn’t know the answer to that at that time.

316. Ms Callister said during the conversation they discussed the fact that Grevillea was not a registered school and that the MOU allowed them to deliver education services up to a point – she also said Mr Murray went into details about what he could deliver and what he could not deliver at Grevillea. Ms Callister said that Mr Murray expressed a view that ‘he was working on a plan to eventually be able to deliver the full VCAL in that environment’.

317. Ms Callister said the issue of lockdowns at Grevillea did come up during the conversation and that Mr Murray said he made sure the teachers followed the young people when they were locked down to read or talk to them through their cell doors. Ms Callister did not recall Mr Murray saying that clients were being placed in lockdown 23 hours a day but said that Mr Murray may have referred to one occasion where teachers had to vacate the site. Ms Callister did say it was clear that not all young people were getting 25 hours instruction partly due to the limitations and partly due to lockdowns.

318. Ms Callister described the tone of the conversation as comfortable, given she and Mr Murray had met previously on a number of occasions. She said the conversation was focused on understanding ‘the RPL issue’:

Ms Callister: … and it ended with him saying, ‘You can have confidence, Gill. We can deliver this.’ He did say that. … [T]here weren’t points of conflict or tension. There were points of, ‘Can we deliver? Can we?’ It was the RPL issue. …

Investigator: … is there something that was discussed or raised, thinking about it now, that Mr Murray could have misunderstood or misinterpreted that might have made him feel … some degree of stress? …

Ms Callister: No, nothing that comes to mind … It wasn’t coercive. It wasn’t. ‘We’ll tell you what to say about RPL.’ It was, ‘We’ll find the answer.’

319. Ms Callister denied that she said to Mr Murray that it was important that he let the court know DET was offering 25 hours of instruction at Grevillea.
Mr Fraser’s account

320. Mr Fraser also kept a contemporary record of the phone call, made on his DET iPad at the time of the phone call and date-stamped.

321. Mr Fraser told investigators the conversation started with Ms Callister reiterating that the purpose of the call was to hear Mr Murray’s views on the MOU. He stated that Mr Murray indicated he knew that to be the purpose of the call.

322. Mr Fraser recalls that Ms Callister asked a very general question about Grevillea: ‘Before we get into that, how is everything going out there?’

323. Mr Fraser remembers Mr Murray responding that things were ‘fairly chaotic’. He recalls Mr Murray using the word ‘panic’.

He (Mr Murray) said there was a lot of confusion and ambiguity. He reported that the DHHS staff in particular, but I think also the justice staff, didn’t have an understanding yet that Grevillea was not a school and that there was frustration about that. This is where – as I said before – there was a belief that I heard from DHHS staff that the Department of Education and Training could just accredit a school and register a school and he was conveying to us at the time, frustration that we weren’t just doing that.

324. Mr Fraser recalls Mr Murray then giving Ms Callister an account of the day-to-day experiences of the children at Grevillea, including educators reading to them through cell doors.
325. Mr Fraser told investigators that Ms Callister went on to work through the MOU with Mr Murray – the trauma-informed practice model, the eight key learning areas and the delivery of 25 hours per week of instruction. Like Ms Callister, he recalls Mr Murray stressing that regardless of what was in the MOU it was the relationship between teachers and students that would ensure continuity of learning:

If he could get the same teachers into Grevillea who had taught these students in Parkville and Malmsbury, that would be the thing that carried the learning of these students and ensured that they had their learning, had minimal disruption, even aside from the lockdowns and the constraints that were in place.

326. Mr Fraser recalls Mr Murray talking to Ms Callister about the timetable and the limited options for delivering VET studies because of the reliance on tools and utensils, such as knives. Mr Fraser recalls that Mr Murray was optimistic that this would change over time.

327. It was then, Mr Fraser said, that the conversation turned toward accreditation as Mr Murray answered Ms Callister’s questions about the age of the students and informed her that some were doing VET or VCAL studies. In response to the Secretary’s question about certification, Mr Fraser recalls Mr Murray saying:

Well it puts at risk that certification because Grevillea is not registered for senior secondary.

328. Mr Fraser remembers Ms Callister then asking: ‘What about RPL?’ Mr Fraser was emphatic in saying he recalled Mr Murray saying: ‘I don’t know, Gill.’

I can remember those words distinctly. He said, ‘I know the Act. I know the guidelines pretty well and I don’t know if RPL can count in this context.’

329. Mr Fraser recalls Ms Callister then asking Mr Murray how he was feeling about the impending court appearance:

... and she said, you know, ‘You’re due to appear on Monday. How are you feeling about it?’ He said, ‘I’d rather it wasn’t happening.’ She said, ‘Fair enough’.

330. Mr Fraser told investigators the conversation finished on two points – first, that he (Mr Fraser) was to investigate over the weekend whether RPL could be applied in the context of Grevillea and second, with an offer of support. He recalls Ms Callister saying:

‘Well, you know, Stephen is available at any point over the weekend. He’ll pursue this matter, but also if you need anyone to talk to or anything occurs to you,’ you know, ‘don’t hesitate to get in touch’.

331. In response to questions from investigators, Mr Fraser said he recalls the following:

- Mr Murray talked about lockdowns and the constraints they had at Grevillea, and made the point that ‘what he was seeing at Grevillea was no worse than what was happening at Malmsbury sometimes in terms of the access’.
- Ms Callister read out the key learning areas in the context of asking Mr Murray to walk her through how these would be provided.
- There was a ‘one minute explanation’ of the senior secondary certificate landscape in Victoria. This followed Ms Callister saying ‘Surely given the age of these students they’d be completing their VET certificates’ and not having a full awareness of the role of VCAL, nor of the two types of VET studies (delivered by TAFE and delivered in schools).
- He had spoken about the role of VRQA and the Australian Skills Quality Authority in registering providers as part of his brief explanation of senior secondary certificates.
332. Mr Fraser told investigators Mr Murray did not raise the issue of staff being sent off the Grevillea site during lockdowns. He said there was not a lot of discussion about ‘25 hours instruction’ except in the context of the impact of lockdowns on delivery of the 25 hours of instruction.

333. Mr Fraser said he did not want to ‘misrepresent’ Mr Murray, but he felt Mr Murray had clearly conveyed to him and Ms Callister during the phone call that he was unsure about the question of RPL as it related to Grevillea, which was why he (Mr Fraser) was tasked with speaking to VCAA for clarity.

334. Mr Fraser said there was no tension in the telephone conversation and it was a collaborative call in the sense of the three of them having a shared purpose in resolving the question of RPL and that ‘we had students in a setting that were at risk of not having their learning recognised and that was a problem that we wanted to find a solution to’.

335. Mr Fraser told investigators he could not recall why he wrote down ‘Melinda Richards’ in his notes nor could he remember any conversation about her. Mr Fraser thought it could have been that Mr Murray was reporting that he had been contacted by Ms Richards or Ms Callister reporting that Ms Richards was someone Mr Murray would see when he gave evidence.

**Mr Murray’s response to Ms Callister’s and Mr Fraser’s accounts**

337. Mr Murray disputed a number of points in Ms Callister’s and Mr Fraser’s accounts.

338. He noted that the ISA (intensive secure annexe) was mentioned in both Ms Callister’s and Mr Fraser’s notes, reinforcing that it was an important part of the conversation: ‘we really focused on that as an important thing for me to keep in mind when giving evidence and to tell the court’.

339. Mr Murray thought it significant that there was no mention in Ms Callister’s notes of Mr Fraser nor the follow-up Mr Fraser was to do, particularly given how significant this issue and its follow-up was according to both Ms Callister and Mr Fraser. It struck Mr Murray as ‘an odd thing to miss’.

340. Mr Murray also stated the reason why Ms Callister’s and Mr Fraser’s notes do not record a discussion about RPL is because that did not occur. Mr Murray said neither Ms Callister nor Mr Fraser knew what VCAL was, let alone how RPL might work.

341. Mr Murray noted that Mr Fraser’s note that ‘VCAL certification yet to be resolved’ does not relate to anything he said.

342. Mr Murray commented that given this call was meant to be about the MOU and whether Ms Callister should sign it, Mr Fraser’s note says nothing about the MOU. Mr Murray also said in response to Mr Fraser’s note that ‘continuity of learning and TIP [Trauma-informed Practice] model is the most important thing’ that ‘They’re not words [TIP] that I would ever use’.

**Responses to the opposing accounts of the phone call discussion**

336. Investigators put to each witness the accounts or versions of the conference call made by the other parties.
343. Mr Murray maintained that during the telephone call he was adamant that qualifications could not be given and that he had not budged from that position during the call. Mr Murray submits this is why Mr Fraser had follow-up to do and why the follow-up call on 11 December was necessary (not because he was unsure or unclear or agreed with them). Mr Murray also submitted that even if the topic of RPL had come up during the telephone conversation, this was not a topic he would have been unsure of, given ‘I’ve overseen this curriculum for thousands of children for the last 10 years in purely VCAL’.

344. Mr Murray denied that:

- the substance of the conversation related to the MOU.
- he said to Ms Callister that ‘you can count on us and we will be here and we will deliver. You can have confidence re the MOU’.
- he said anything about the continuity of learning and the importance of the trauma-informed practice approach.
- Ms Callister raised the fact that it was December 2016 and asked at that time what it meant for those young people completing secondary school studies.
- he had told Ms Callister, after she asked if the young people in Grevillea could get their certificate in senior secondary studies, that he was unsure about this.
- there was any discussion where Ms Callister asked whether RPL was possible for the Grevillea young people or that he said he did not know if RPL was possible.
- the names David Howes or Lee Watts were mentioned in the discussion.

- there was any discussion of the VET component of VCAL. Mr Murray argued that Ms Callister and Mr Fraser would not have known what that was and that Mr Fraser would not, at that time, have had the knowledge to explain the difference between a VET course and the VET component of VCAL.

345. Mr Murray agreed that towards the end of the call he did say to Ms Callister and Mr Fraser, in relation to his appearance in the Supreme Court, that ‘I just want to get in and out and I was going to tell the truth’. He said he made this comment because Ms Callister was saying to him ‘it’s important you say this or that’. Mr Murray also said he was anxious about the court case (as stated by Ms Callister and Mr Fraser) and that he was confident about delivering the education services that were being provided at Grevillea at that time. Mr Murray said there was a conversation about TAFE and VET but only when Ms Callister made mention of young people at schools also attending TAFE.

Ms Callister’s response to Mr Murray’s and Mr Fraser’s accounts

346. Ms Callister refuted that there was any attempt to persuade Mr Murray that accreditation and qualification could be given – she said it was an issue that none of them knew the answer to.

He never said, ‘We shouldn’t be there.’ He raised legitimate concerns about the qualifications or accreditation. He didn’t say, ‘It’s against the Act. It’s illegal.’ He said, ‘I’m not sure,’ when it was raised, ‘Could we use Parkville’s registration?’ and undertook to have a discussion over the weekend about that.
347. Ms Callister said there was no discussion about the Court proceedings, with the exception of her asking Mr Murray how he was and making the offer of Mr Fraser being available to support him. Ms Callister denied she made the statements alleged by Mr Murray in relation to what it would be good for the court to hear or topics about which it would be unfortunate or a shame for the court to be told of.

348. Ms Callister said it was Mr Murray who raised the ‘volatility’ of the situation, that the phone call had nothing to do with Ms Peake or DHHS, and that she did not say there was a lack of clarity that arose in relation to the court case that she wanted to resolve.

349. Ms Callister said she did not:

- read out the eight key learning areas, say that they can be delivered through the letters of exchange and that students at Grevillea could be put up another year level based on the results.
- state that qualifications could be awarded even though Grevillea was not a registered campus or school.
- suggest and state that the objective over the weekend was to get to a point where it could be established that things happening at Grevillea were the same as that in Parkville and Malmsbury.

350. Ms Callister said Mr Murray did not:

- say that the eight learning areas from schedule 1 of the ETRA applied only to prep to year 10
- have to explain to her what VCAL was (Ms Callister states she understands exactly what VCAL is)
- say they were delivering subjects or units at Grevillea they were not authorised to do
- ask Mr Fraser to explain to her what VCAA is (Ms Callister states she knows what VCAA is)
- say it would be unlawful to establish a youth justice centre to punish youths involved in the Parkville riots.

**Mr Fraser's response to Mr Murray’s and Ms Callister's accounts**

351. Mr Fraser said there was no discussion about the Supreme Court proceedings, except for Ms Callister asking Mr Murray how he was and making the offer of Mr Fraser being available to support him. Mr Fraser said there was no discussion of particular matters or topics that might arise during the proceedings, nor was there discussion about the evidence Mr Murray might give during the proceedings.

352. There were other parts of Mr Murray’s account of the conversation that Mr Fraser said did not occur, in particular:

- Ms Callister telling Mr Murray he could call her directly over the weekend
- any mention of Ms Peake or that information was coming from DHHS to Ms Callister
- Ms Callister saying the ‘Barwon Grevillea situation is incredibly overheated’
- Ms Callister telling Mr Murray she was calling to ensure ‘we were on the same page about the MOU’ or that there was a lack of clarity Ms Callister wanted to resolve before the court case
- Ms Callister suggesting to Mr Murray that it was possible to accredit clients at Grevillea or that the letters of exchange ensured that Grevillea clients could be awarded qualifications
- Mr Murray telling them the eight key learning areas only apply from prep to year 10 or questioning the reference to the eight areas
Being asked or finding it necessary to explain to Ms Callister what VCAL was

Mr Murray saying that to provide senior secondary certificates you must be a registered school

Mr Murray stating DET was not authorised to deliver units or subjects

Ms Callister saying she was sure that qualifications could be given despite Grevillea not being registered

Ms Callister providing an example of children attending TAFE college or on flexible timetables to achieve VET units and being accredited as part of VCAL or VCE studies

Mr Murray having to explain about TAFE providers being RTOs and being registered by VRQA

Ms Callister asking what VCAA is

Mr Murray telling them to look at a particular section of the ETRA in relation to accreditation or any other topic (he did note that Mr Murray told he and Ms Callister that he knows the ETRA well)

Ms Callister making any comment about young people at Grevillea being there because they had destroyed half of Parkville

Mr Murray talking about the difference between lockdown at Grevillea in comparison to Parkville or Malmsbury

Mr Murray commenting about the legality of establishing a youth justice centre to punish children

Mr Murray saying that no child had received 25 hours instruction and at least five children had not seen daylight, and that the situation in Grevillea was bad.

Ms Callister saying they needed to establish that young people at Grevillea were getting the same as they were getting in Parkville and Malmsbury.

The Friday conference call: what can be surmised?

353. It was not by design that the date for signing the MOU converged with the commencement of the court case. The 28 November letters of exchange provided the deadline for MOU finalisation of 9 December. This predated the issuance of the court proceedings. The two, however, are inextricably linked and both undoubtedly informed the call to Mr Murray on 9 December.

354. According to Ms Callister’s evidence to the Legal and Social Issues Committee, the purpose for calling Mr Murray on 9 December was to get his advice before signing the MOU that what she was agreeing to could be ‘delivered on the ground’:

I chaired a meeting that afternoon with the department’s lawyers and a number of program people and went over the final draft of that memorandum of understanding. At the end of that meeting I said that I would approve the MOU in principle but only once I had consulted with Mr Murray ...

355. Ms Callister’s recollection of the sequence of events above is not supported by the evidence. The briefing that she recalls involving lawyers and program people did not happen, at least in the manner that she recalls it. Records show that at 5.06pm when Mr Fraser messaged Mr Murray asking if he was available for a call, Ms Johnson was still working on the MOU at her desk and liaising with DPC and DHHS to resolve certain queries. Ms Johnson told investigators she recalled meeting with Ms Callister to give her the final version of the MOU after the conference call occurred. This is supported by Ms Johnson’s email from later that evening.
356. Mr Murray submitted to the investigation that seeking his advice on the deliverability of the MOU could not have been the true purpose for the call because he ‘had not received a copy of an MOU and had not been part of discussions about it’. On the evidence, however, this is not correct. According to Mr Bruce, he consulted with Mr Murray several times in early December. Records show Mr Murray received a copy of the draft MOU from Mr Bruce on 7 December and provided his feedback on it, to an extent that demonstrates his understanding of its purpose and contents. When the investigation put to Mr Murray that he had been consulted on the MOU he said he couldn’t recall ‘talking about it a lot’ and if he had seen a copy, he ‘didn’t pay much attention to it’.

357. Ms Callister and Mr Fraser had been advised by DET Legal that there was a hiccup in finalising the MOU. Both would have been aware from the previous day’s email, which Mr Bruce had copied Mr Fraser into, that DHHS wanted the MOU to commit DET to provide ‘schooling’ at Grevillea. However, Grevillea was not registered as a school with VQRA.

358. While the decision to call Mr Murray was made late in the day, before Ms Callister had a copy of the final version of the MOU and without a formal briefing as described, it is not unreasonable, in and of itself, that Ms Callister may have wanted to hear directly from Mr Murray about how the MOU would operate in practice.

359. The context of the MOU, was, however, also relevant to the court case: one of the plaintiffs’ allegations being that DHHS was failing to meet its statutory duties by not having young people attend a registered school.

Did Ms Callister say DET could provide qualifications and accreditation to young people at Grevillea, based on the letters of exchange and MOU?

360. Given the extensive enquiries over the weekend to try to find an answer to the question of accreditation, it is unlikely that Ms Callister would have told Mr Murray they could be – because she did not know the answer to that question.

361. However, this was the preferred option for everyone concerned, so Mr Murray would have reasonably thought that if he had said that qualifications and accreditation could be provided at Grevillea at that time, this would be met favourably by Ms Callister and Mr Fraser. Mr Murray did not believe they could be and this would have been evident to both Ms Callister and Mr Fraser from early in the conversation.

Did Ms Callister doubt the Education Training Reform Act 2006 (Vic) (ETRA) requirements?

362. Being a committed advocate for Parkville College, Mr Murray would have wanted the best outcome for the students and would have felt some pressure to say that qualifications could be achieved because it was what both DET and DHHS wanted.

363. In describing registration requirements Mr Murray referred to his knowledge of ETRA and its requirement that only a registered school can recognise completion of a course, or part of a course that it is registered to provide.

364. Mr Murray told investigators that Ms Callister responded by saying she found that hard to believe. Ms Callister and Mr Fraser both said she did not say this. Ms Callister’s notes of the conversation records the question of whether Parkville College’s registration could extend to Grevillea and it is reasonable to assume that Ms Callister challenged Mr Murray’s position but probably not in the words Mr Murray recalls.
365. Mr Murray does not say that Ms Callister tried to force the issue with him beyond expressing her view that there had to be a way for the teaching delivered at Grevillea to count toward qualifications.

366. Confirmation that Ms Callister was correct that there was a mechanism to achieve accreditation, being RPL, was not finalised between DET and DHHS until 3 March 2017. This demonstrates that this was a complicated issue, which no-one in the conference call fully understood at that time.

367. Mr Murray’s evidence to the investigation showed that he has, and would have had at the time, a working knowledge of how accreditation and qualifications could be achieved for the young people at Grevillea. His view that this could not be achieved at that time would have been perplexing for Ms Callister, who was looking to Mr Murray to assist her to find a solution.

368. Ms Callister told investigators that for Mr Murray ‘to profess no knowledge of accreditation or RPL is not entirely accurate. Work had started on it …’:

But at no point in that conversation did he say, ‘It’s impossible. It can’t be done,’ and we said, ‘Yes, it can,’ and he said, ‘No, it can’t.’ He characterises a conversation where he was tried to be persuaded about something that neither Stephen nor I were experts in and therefore needed to follow up and he agreed to be part of that next discussion.

**Did Ms Callister raise RPL as a solution?**

369. Ms Callister recalls that she raised RPL as a potential solution; however, Mr Murray does not recall her using that term.

370. In fact, the evidence obtained by the investigation is that it was not until 10.15am Sunday morning (11 December) that David Howes emailed Mr Fraser identifying RPL as the mechanism through which education services at Grevillea may be used to count toward the awarding of VCAL units. Ms Callister’s recollection is therefore inaccurate – however, her confidence that there would be a pathway to accreditation was well placed.

371. This is consistent with her direction to Mr Fraser that he should look into the accreditation issue over the weekend, which is also confirmed by Ms Johnson’s 10.33pm email that same evening.

372. At 5.54pm (during the conference call) Ms Johnson sent Mr Fraser a message advising that the issue with finalising the MOU had been resolved. He acknowledged this by sending her a message saying ‘Great’. It is reasonable to assume Mr Fraser would have conveyed this to Ms Callister at that time.

373. From a DHHS and DPC perspective, the issue of education services delivery for the purposes of the MOU had been resolved, so it was not necessary to explore this issue further on the Friday night or over the weekend to finalise the MOU, which was signed unamended on the Tuesday.
374. In response to the draft report, Ms Callister submitted that:

Once the issue of accreditation and recognition of prior learning (RPL) was raised as a concern by Mr Murray, in the Friday phone call, I needed to understand whether (and to what extent) it was available.

There were four reasons that it was important to find out the answer. First, I needed to know if it was relevant to the MOU. Second, I needed to be able to advise the Minister. Third, if RPL was available systems and processes needed to be put in place in order to support RPL. Fourth, I wanted Mr Murray to be fully informed of the policy framework relating to RPL bearing in mind that he would be in the Supreme Court the following working day.

As it turned out, while it was clear that accreditation would not be possible in the short term while it was not a registered school, young people at Grevillea could – and did – obtain recognition for what they had learned at Grevillea through RPL. But I did not know that at the time of the Friday phone call.

**How was the court case raised?**

375. It is common ground that Mr Murray’s attendance at court was raised, although evidence given to the investigation differed as to the specifics of what was said.

376. Ms Callister and Mr Fraser describe this part of the conversation as being about checking Mr Murray’s welfare and offering him support. Mr Murray describes the conversation as being directed towards influencing him about the evidence he would give.

377. The issue of lockdowns was discussed but Ms Callister and Mr Fraser deny Mr Murray was told that it would be important for him to tell the court that lockdowns happened frequently at Malmsbury and Parkville, and that children were locked down for substantial periods of time on behaviour management plans.

378. Ms Callister and Mr Fraser also deny Ms Callister said to Mr Murray that it was important that he let the court know that DET was offering 25 hours of instruction at Grevillea or that Mr Murray responded by saying that in the first week of operation not one child had met what was being offered and at least five children had not seen daylight.

379. However, they agree Mr Murray did indicate the current limitations at Grevillea, such as lockdowns, meant that delivery of 25 hours instruction was not being achieved but Mr Murray was positive that this would be achieved moving forward. They say Mr Murray talked about how education was able to be delivered to young people in the isolation unit at Malmsbury as an example of how things would improve over time at Grevillea.

380. Ms Callister and Mr Fraser both denied Mr Murray was told by Ms Callister that what ‘we’ (DET) needed to establish over the weekend, was that young people at Grevillea were getting the same education as those at Parkville and Malmsbury and the challenges experienced at Grevillea regarding lockdowns were similar to those experienced at Parkville and Malmsbury. Ms Callister told investigators she knew about the limitations at Grevillea and she was under ‘no illusions’ it was different to Parkville and Malmsbury.

381. Given Ms Johnson’s message (confirming the MOU issue had been resolved) was received and acknowledged relatively early in the telephone conversation, the discussion turning to the court case would have been more than a brief part of the discussion. The intense debate around potential pathways to accreditation for students at Grevillea was a point of contention that would have been at the forefront of everyone’s mind when discussion turned to Mr Murray’s impending attendance at court.
What may have led Mr Murray to interpret the call as he did?

382. Mr Murray told the investigation that when Mr Fraser called him at 5.10pm to arrange the conference call, he told his colleagues he was expecting a telephone call from Ms Callister and they should prepare to get out the champagne because he was expecting good news. He said he was hoping Ms Callister was calling him with good news about the funding issue at Parkville. He would have been disappointed to find that the discussion was about education services at Grevillea, and not resolution of the funding issue.

383. While still speaking with Ms Callister and Mr Fraser, it appears that Mr Murray would have packed up and walked to his Vespa to ride to his in-laws in Friday night traffic with his headphones in. This would not have been without its distractions. Indeed, some of the phone call took place while Mr Murray was on the road.

The follow-up call on 11 December 2016

384. The telephone call between Mr Fraser and Mr Murray occurred on Sunday 11 December 2016 at 1.46pm and lasted 23 minutes. Both Mr Murray and Mr Fraser confirm that no other person was present for this call.

385. Neither Mr Murray nor Mr Fraser told investigators that they took notes of their conversation or recorded the call. Mr Murray did not make any written account of the call at the time and did not do so until January 2017, however, he did speak to Ms Merkel about the call that afternoon.

386. Each witness provided their account of what occurred directly to the investigation:

- Mr Murray’s account is drawn from the extracts of a written statement he provided the investigation on 22 December 2017 and his two interviews with investigators, on 16 January 2018 and 4 May 2018.
- Mr Fraser’s account is drawn from his interview with investigators on 16 April 2018.

Mr Murray’s account

387. Mr Murray said Mr Fraser opened the conversation by telling him he had spoken with VCAA over the weekend and that VCCA had confirmed he could provide ‘recognition of learning’ for children at Grevillea.

388. Mr Murray and Mr Fraser then discussed a range of matters relating to the distinction between recognition of learning and Recognition of Prior Learning, referring to page 13 of the VCAL unit assessment guide.

389. Mr Murray said the discussion turned to VET and he told Mr Fraser that VET was impossible to deliver because Grevillea would require facilities for practical subjects. This would require DET to remake the auspice agreement with Melbourne Polytechnic, which was the TAFE provider of VET to Parkville College.

390. Mr Murray told Mr Fraser there was no way he would tell the Court that Grevillea could offer VCAL or VET. Mr Murray told investigators that he was ‘supremely confident’ that he was correct about this point.
The conversation moves to the ‘justice scenario’

391. Mr Murray said he then changed the subject to DET’s funding of Parkville College, telling Mr Fraser that he did not want this issue ‘hanging over his head’ because he felt like it was being used as leverage for him (Mr Murray) to respond in a certain way in court.

392. Mr Murray said that Mr Fraser responded by saying that he (Mr Fraser) supposed it would be difficult if DHHS lost the court case and decided to shift Youth Justice to the Corrections portfolio and then the Corrections portfolio decided to provide education to students using a TAFE model. This would leave the existence of Parkville College up in the air.

393. Mr Murray said to Mr Fraser he understood what he was saying. The telephone call then ended.

394. Mr Murray told investigators that Mr Fraser did not sound angry during the conversation and was ‘pretty accepting’ of what Mr Murray had told him. Mr Murray stated Mr Fraser did not explicitly direct him about what to say in Court the following day. However, from the telephone conversation that Mr Murray had with Ms Callister and Mr Fraser on Friday 9 December, Mr Murray considered Mr Fraser’s Sunday telephone call was directed towards the evidence he was to give in Court. Mr Murray told investigators:

I just saw it as an extension of what Gill was talking to me about. So I understood it was for Court on Monday, and nothing else. And we’ve never had a conversation about this after that.

395. In response to the draft report, Mr Fraser submitted it is not open to the investigation to find that ‘he was responsible for: any conduct that impacted upon Mr Murray in that 9 December phone call or indeed, the ‘extended’ effect of the 9 December phone call upon Mr Murray when he received a follow-up phone call … on 11 December.’

Mr Fraser’s account

396. Mr Fraser told investigators the phone call started with a casual exchange in keeping with the positive working relationship he had with Mr Murray.

397. They then discussed page 13 of the VCAL guide, with Mr Fraser saying, ‘I think this gives us a mechanism. What do you think?’ Mr Fraser recalled Mr Murray saying he was not sure that the situation could apply at Grevillea. Mr Fraser told investigators that Mr Murray ‘...basically repeated the response that he gave to the Secretary…I [Mr Fraser] remember him saying, “It would be a mistake to think this is an easy process. It’s not just a tick box exercise. This requires quite a bit of preparation on behalf of the student and the school to assemble a portfolio of work that is sufficiently robust to convince the RPL assessor that recognition should be granted.”’

398. Mr Fraser told investigators that from this conversation he understood Mr Murray was trying to convey to him the seriousness and complexity of the RPL process. Mr Fraser told investigators they talked through it in quite a bit of detail.

The conversation moves to the ‘justice scenario’

399. The conversation then changed subject. Mr Fraser recalls asking Mr Murray ‘Where do you think all this is heading?’ and Mr Murray responding, ‘What do you mean?’ Mr Fraser then said words to the effect of ‘Well, all of this, you know, students in Grevillea. We’ve obviously got a fairly highly pressurised situation. We’ve got government making quick decisions. Where do you think all this is leading to?’ And he said, ‘Oh, yeah, I see what you mean,’ and he said, ‘I still don’t know.’
400. Mr Fraser then recalls saying to Mr Murray, ‘You know, one possible outcome is a machinery of government change.’

401. Mr Fraser told investigators he then said to Mr Murray that this would see youth justice transferred from DHHS to DOJR. This is a model that operated in other states and territories in Australia at the time and would potentially have different consequences for the model of teaching and learning that Parkville delivered. Mr Fraser said he explained this was a decision the Government could make at any time and that he conveyed his anxiety to Mr Murray about that as a possible outcome.

402. Mr Fraser then asked Mr Murray how he was feeling about Monday [giving evidence] and recalls Mr Murray giving substantively the same answer he had given to Ms Callister during the conference call on the previous Friday, that he wasn’t looking forward to it.

403. Mr Fraser recalls saying words to the effect that he would not want to be in Mr Murray’s shoes and that having been required to give evidence previously he did not envy Mr Murray.

404. Mr Fraser told investigators Mr Murray then raised concerns about what he would be asked at Court and that he (Mr Murray) did not know how to prepare for that. Mr Fraser recalls Mr Murray saying several times to him, ‘They’re clever. They’re smarter than me. They’ve got all this worked out,’ and Mr Fraser saying in response ‘You need to tell them what you know.’

405. Mr Fraser said the telephone call ended after he told Mr Murray that if there was anything he needed or if Mr Murray wanted to talk through anything he should not hesitate to contact him.

406. Mr Fraser told investigators the conversation about Mr Murray’s attendance at Court the following day did not extend to specific topics Mr Murray was going to give evidence on such as RPL or qualifications.

407. When asked what was driving the urgency to find the RPL solution, Mr Fraser said that it was the perception of the young people at Grevillea that the education they were receiving might not count toward their certificates:

   Investigator: Again, there does seem to be an urgency about this issue... are you saying that the [Court] case didn’t influence the issue about RPL in terms of the Department of Education and Training’s perspective?

   ... 

   Mr Fraser: ... So all of my dealings with this matter, as much as they might have intersected with the legal division and the preparation of a case, my response was directed towards the question of, ‘Will learning count for these students and how can we avoid the situation that they might be in in Grevillea, both with the risk that their learning doesn’t count towards the certificates that they’re working towards and the perception that that’s the case,’ which was an equal part of it.

   Investigator: And when you say ‘perception’ by the - - -

   Mr Fraser: By the students.

   Investigator: By the students? Anybody else? Anyone’s perception, the public?

   Mr Fraser: No. It wasn’t my concern, no. I was aware. I think there was some media at the time stating that the students were feeling that they were wasting their time there and that - I guess that’s the same concern that I was responding to, but it was from the perspective of the students that I was most concerned about this, not the media perception or the public perception or, you know, any other.
Mr Fraser's responses to Mr Murray's account of the telephone conversation

408. Mr Fraser agreed he had discussed three things: the RPL issue, a potential change in machinery of government, and Mr Murray’s Court attendance. How Mr Fraser characterises the nature and intention of the conversation differs from Mr Murray.

409. Mr Fraser was adamant when questioned by investigators that Mr Murray did not mention Parkville College’s budget during the telephone conversation. When investigators directly asked Mr Fraser whether Mr Murray had mentioned words to the effect that Mr Murray did not want the issue of the budget hanging over his head when he was giving evidence at court, Mr Fraser said ‘no’.

410. Mr Fraser did not consider that Mr Murray might have perceived his telephone call as being linked to the evidence he might give in Court the following day. In fact, he highlighted to investigators that he had a heightened awareness of the risk of such conversations, given recent Independent Broad-based Anti-Corruption Commission (IBAC) investigations into DET.

411. Mr Fraser emphasised that Mr Murray’s strength of character and their trusting professional relationship made it hard for him (Mr Fraser) to imagine that his remarks could have been viewed as a form of pressure.

I think there was a level of trust there. There was a level of shared understanding. There was a kind of frankness. You know, it’s very difficult for me to consider that trying to convince Brendan of something or trying to connect two issues like that...he’s not someone who’s easily influenced. He’s a fairly strong character. That’s something I admired in him and still admire. All of those things, the trust, the rapport, the respect for each other’s work, the fact that we had worked together so closely. My understanding of his strength of character makes it very, very difficult for me to believe that he could have interpreted things that way.

412. Mr Fraser explained that in raising the machinery of government issue with Mr Murray he was wanting him to know that his work was valued and his achievements at Parkville College appreciated. His comments, he said, reflected the reality of the government’s rapid decision making.

... at the time I was conscious that government were making rapid decisions. They had made a rapid decision to Gazette Grevillea. They had made a rapid decision on a whole range of fronts. They had made those decisions independent of court action. I certainly didn’t connect the Court case with a Machinery of Government change.
Mr Murray’s responses to Mr Fraser’s account of the telephone conversation

413. Mr Murray disagreed that Mr Fraser directed him to page 13 of the assessment guide and that he (Mr Murray) had spent time walking Mr Fraser through the application and portfolio development process at Parkville. He stated again that he had made the point that ‘we couldn’t provide it - RPL. I was adamant that we couldn’t; not to say another school in the future couldn’t, but that we couldn’t’.

414. In relation to their discussion about the budget, Mr Murray acknowledged this was his ‘Achilles heel’:

Investigator: And so when that conversation does occur and he says, ‘Well, this is what could happen,’ just tell me again how you took that. Why was he telling you that?

Mr Murray: I understood that he was telling me that if the state didn’t win the case or if my evidence wasn’t as Gill and he, to a degree, had laid out for me on the Friday night, that the school may not receive its funding, which had been my, I suppose, Achilles heel.

415. When investigators put to Mr Murray Mr Fraser’s rationale for bringing up machinery of government changes (to give Mr Murray a sense of confidence and comfort), he said that did not ring true:

Mr Murray: It doesn’t seem to be true to me. It seems an odd way to give me confidence ... 12 hours before I’m in the Supreme Court. It was very much on my mind going into the Supreme Court to the point I spoke with Ian Lanyon about it that if we lose this, it looks like - if the State loses, it looks like DH[H]S will lose this and the funding, Parkville, everything is sort of gone. That was an issue for me. So it didn’t give me comfort.

Investigator: Had there been general talk about – generally outside of the court case, that Juvenile Youth Justice could be moved to other portfolios?

Mr Murray: This was the first time I heard it.

Investigator: The first time?

Mr Murray: And it hit me hard.

Investigator: As I said to you earlier, Mr Fraser said the issue of budget is not raised by you and, like you said, that you’re saying that’s not true. We had put to him that you had specifically said you did not want the budget hanging over your head when you were giving evidence and he replied that you never said that. Do you want to comment or respond to that?

Mr Murray: That’s not true.

Investigator: Okay.

Mr Murray: I was persistent.

Investigator: Mr Fraser said he also concluded the call by reiterating to you the offer of support and that he told you that if there was anything you needed and anything you wanted to talk through that you should not hesitate to contact him directly. Do you recall that?

Mr Murray: No, that’s not true.

The Sunday call: what can be surmised?

416. Mr Murray’s and Mr Fraser’s accounts of their 11 December 2016 telephone conversation agree that the early part of the discussion related to whether RPL could be used at Grevillea so that students’ learning could count toward VCAL accreditation.

417. Mr Murray says he explained to Mr Fraser in detail the RPL process as it related to Grevillea. They both agree that Mr Murray was not persuaded RPL could apply to Grevillea at that time. Mr Fraser describes Mr Murray as being sceptical. The MOU was not discussed in explicit terms.
418. Their accounts of their conversation diverge at this point. Mr Murray says he changed the subject to the issue of Parkville College's budget. He describes himself as being 'like a dog with a bone' on this issue, which he would raise with Mr Fraser at every available opportunity.

419. Mr Fraser was adamant that Mr Murray did not mention Parkville College's budget during the telephone conversation. Mr Fraser's account of the conversation is that once the issue of RPL had been exhausted without Mr Murray being persuaded it could apply, Mr Fraser asked him, 'Where do you think this is all headed?' Discussion then turned to the court case and the potential of a machinery of government change. In Mr Fraser's view, this was not because there was potential for the Court to find against DHHS, but rather because this was an option available to the Victorian government which had already taken place in other states by that time.

420. Neither say that Mr Fraser made any explicit demand on Mr Murray to say or not say something in his evidence to the court.

421. Mr Fraser says the purpose of his call was twofold:
   • to say that the RPL issue from Friday night had been resolved and to test whether Mr Murray agreed
   • to express DET's appreciation of Mr Murray's work and to offer him ongoing support during the court case.

422. Mr Fraser said discussion regarding the potential for machinery of government change came about due to Mr Fraser's own anxiety about this possibility. This appears confusing in the context of his contacting Mr Murray to offer him support.

423. Mr Murray's account is that the conversation turned from discussion about the budget to talk about the upcoming court case. He said he told Mr Fraser that he did not want the issue of funding hanging over his head at Court and asked for an answer about whether DET had resolved this issue. Mr Murray says Mr Fraser responded by telling him that funding to Parkville may not matter if DHHS lost the court case and youth justice went to DOJR which then chose a TAFE distance education model instead of Parkville College's registered school model. In effect, Mr Murray alleges this amounted to an implied threat. Mr Murray says this was the end of the conversation.

424. Mr Fraser denies he was asked about funding and he says the conversation ended after a more general discussion regarding possible machinery of government changes and with Mr Fraser offering Mr Murray support during the court case if he required it.

425. In his response to the draft report, Mr Fraser noted that 'on a number of critical issues throughout this investigation, Mr Murray has been shown to be an inaccurate and unreliable historian' and that 'Mr Murray's assertion that the budget was discussed, should not be readily accepted'.

426. Given that Mr Murray had consistently raised the issue of Parkville College funding with DET over the preceding year it would be consistent with his usual conduct to have done so during his conversation with Mr Fraser on Sunday. This is particularly the case given Mr Fraser became involved with Parkville College for the purpose of looking into and resolving the funding and deficit issue. It is also supported by Ms Merkel's evidence to the investigation and her recollection of her contemporary conversation with Mr Murray after the Sunday call.
427. Mr Fraser told investigators at interview that while he had told Mr Murray on 25 November 2016 that the DET Budget and Finance Management Committee had approved a new funding model for Parkville College at a meeting on 21 November 2016, he did not tell Mr Murray the Committee had approved funding to remove Parkville College’s $7.29 million past operating deficit until 21 December 2016. Mr Fraser told investigators that he had neglected to tell Mr Murray about this until 21 December 2016 due to an oversight on his behalf.

428. In response to the draft report, Mr Fraser submitted that on reflection, when interviewed by investigators, he must have surmised that he knew about the decision to remove the deficit. Having subsequently reviewed his records, he strenuously denied he knew of the decision earlier than 19 December or that he deliberately withheld information about the decision from Mr Murray. He provided evidence, including his difficulty in being able to access the Budget Committee’s intranet site. Mr Fraser submitted that the evidence obtained by the investigation did not support a conclusion ‘…that it is more probable than not that I was in fact aware of the decision to wipe the deficit…and that I withheld that information from Mr Murray’.

429. Mr Fraser is an experienced executive, and by his own account had a close working relationship with Mr Murray. If Mr Fraser was not aware of the Committee’s decision to remove the deficit, when Mr Murray raised the funding issue on the Sunday call he could have undertaken to find out, knowing, as he was, that Mr Murray was ‘desperate’ for the deficit to be wiped. Mr Fraser submitted that Mr Murray viewed the removal of the deficit as less of a priority than resolving funding arrangements for students with a disability. The deficit, however, was part of the funding issue. Confirming it had been resolved – or checking its status - would have been consistent with him offering Mr Murray support, but neither was done.

The ‘justice scenario’

430. Mr Fraser sent a text to Ms Callister after the Sunday telephone call at 4pm saying ‘Spoke with Brendan – I think we’re about as clear as we can be. I went through the justice scenario with him’. The justice scenario refers to the responsibility for youth justice moving from DHHS to DOJR.

431. Mr Fraser told investigators the text was in relation ‘to a whole range of matters and the main thing I intended to convey there was clarity of the support for Brendan’.

432. If the issue of accreditation and qualifications was the main purpose of the telephone call it could have been made on the Monday during work hours, given Ms Callister had not asked for an answer to the accreditation issue until lunchtime on Monday. Mr Fraser could have asked Mr Murray to speak with Mr Howes directly to discuss whether RPL could apply at Grevillea at the time, and if not, what needed to be done.

433. In response to the draft report, Mr Fraser noted that his task was to ‘resolve the issue of accreditation … over the weekend’ and ‘it is not uncommon for senior staff members at the Department to pursue work outside of weekdays, on weekends, as a matter of routine’.

434. The timing of Mr Fraser’s telephone call on Sunday was within the timeframe of Ms Callister’s direction for him to research this issue over the weekend, so that Mr Fraser could advise her on Monday, and would be in keeping with Mr Fraser’s commitment to providing support to the Secretary. However, given that records of student learning at Grevillea were being maintained, there was not the level of immediacy in the issue requiring Mr Murray to confirm his view to Mr Fraser of whether or not RPL could apply at Grevillea on the Sunday afternoon.
435. As justification for the call, Mr Fraser told investigators: ‘I had an urgent task that I was given to complete over the weekend.’ However, the investigation found that written confirmation from DET to DHHS that RPL could apply at Grevillea was only sent on 3 March 2017. The letter had been drafted over several months starting in December 2016.

436. The burst of activity between the conference call and the follow-up call is not therefore matched by the urgency the issue is given after Mr Murray gave evidence in court.

437. Mr Fraser agreed and told the investigation this was the case and that the second call was not about the MOU but rather the students’ concern that their learning would count toward their VCAL. However, this is not a plausible explanation.

438. In response to the draft report, Mr Fraser submitted that ‘to suggest that learning and the proper accreditation of it for students was not a matter of critical priority for Mr Fraser in his position, is at odds with striving to deliver and enhance, educational opportunities for young people in Victoria.’

439. Mr Fraser’s evidence that he raised the potential for machinery of government change with Mr Murray contradicts his evidence that the purpose of his telephone call was, in part, to offer support to Mr Murray who had indicated he was nervous about giving evidence in court.

Allegation 1: Conclusions

440. The allegations subject to this investigation came about against a background of immense pressure for all the parties involved. All carried degrees of responsibility for the challenging task of providing education services for children within the walls of an adult prison, within a rapidly evolving situation subject to intense scrutiny by the public, the government, the media and the court. Each of the participants in the disputed conversations was implementing a difficult and controversial plan, which had not previously been tried. Each of them cared about the successful provision of education to young people.

441. For the key protagonists, the period in mid-December 2016 was exceptionally challenging. In addition to assisting DHHS to respond to the youth justice crisis, Ms Callister was dealing with other complex and sensitive matters, some of which were also receiving media attention. Mr Murray had personal connections through family and friends to the plaintiffs’ lawyers in the proceedings, which would inevitably have tested his loyalty to his employer.

442. The disputed conversations took place against this context of heightened tensions and competing demands. For DET, the pressure was immense not only to deliver education services, but to be able to say they could deliver education services, in response to the plaintiffs’ allegations that DHHS was failing to meet its statutory duties by not having young people attend a registered school. While the impending court case and deadline to execute the MOU were coincidental, both brought into stark relief the question of exactly what services DET could provide young people at Grevillea.
The specific allegation is that the calls were an attempt to influence Mr Murray by telling him what the department would like him to say and not say in those proceedings; in the Sunday call, adding the implied threat that funding for Parkville College would not be renewed in the event of an adverse court outcome.

Both Ms Callister and Mr Fraser deny this allegation in the strongest terms. In relation to the Friday call, it was not unreasonable, in and of itself, for Ms Callister to wish to speak to Mr Murray before signing the MOU. It is also evident that she did not have an answer to the question of accreditation on Friday evening, therefore could not have tried to influence him on that point at the time. But it is equally clear that Mr Murray was left with the impression that he was being told what he should say to the court. Their insistence that a pathway existed and that Mr Fraser investigate this and confirm it on the weekend would have had the effect of causing Mr Murray to feel that they wanted him ‘to see things their way’, which he construed as being influenced.

Mr Murray’s stresses would undoubtedly have been heightened by his personal involvement assisting the plaintiffs’ lawyers in the litigation, unknown to DET at that time.

In response to the draft report, Ms Callister noted that Mr Murray was conflicted in his position, which is recognised. She also submitted that while Mr Murray may have been motivated by his concerns for the young people who had been transferred to Grevillea, ‘those motivations do not, however, excuse Mr Murray’s failure to declare his conflict(s) of interest nor his repeated attempts to impugn my professionalism’.

Ms Callister and Mr Fraser submitted to the investigation that Mr Murray had been inaccurate in his evidence in respect of a number of matters and was misleading because of this. Specifically, Mr Murray incorrectly told the Committee that he had not been consulted regarding the drafting of the letters of exchange and the MOU. Ms Callister also noted that Mr Murray had not disclosed that he had received a proof of evidence from the plaintiffs’ lawyers. Both point out that none of the allegations subject of this investigation have been substantiated, which they say detracts from Mr Murray’s credibility as a witness.

While I note that Mr Murray was initially inaccurate about having been consulted about the letters of exchange and the MOU, and that he did not make DET aware of the extent of his co-operation with the plaintiffs’ lawyers, this does not render his evidence to this investigation unreliable. All of the key witnesses to this investigation were inaccurate on some points. Evidence and information was presented to them by investigators to assist them in their recollection, where it was possible to do so. The process of weighing evidence carefully, including the reliability of witness accounts, involves taking this frailty into account when deciding what conclusions can and cannot be drawn from the evidence. This was not an investigation where the evidence of any witness was so wholly unreliable or biased it should be discounted.

In relation to the Friday conference call there is little common ground between the parties and the evidence is that each of them, in at least some respects, is wrong or mistaken in their account. Given the context, this is not surprising. People’s impressions of what is said during a conversation will differ, memories fade even over a short period of time, and subsequent events will have a bearing on how things are remembered. It is not possible to establish, even on the balance of probabilities, an accurate account of what was said during the conference call.
450. What can be clearly established, however, are two matters: that Mr Murray felt immense pressure following the phone call, evidenced by his contemporaneous response to at least four people, and that there was a flurry of activity over the weekend following the call, to attempt to find an answer to the question of accreditation at Grevillea.

451. In response to the draft report, Ms Callister said ‘DET was not trying to get an answer to the question of accreditation at Grevillea’ and that she ‘was trying to understand whether any learning that took place at Grevillea could be recognised for accreditation at a later time at a registered school or Registered Training Organisation.’ This, however, was the question of accreditation.

452. There is no doubt that Ms Callister had directed Mr Fraser to find an answer to this issue, not unreasonable in itself, but the question is why was it so urgent? There was considerable activity by senior DET staff over the weekend, including into the early hours of Sunday morning. This activity was plainly not necessary to finalise the MOU, which had in fact been finalised on Friday evening during the conference call and was signed unamended on Tuesday morning. Mr Fraser’s assertion that the urgency was driven ‘by the students’ at Grevillea is simply not credible.

453. By the time of the Sunday call from Mr Fraser to Mr Murray, the issue with the MOU’s drafting had been resolved. While the question of accreditation remained an important issue for DET, the answer was not required over the weekend. Despite the claimed urgency of resolving the RPL question, confirmation that RPL could be awarded at Grevillea was not in fact obtained until 3 March 2017, nor was it dependent on Mr Murray’s agreement that it could be.

454. Mr Fraser telephoned Mr Murray on Sunday because he wanted to tell him that they had found a pathway to accreditation at Grevillea. It is common ground that Mr Murray was not persuaded of this. It is also common ground that Mr Fraser raised ‘the justice scenario’ - that youth justice could move from DHHS to DOJR, which could have implications for Parkville College’s future.

455. While Mr Fraser disputes Mr Murray raised the question of Parkville College’s funding, on balance, given Mr Murray’s well-evidenced persistence on the issue of funding, it is more likely than not that he did, and that the ‘justice scenario’ was connected to that. It would not be surprising if Mr Fraser was exasperated by Mr Murray’s refusal to agree that RPL presented a solution to accreditation, after all the work done over the weekend, and wanted to remind him his position was precarious.

456. This view is supported by Mr Fraser’s ‘oversight’ in taking steps to inform himself and Mr Murray that a decision had been made to wipe Parkville College’s budget deficit, a matter plainly causing stress to Mr Murray at the time.

457. The urgency of the research over the weekend, the text from Ms Callister to Ms Peake on Sunday morning (stating ‘Another long series of calls re grevillea y’day a’noon, complicated re quals but getting there. Will let you know when definitive’), concluding with Mr Fraser’s telephone call to Mr Murray on Sunday and his subsequent text to Ms Callister, lead to the inescapable conclusion that but for Mr Murray giving evidence in court, both calls, on Friday and Sunday, would not have occurred.
458. While I accept, on balance, that the Friday call was not made with the intention to tell Mr Murray what to say in court, Ms Callister was well aware that he was giving evidence on the Monday. There was an imbalance of power between her and Mr Murray, a relationship that Ms Callister describes as having a ‘natural seniority difference’. The terms of the MOU had been finalised on the Friday and no compelling reasons were put forward for the urgency of answering the question of accreditation over the weekend, if not connected to the court proceedings. In all of the circumstances, although the allegation is not substantiated, making a call at that time was injudicious.

459. The weekend’s activity confirms DET thought it was important for Mr Murray to know there was a mechanism for accreditation of learning at Grevillea prior to his giving evidence. There is a fine line between informing a witness about facts relevant to the evidence they are likely to be examined on, and seeking to influence the evidence they are going to give.

460. While Mr Fraser characterised his follow-up call on the Sunday, as far as the court case was concerned, as offering support to Mr Murray, this is unlikely in the circumstances. While the parties disagree on the context, there is no dispute that they discussed the possibility of the responsibility of youth justice being moved from DHHS to DOJR with the attendant risk for the future of Parkville College. I have no doubt that the ‘justice scenario’ – though probably spontaneous and borne out of a not unreasonable frustration – came across as an implied threat, most unlikely to give Mr Murray a sense of confidence and comfort as he claimed.

461. While I do not believe the follow-up call was made with the intention of telling Mr Murray what to say in court, it was made to impart facts relevant to those proceedings, and in a heightened environment of apparently unresolved funding and the potential for adverse outcomes for Mr Murray if the litigation was lost. This would not unreasonably have felt to Mr Murray like an attempt to influence his evidence, and in all of the circumstances, the call was not only injudicious but inappropriate.

462. The relevance of the two calls to the proceedings is confirmed by events the following day at court. This is supported by text exchanges between Ms Callister and Ms Peake about Mr Murray’s evidence, when he was asked about the accreditation issue, which was wrongly assumed by Counsel for the State to have been resolved with Mr Murray over the weekend.

463. In her response to the draft report, Ms Callister considered the investigation had created ‘an artificial linkage between four separate events: the Friday phone call, the Sunday phone call, the text messages [with Ms Peake] and Mr Murray’s evidence about the accreditation issue’. She noted that Mr Murray agreed there had been extensive discussions about RPL over the weekend however he did not disclose this under cross-examination in court, which could have been construed ‘as him having no knowledge of this issue’. Ms Callister submitted that ‘it is fair to conclude that Mr Murray had less interest in the resolution of this issue than in maintaining consistency with his proof of evidence’.

464. Both Ms Callister and Mr Fraser point out that Mr Murray had been inaccurate in his evidence in respect of a number of matters and was conflicted in his position, which I also acknowledged.
Chapter 5

Allegation 2: misleading the Supreme Court

That information put forward by the State in the Certain Children matter and subsequent stay application was misleading.

Introduction

465. On 2 December 2016, the plaintiffs filed an originating motion for judicial review in the Supreme Court of Victoria. On 7 December 2016, Mr Murray was subpoenaed by the plaintiffs to attend to give evidence.

The State’s evidence

Ian Lanyon’s affidavit

466. The evidence filed by the State in support of the stay application was the affidavit of Ian Lanyon, affirmed on 20 December 2016.

467. In paragraphs 9 through 14 of his affidavit, Mr Lanyon identified the particular challenges of accommodating the cohort of young offenders on remand, including the legislative requirements to separate certain categories of young people within the youth justice system.

468. In paragraphs 15 to 17, Mr Lanyon stated that Parkville and Malmsbury were beyond capacity in the secure sites, and he gave an example of three children sleeping on the floor in isolation rooms on 15 December 2016.

Mr Lanyon’s evidence in court

469. In response to a question from Justice Garde on 21 December 2016, Mr Niall QC for the State clarified that the State’s position was there was nowhere for the young people to lawfully be held if the Grevillea Unit was to close:

> The position is that the currently identified or gazetted premises are insufficient given the loss of the 60 secure beds at Parkville.
Mr Lanyon is asked about bed availability at Malmsbury

470. Mr Walters QC for the plaintiffs then expressed the view that this was untrue:

Your Honour, we strongly contest the false assertion that there is nowhere else for these people to go. That is not true. We are in a position to call evidence about that.

471. Mr Walters subsequently questioned Mr Lanyon on his evidence about the availability of secure beds at Malmsbury.

472. Mr Lanyon confirmed that of the 32 beds available at Malmsbury at the time, all were non-secure beds and that Parkville was one over capacity.

473. Mr Lanyon was further questioned about an email that summarised the outcome of the Client Movement Panel meeting earlier that day. The email identified an option for the transfer of the young people in Grevillea to Malmsbury and Parkville. Mr Lanyon stated that the identified rooms were secure rooms (isolation rooms), rather than bedrooms.

474. Mr Walters continued to question Mr Lanyon about ‘the email’ and the young people who were intended to be transferred to Malmsbury:

Mr Walters: Then under the next heading there’s ‘Transfer of current Grevillea clients to Malmsbury’. Do you see that?

Mr Lanyon: Yes.

Mr Walters: There are nine names?

Mr Lanyon: Yes.

Mr Walters: In respect of each of them, they are units within Malmsbury identified, is that right?

Mr Lanyon: Yes.
Mr Murray and a Director of the Human Rights Law Centre exchange messages during Mr Lanyon’s cross examination

475. While Mr Lanyon was being cross examined, Mr Murray exchanged a series of text messages with a Director of HRLC, in which the Director expressed a view that the Judge may be thinking that the evidence being given by Mr Lanyon was not credible.

Mr Lanyon’s re-examination

476. Mr Lanyon was then re-examined by Mr Niall and asked whether the proposed movements set out in the email would be appropriate, to which Mr Lanyon answered:

- **Mr Lanyon:** I think it’s possible but I don’t think it’s appropriate.
- **Mr Niall:** And why not?
- **Mr Lanyon:** Because it will exacerbate the risks to all of these young people and also to my staff, and ultimately to the community safety.

477. Mr Lanyon was then asked whether he would change the position put forward in his affidavit, given the content of the email:

- **Mr Niall:** Having read the email this morning, does that cause you to alter in any way what you have said in paragraphs 15 to 17 of your affidavit?
- **Mr Lanyon:** No, it doesn’t. I stand by this.
- **Mr Niall:** Would the arrangements that are set out in paragraph (e) remove or alter the nature of the risks or problems that you identified in paragraph 15 or 17?
- **Mr Lanyon:** No, it does not.

478. Justice Garde ultimately accepted the State’s application for a stay.

Summary of the evidence put to the Supreme Court

479. Counsel for the plaintiffs argued the State’s position – that the youth justice system was at capacity – was false and that the email was evidence that it was possible to transfer the young people from Grevillea back into Parkville and Malmsbury. The plaintiffs also directly put it to Mr Lanyon that young people had been moved from the open units at Malmsbury to secure units ‘on a scale that means there’s more beds available in the unsecure area than there have been for quite some time’.

480. It appears this line of questioning was to suggest that young people had been moved from the open units at Malmsbury to secure units to fill spaces and justify the establishment/continued operation of Grevillea.

481. The plaintiffs called Mr Murray’s evidence to support the proposition that young people had been moved from the open units to the secure units to fill spaces. Beyond the email and Mr Murray’s testimony that there had been more young people in open units two months before the riots, the plaintiffs did not put forward any evidence to demonstrate that Mr Lanyon’s affidavit was false.
The investigation’s findings

482. The investigation did not find any evidence to substantiate the suggestion that young people were moved from open units to secure units ‘on a scale that means there’s more beds available in the unsecure area than there have been for quite some time’.

483. The graph below shows the number of young people per unit on dates between July and December 2016.

Graph 1: The number of young people per unit at Malmsbury at various dates from Jul to Dec 2016

Source: Data obtained from summary of CIS reports (1 July – 28 December 2016).
Graph 2: The number of young people in ‘secure units’ at the Malmsbury senior site

Source: Data obtained from summary of CIS reports (1 July – 28 December 2016)

Graph 3: The number of young people in ‘open units’ at the Malmsbury senior site

Source: Data obtained from summary of CIS reports (1 July – 28 December 2016)
485. The Malmsbury bed lists show that on 20 December 2016 there were 23 young people in open units and on 22 December 2016, there were 24 in open units. These figures also reflect the accommodation situation in open units on 3 October 2016, several months before the court proceedings.

486. That Parkville and Malmsbury were operating at capacity was accepted by the Court of Appeal, and ultimately not contested by the plaintiffs.

487. While the records show that from July to December 2016 the number of young people in secure accommodation increased, and the number of young people in open accommodation decreased, this appears to be a gradual trend, rather than a reaction to the riots at Parkville and the establishment of Grevillea.

488. James McCann, Head of Operations (Youth Justice), told investigators there was a steady decrease in the number of dual track clients and a tendency over time for there being less young people in open units. These trends were described in Chapter 2.

The three parts of Mr Murray’s allegation

489. Mr Murray’s allegation that the Supreme Court was misled has three parts and each is addressed in the following paragraphs.

‘Sleight of hand’

490. In his oral evidence to the Committee, Mr Murray said:

... it was like a sleight-of-hand trick that if children and young people in the Admissions unit are able to walk freely in minimum-security, what that meant for five years previous was that they could occupy beds within the open facility once they became available, and that was not the case during the Supreme Court trial.

491. According to Mr Lanyon and Mr McCann, in some cases young people accommodated in Admissions and Ulabara were able to access the open facility to attend school or visit the gym as part of their transition to an open unit.

492. However, both Mr Lanyon and Mr McCann told the investigation that whether a young person is able to go outside during the day and whether they require secure or open accommodation are two different considerations. Mr McCann said placement within an open unit ‘carries with it a separate level of risk than just attending a class’. He went on to say:

... I think in the context of the decision making around that time [a young person had escaped] was very much in people’s minds. So ... I acknowledge there would have been no easy transitions from secure to open. In my mind, as the person that carries the risk, I don’t think that’s unreasonable.

Investigator: So do you agree that there was a sleight of hand trick being used, that if children and young people in the Admissions unit are fairly minimum security what that meant for five years previous was that they could occupy beds within –

Mr McCann: If you took that at its fuller sense, then you could do away with this – five years ago you could have done away with the secure infrastructure that supports the Admissions unit, if that makes sense.
493. When asked to speculate on how Mr Murray may have formed the view that there was a ‘sleight of hand’, Mr McCann suggested that Mr Murray was coming from the view that DHHS should have been ‘doing everything possible to avoid having to place young people and children in Grevillea’:

Mr McCann: ... I think what he’s getting to at this point is saying that you had young people occupying secure beds that those children could have accessed. If they’re accessing some parts of the open site, can’t we stretch that a little bit, place them in the open site and free up the beds in Admissions to get kids out of Grevillea?

Investigator: What do you think about that viewpoint?

Mr McCann: Well, he – again, there’s a different role here. There’s people who carry the risk versus people who, you know, are passionate advocates and – ... have a lot of value to add, but at the end of the day they don’t carry the risk. And there was – I probably can’t overstate the sense of the whole system was bunkering down, in effect, trying to manage any potential – we just couldn’t go on having incident after incident. So taking – and particularly what I’ve said earlier is that I don’t think there’s a robust screening process that supports transition from secure to open. We just weren’t in a position, I don’t think, to bring some of those decisions forward in order to free up secure beds, which I think is what he’s getting at.

494. In response to Mr Murray’s allegation being put to him, Mr Lanyon said:

... if they were classified being treated as open, they would have been put into open beds. They were classified in the Admissions unit because they either immediately had come into the site or they were classified to be in that unit and it’s a self-contained unit, but we did discuss that, yes, at times some young people are allowed to be, go to other parts as part of their transition out of the admissions unit and that’s how it’s always existed. That’s for time immemorial, if you like, that it’s a transition strategy.

495. When asked whether the transition strategy could have been sped up in respect of some clients to facilitate the availability of more secure beds, Mr Lanyon said:

So could, well, could is an open word. Could? Yes. Could you? Yes, you could. In fact, could you by-pass the admission process? Yes, you could. Could you put any of these kids into the open units? Yes, you could, but if you did that what you do is usurping the entire risk assessment and risk management process within Youth Justice that has stood for a long time and is constantly being refined.

So could you? Yeah, you could. But to do that would be to accept an unacceptable amount of risk and would undermine the system.

496. The investigation accepts the evidence of Mr Lanyon and Mr McCann about the process for classifying and accommodating young people at the senior open site at Malmsbury.

497. Of note, at interview Mr Murray told the investigation that he agreed that allowing certain young people out of Admissions during the day was an established transition strategy.

498. The graph on the next page shows the number of young people per unit at Malmsbury in the days before and after the riots. The records show that while the total number of young people accommodated at Malmsbury increased significantly after the riots, the number of young people accommodated in the open units remained steady.
Across this period, seven young people moved between secure and open units at Malmsbury, five from open units to secure units and two from secure units to open units. Of the five young people who were moved from open to secure units, two were moved at their own request and three were moved for safety and security reasons. In each instance, the reason for the move was documented by the Classification Panel.

The investigation reviewed the bed lists at Malmsbury over the relevant time and has not identified any evidence to substantiate Mr Murray’s allegation that young people ‘who were already assessed as being eligible for the open units and were in the open units were brought back into Admissions to fill beds.’

501. Mr Murray also told the investigation that young people were ‘rounded up’ and put into Admissions before the riots at Parkville, following the escape of a young person on 8 November 2016:

I understood that jobs were on the line for senior staff, including Ian, at that time and then the riots happened, which overshadowed everything, but it’s important to not lose sight of [a young person’s escape] and what occurred at Malmsbury because it was a game changer. So kids were rounded up and put into Admissions and filtered – that were already in the open. This is what I feel ashamed of.

Graph 4: The number of young people per unit at Malmsbury immediately before and after the riots at Parkville

Source: Data obtained from summary of CIS reports (1 July – 28 December 2016).
502. Neither Mr Lanyon nor Mr McCann agreed with Mr Murray’s assertion that young people were ‘rounded up’ and moved back into secure accommodation:

   **Mr McCann:** I know of no sophisticated or clandestine direction to fill secure beds in order to justify Grevillea being open.

503. The investigation reviewed the bed lists at Malmsbury over the relevant time and did not identify any evidence to substantiate Mr Murray’s allegation that ‘kids were rounded up and put into Admissions’. The records show that no young people were transferred from the Campaspe unit to a secure unit at this time. One young person was moved from the Lauriston unit into Admissions, and two young people were moved from the Ulabara secure unit to open units (one to Campaspe and one to Lauriston).

‘Double counting young people’

504. According to Mr Murray, after the proceedings on 21 December 2016 he had a coffee with Mr Fraser and raised his concern that young people were being double counted. The suggestion was that Mr Lanyon had counted young people twice and exaggerated the numbers and capacity pressures at Parkville and Malmsbury.

   ... I put in front of him [Mr Fraser] the bed list with empty beds. I outlined for him my concerns that kids were named multiple times in beds. And I showed it to him and made him look at that. And I showed him some kids’ names that I wasn’t familiar with attending our school that are holding secure beds.

505. In early 2017, this allegation was put to Mr Lanyon by DHHS. He provided a written statement denying the allegation. In addition, DHHS briefed Counsel to provide advice about whether there was any substance to the allegation. Counsel reviewed the relevant documentation and concluded that he could not discern any material omission or misstatement by Mr Lanyon.

506. The investigation was provided with a copy of Parkville bed lists dated 22 December 2016 on which the names of four young people appear twice. Young person A is listed against ‘Remand South’ unit, young persons B and C are listed against ‘Remand North’ unit and young person D is listed against ‘Parkview’ unit. All four young people are then also listed against ‘Barnett’ unit and shaded in green below. Redacted extracts of the bed lists appear on the following page.
Figure 6: Parkville Youth Justice Centre bed allocation dated 22 December 2016
507. Investigators put this bed-list to Mr McCann for his explanation about why some young people’s names appear twice.

**Investigator:** Can you just take us through why they’re listed twice in the bed list? … [A] I think is one of them, who is on the front page listed in Remand South.

...  

**Mr McCann:** So he’s overnight Barnett, bedroom 3.1. So if you go to Barnet 3.1 it says ‘vacant’, but that’s – he’s in B2/D2 and he’s highlighted.

...  

So that means that during the day he’s operating in Remand South but he’s being accommodated at night in that bedroom BD/D2. If you also look at [D] a couple above him, [D]’s sleeping in Barnett A4, but he’s down on the next page. He’s managed during the day in Parkview and you’ll see the orange shading next to him saying ‘overnight bedroom, Barnett A4.’

...  

**Mr McCann:** So he’s unlocked out of his bedroom out of A4 in Barnett and he’s escorted down to Parkview where he remains until lockdown that night.

508. The explanation given by Mr McCann is consistent with Mr Lanyon’s written statement:

On a daily basis, staff employed within the Admissions area of the centres produce daily Unit Lists or ‘bed list’ that identify by name each of the young people detained in each of the units. With the current capacity pressures and bed shortages it has become necessary to sleep clients in certain units at night and to remove them during the day and place them into other units where they are with peers or like groups.

...  

The bed lists attempt to record these movements so as to visually inform the operational staff at the centre of both the daytime and night time arrangements for each young person to ensure there is no confusion and that capacity is managed within the statutory requirements.

509. The final page of the bed-list includes a tally of young people per unit. The records show that the four young people are counted against the unit they spend the day in, rather than the unit they sleep in (Barnett). The records do not show that young people were counted twice, therefore Mr Murray’s allegation is not substantiated.

**Conclusion**

510. There is no evidence to support the allegation that the Government or its representatives misled the Supreme Court.
Chapter 6

Allegation 3: misconduct investigation in reprisal

That Mr Murray was investigated for misconduct by the Department of Education and Training in reprisal for:

• making requests to the Department of Education and Training for additional funding for Parkville College; or
• giving evidence to the Supreme Court that was adverse to the government’s position.

Introduction

511. The Committee referred the question of whether Mr Murray had been investigated by DET for allegedly providing an email about re-housing young people from Grevillea to the HRLC in the context of the Certain Children matter. When investigators met with Mr Murray at interview on 16 January 2018 to clarify his allegation that DET had engaged in reprisal action against him, he confirmed his view that while he thought providing the email to HRLC was the right thing to do, he understands in hindsight that it was misconduct but that DET’s investigation was an overreaction.

512. Mr Murray told investigators that he had concerns about reprisal against him because he had raised Parkville College’s budget issues consistently and then because of the email he forwarded to HRLC.

513. The investigation considered DET’s actions in respect of Mr Murray in June 2016 (regarding the budget and deficit) and December 2016 (regarding the email) and considered whether they constituted reprisal action.

Performance management regarding financial management of Parkville College

514. For a number of years, both DET and Parkville College had held concerns about the budget and funding model for the school. By mid-2016 Parkville College had accrued a budget deficit. The total operating deficit Parkville College had accrued from 2014 was $7.59 million.
515. On 6 June 2016, Bruce Armstrong, Deputy Secretary, Regional Services wrote to Mr Murray to state DET’s concerns about the budget deficit and to outline steps DET intended to implement to monitor and review Parkville College’s financial situation from that time. Mr Armstrong stated in his letter that: ‘Continued operation beyond a budget envelope is contrary to the financial management responsibilities of a financial delegate under the Financial Management Act’. He also stated that to support the College with its risk management and governance responsibilities, he proposed that a DET representative join the Board of the College Council.

516. Mr Murray told investigators that Amanda Hubber, DET’s Senior Education Improvement Leader, told him in around June 2016 that she had been asked by DET to improve Mr Murray’s performance with regard to budget and governance as he was seen in DET as a principal who could not control the school council. Mr Murray told investigators that Ms Hubber was reluctant to undertake this task because it had not been her decision to initiate the performance improvement process.

517. Mr Murray wrote a lengthy letter dated 16 June 2016 which rejected Mr Armstrong’s assessment. Mr Murray comprehensively set out why he did not agree with ‘the imputation that [he had] failed to act in accordance with his financial and professional obligations as Executive Principal’ and identified issues with the school’s funding model.

519. Mr Fraser told investigators this was at the request of Mr Armstrong:

I had been asked by Bruce Armstrong to deal with these matters directly ...

And I think it’s important to point out it was a unique relationship. Most, mostly school principals would report directly through to a regional office contact. The nature of the work required to resolve these matters, because they related to the funding, they related to workforce matters, to the governance of the school, meant that a lot of liaison and interaction with Central Office Division was required to pursue those matters and so my understanding from Bruce was that it was probably more efficient to have a Central Office contact, working directly with Brendan to resolve those matters. So that was what I understood to be the nature of that purpose.

Was Mr Murray ‘performance managed’ in mid-2016?

520. Witnesses who provided evidence to the investigation had different understandings of whether Mr Murray was ‘performance managed’ in mid-2016.

521. According to Ms Hubber, Mr Murray was performance managed:

Ms Hubber: ... that question was did I believe Mr Murray was unfairly performance managed? My response is that I believe that he was ... He was being performance managed for financial management of his budget. That budget was inadequate to the provision of the education that he was responsible to deliver and that meant that he either was faced with not delivering the education that was described in the ministerial brief for the college or going into deficit. He did attempt to inform the - or he did inform the department of his, and his school council’s, concern about the adequacy of his budget.

Mr Fraser becomes involved

518. In early August, Mr Fraser began working with Mr Murray and Parkville College to progress and resolve the budget and funding issues. His role was to review the college’s funding model to assess whether it was appropriate in the circumstances.
What was the rationale for Mr Armstrong’s letter to Mr Murray?

522. At interview, Tony Bugden, Executive Director, People – DET was asked about the rationale for Mr Armstrong sending the letter to Mr Murray:

Investigator: So now he’s getting a letter about budget management ...

Mr Bugden: Yeah.

Investigator: But there’s no recognition of: there’s a problem with the funding model.

Mr Bugden: Yeah. But I think at that time they’re going to fill that hole. They’re trying to make sure that Brendan just doesn’t fill it with another $2 million worth of debt.

523. Mr Bugden confirmed that a formal performance management process was not instigated by DET Human Resources.

Investigator: Senior Education Improvement Leader Amanda Hubber indicated to us in an interview that she felt that Brendan Murray was being performance managed or she had been asked to performance manage him. Do you have any awareness of that?

Mr Bugden: … there’s absolutely no question that Amanda Hubber could start a process that she describes as performance management.

Investigator: Would that be - - -

Mr Bugden: That’s local.

Investigator: Local performance?

Mr Bugden: Yes. Because remember the SEIL [Senior Education Improvement Leader] is responsible for each principal’s performance plan. He’s responsible for monitoring that plan and is responsible for assessing that plan. For me, performance management means … where you step out of the performance process and go into a formal unsatisfactory performance process and there’s a set of formal pieces of correspondence that will pass between us and that individual because at the end of that process, it can lead to termination.

So what we do is establish a correct process that can survive an unfair dismissal test …

524. Mr Bugden subsequently emailed investigators to confirm that DET did not engage a formal performance management process in respect of Mr Murray.

Was Mr Murray being ‘performance managed’ in retribution for raising issues around Parkville College’s budget?

525. DET’s view in mid-2016, as expressed in Mr Armstrong’s letter, was that Parkville College required support with its risk management and governance responsibilities. Ms Hubber’s evidence is that she considered it unfair of DET to have commenced performance management in the circumstances, because Mr Murray was not responsible for the budget deficit.

Evidence of Mr Fraser

526. Mr Fraser’s evidence to the investigation supports Ms Hubber’s view. He told investigators there was a problem with the funding model, which required rectification.

Mr Fraser: … I was aware that a letter had been sent to Brendan Murray from Bruce Armstrong articulating a number of concerns with the financial management of the school.

…

I came to a view that the factors referred to here [in Mr Armstrong’s letter of 6 June] had not in fact contributed to the deficit.

Investigator: So this letter that was sent to Brendan Murray was not reflective of the reasons, the actual reasons, why the budget deficit was in effect –

Mr Fraser: Well so, yes, the budget was in deficit because of the large number of staff that were being employed. I came to a view that the employment of those staff was justified and that the budget was insufficient to deliver on what Parkville College was expected to be doing.
527. Mr Fraser gave evidence that it was colleagues in the financial services and human services divisions who had drafted the letter and that it represented their views about the deficit:

They provided advice to Bruce Armstrong. I know these matters were discussed in the department’s budget and financial management committee and these - this letter represents those views and Bruce Armstrong signed this letter on the advice of those colleagues.

**Conclusion**

528. DET’s decision for the SEIL (Ms Hubber) to engage Mr Murray in performance improvement activities at a local level may have appeared prudent to DET at the time. Ongoing funding issues had not been resolved successfully; and while external reviews had been commissioned by DET to understand these issues, it appears these reviews had not resulted in the formulation of a sustainable funding model for Parkville College by mid-2016.

529. DET did have a genuine issue with Parkville College’s budget and Mr Armstrong’s letter sets out steps to monitor and review expenditure at Parkville College. The involvement of a departmental representative on the school council was foreshadowed. Measures were put in place, and further review resulted in the budget deficit being wiped and the funding model revised.

530. DET was incorrect about the cause of the budget deficit, which was outside of what Mr Murray could control in the circumstances. Mr Murray would have considered, with justification, that he was unfairly treated and it is understandable that he would have been upset by this.

531. However, the approach taken by DET in attempting to address this issue, and in reacting to Mr Murray’s concerns, was not punitive.

532. On 24 November 2016 DET’s Budget and Finance Management Committee decided to wipe the deficit, including the forecasted accrued debt to 30 June 2017. A new funding model was then developed. There is no evidence that DET continued to performance manage or otherwise blame Mr Murray for raising his concerns.

**Was the investigation or action taken in relation to the 21 December 2016 email disclosure to HRLC ‘retribution’ by DET against Mr Murray?**

533. Mr Murray was employed as the Executive Principal of Parkville College pursuant to an employment contract dated 27 May 2013. The contract’s expiry date was 26 May 2018. Clause 11.1 of the contract states

> Information other than that generally published and available regarding the Employer’s business, operations and systems, financial affairs and structures (ie ‘confidential information’) is of value to the Employer and is of a restricted and confidential nature. During the period of this Contract and for any time thereafter, the Executive will not use or disclose any such confidential information to any other person, firm or corporation without the previous consent in writing of the Employer.

534. There is also a common law duty of fidelity implied in employment contracts, including Mr Murray’s, requiring employees not to remove, copy or memorise any of their employer’s valuable information.
Investigation of the leak of the email

535. At 1.27pm Mr Lanyon forwarded the email to the Deputy Secretary, Operations Division DHHS:

As per the email below, Parkville College were this morning emailed this confidential information – containing client names – and this email was then in the hands of the plaintiffs at court just minutes later! (Not sure why BM would need to send it to me...)

I suggest an immediate investigation be launched as to how this came to have been leaked, and this would no doubt require co-operation of DET integrity branch.

536. DET’s Integrity and Assurance Division commenced an investigation in relation to the leak and concluded that it came from Mr Murray. The findings of the investigation were that:

At 12 noon on 21 December Brendan Murray forwarded the 21 December email to [a Director of] the Human Rights Legal Centre.

537. A snapshot taken from Mr Murray’s mailbox at 3pm on 21 December showed at that time:

- The email had not been deleted from Mr Murray’s Inbox.
- The email from Mr Murray to a Director of HRLC had been deleted from the Sent Items folder.
- The email from Mr Murray to a Director of HRLC had not been deleted from the Deleted Items folder.

538. On 22 December 2016 Mr Murray emailed Mr Fraser to inform him that he was about to go on leave and was ‘exhausted by the year and particularly by the pressure of the last 6 weeks …’

539. DET’s Information Technology Division (ITD) provided a further copy of Mr Murray’s mailbox as of 30 December. (It had not been accessed since the afternoon of 23 December at 4.40 pm.) As of 30 December, the email from Mr Murray to a Director of HRLC was no longer contained in the Deleted Items folder. This could mean one of two things: that it had either been hard deleted (ie deleted from the Deleted Items folder) or that it had been moved into a local folder, not visible from the email snapshot.

DET’s response to the email

540. Having identified Mr Murray as the source of the leaked email, DET leadership met on either 29 or 30 December to discuss what DET’s response to Mr Murray would be. Tony Bugden said that during the meeting, the leadership team considered possible options for action under ETRA and Mr Murray’s contract of employment. They also discussed ‘whether there had been breaches of other legislation and that sort of thing’.

DET seeks legal advice

541. Having identified Mr Murray as the source of the leak, DET sought external legal advice. The Advice dated 9 January 2017 stated that:

... on the basis of information provided to us to date and without knowing Mr Murray’s response to the matters alleged in relation to his conduct, we agree that the Department has sufficient grounds to conclude that Mr Murray’s conduct in forwarding an email containing confidential information to a third party constitutes misconduct warranting summary dismissal.
542. The Advice went on to say that Mr Murray’s conduct went beyond misconduct that would require notice of termination for six reasons:

a) the importance of maintaining confidentiality of an employer’s information, which goes to the heart of the employment relationship

b) The nature of the information which was disclosed, particularly given that it contained the personal information of 19 youths, and was disclosed to a third party in the context of high profile legal proceedings

c) That Mr Murray holds a senior role within the Department and ought to have understood the importance of maintaining confidentiality and not acting contrary to the interests of the employer

d) That Mr Murray had previously kept the Department informed in relation to the legal proceedings, including notifying the Department that he had been subpoenaed to give evidence, but apparently deliberately omitted to notify the Department of his intention to forward on the 21 December Email

e) That Mr Murray deleted the email he sent to the Human Rights Law Centre (namely the email forwarding the Email) from his edumail account on the same day it was sent, and subsequently ‘hard deleted’ it from his deleted items email folder at some point prior to 30 December 2016 (most likely by 23 December 2016), an indication that he understood that he had acted improperly in disclosing the email to the HRLC; and

f) That Mr Murray appears to have knowingly and intentionally misled a more senior member of the Department when questioned regarding whether he was aware of how the 21 December Email came to be used by the Fitzroy Legal Service in legal proceedings, a further indication that he understood that he had acted improperly in disclosing the 21 December Email (subject to the Department obtaining evidence confirming the nature of his conversation).

The Advice also considered Mr Murray’s confidentiality obligations under the [Child, Youth and Families Act 2005 (Vic)]

543. The Advice also considered whether, in forwarding the email to HRLC, Mr Murray contravened sections 492(A) and 534(1)(c) of the CYFA.

544. Section 492(A)(2) CYFA provides that:

A person who holds or has held a position must not record, disclose, communicate or make use of confidential information, except to the extent that is reasonably necessary to perform a duty or function of that position, or to exercise a power of that position, under this act or any other Act.

545. The Advice was that the email:

... includes information regarding the transfer of certain detainees, including those who will be moved into isolation. It also includes information regarding staffing arrangements required to manage the increase in numbers. On a broad construction of section 492A(c), information of that kind is in our view likely to constitute information concerning the management of, or operation of security measures, in or in relation to a youth justice facility.

546. The Advice indicated there was no statutory or judicial guidance on this point, but there was a proper basis to put the allegation to Mr Murray that he had breached section 492(A) CYFA.

547. Section 534(1)(c) CYFA provides that:

A person must not publish or cause to be published, except with the permission of the President (of the Children’s Court) or of a magistrate, or of the Secretary (of DHHS), any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.
The Advice said that in forwarding the email to a Director of HRLC, Mr Murray had published confidential information to a section of the public, notwithstanding that the email was only sent to one recipient.

Despite the Advice that there was a proper basis to assert that Mr Murray contravened section 492A and less strong grounds to assert he had contravened section 534, they also advised that for strategic and practical reasons, DET should not include those allegations in the show cause letter that DET were considering providing Mr Murray. Briefly put, the Advice was that the practicalities of introducing criminal allegations into a workplace investigation would complicate DET’s investigation process and the allegations may be difficult to prove to a criminal standard, including potential debate over the interpretation of the sections referred to above.

**DET considers available options**

The Advice stated: ‘the breach of a fiduciary obligation (such as breaching confidentiality)’ justified termination of an employee’s employment and that Mr Murray’s behaviour fitted this description:

... Mr Murray’s conduct in disclosing the email was the central issue that creates a basis for Mr Murray’s summary dismissal.

Further, the Advice concluded:

In our view, the disclosure of the 21 December Email is sufficient, in and of itself, to constitute serious misconduct.

The Advice stated that DET’s enquiries of the email leak were sufficient to constitute an investigation for the purposes of its Misconduct Guidelines. It also said DET’s ability to summarily terminate Mr Murray’s employment arose from three sources, namely:

(a) the common law (ie. An employer’s right to summarily dismiss an employee for serious misconduct), subject to any applicable legislative restraint, given the public sector nature of the employment;

(b) clause 6.7 of the Contract of Employment; and

(c) relevant provisions of the ETRA Act, specifically.

i. sections 2.4.61(d) and 2.4.61A; and

ii. section 2.4.23F, which permits the Secretary to terminate an employee’s contract in accordance with the terms of the contract.

Sections 2.4.61(d) and 2.4.61A of the ETRA provide a process for DET to terminate employment at the conclusion of a disciplinary procedure, once due process has been applied. It is referred to as a ‘Division 10 process’.

Section 2.4.23 was inserted into the ETRA in 2016 to allow for an abridged summary dismissal process for ‘Principal class’ employees. Effectively, this section would allow DET to dismiss Mr Murray for breach of contract without the requirement for a statutory disciplinary procedure to be followed, so long as reasonable grounds for termination of contract existed at common law. The Advice was that they did.
555. In addition to the options available regarding legal grounds for summary dismissal, the Advice also stated there was a proper basis to assert that Mr Murray contravened section 492A of the CYFA, and less so section 534 of the CYFA. Accordingly, in addition to grounds for summary termination, it was open to DET to pursue criminal charges against Mr Murray for breaching these provisions.

556. Having considered the Advice, DET decided to pursue action under Division 10, the ‘normal misconduct process’. Mr Bugden explained to investigators that DET still regarded Mr Murray’s behaviour in disclosing the email as serious misconduct:

… one of the things that we hold very dear is the way in which we treat our data of our students in schools because part of the confidence we think the community needs is that we will take the students’ information and we won’t be using it for purposes other than what was intended.

In this particular case the document, whilst it was being released for another purpose, in fact had the names of all of those inmates in that list and for us, in all of the documentation and policy we had, we talk a lot about principals, employees and others not using any data for any purpose other than that it was intended, so in our view the decision to release that information so it became part of a court proceeding was a significant breach.

That was the view we came to and in my view, personally, it doesn’t matter what the circumstances were. It was unjustified. In my view, Brendan had other options available to him. If he wanted to make that information known he could have used the internal channels to do that.

In my view he should have approached the department and indicated that, in his view, what was being said by another department was, in fact, untrue and he had, in his view, a moral obligation to make that known and then sought the department’s help in resolving that matter.

…

The decision was: is there any circumstances where it’s acceptable to release that information into the public arena and the view we came to was there wasn’t.

Legal negotiations

557. On 10 January 2017 DET provided Mr Murray a letter outlining the allegations against him and requesting that he not attend work while the investigation was ongoing. Mr Murray engaged lawyers shortly after and on 20 January 2017 Mr Murray’s lawyers wrote to DET outlining his position. Correspondence between DET and Mr Murray’s lawyers was exchanged subsequently until around the last week of January 2017 when his lawyers raised the possibility of negotiating a settlement outcome that would result in Mr Murray separating from DET. A meeting went ahead and an agreed separation and settlement was reached by Deed of Separation dated 10 March 2017.

558. On 30 May 2017, Mr Murray told the Legal and Social Issues Committee that he had decided to resign on 21 December 2016 as he ‘could not do this anymore.’ He stated that he did not seek a payout; nor was it a mutual termination. He resigned and received his owed entitlements. However, it appears that Mr Murray’s plans for resignation were delayed by the instigation of the investigation.
559. DET sought further legal advice regarding its options after the meeting with Mr Murray and his lawyers. By that time, DET had a response from Mr Murray to the matters being investigated in the form of a statutory declaration.

560. DET’s external lawyers considered Mr Murray’s statutory declaration as part of its advice:

Our view that the FWC [FairWork Commission] could conclude that there was a valid reason to terminate Mr Murray’s employment is consistent with relevant case law ... Mr Murray’s conduct in forwarding the Email was a significant error in judgement, or at least a failure to take reasonable care by failing to seek authorisation prior to making the disclosure of the Email, and this conduct was a valid reason for dismissal.

561. The Advice also states, that having considered Mr Murray’s explanations for his conduct, that even though there was a valid reason to dismiss him, the Fair Work Commission might consider his dismissal harsh in the circumstances, taking into account his long and good history of service with the department. This is an outcome of unfair dismissal law that finds that dismissal is too harsh a consequence on an employee given that employee’s particular circumstances, even though the employer has valid reason to dismiss.

562. Mr Bugden explained his assessment to investigators during his interview:

Mr Bugden: I think, is that it’s likely to have been a reprimand, fine or demotion. Based on what I know, I’d be surprised if it would have been a reprimand or a fine. I think it was more likely to have been a demotion. I mean, the principal is the position in our system that holds the most trust. So when you betray that trust, it’s something that we struggle with.

563. In response to the draft report, Mr Murray noted clause 7(a) of the Deed of Separation did not impose a restriction on his future employment and the department decided to not investigate further in light of the Settlement Agreement. For completeness, clause 7 in its entirety is set out below:

7. Future Employment Undertaking:

(a) The Department confirms that the Statutory Declaration has been independently reviewed by the Manager, Employment Conduct Branch for the Department of Education and Training, who has determined that the Department will not impose an employment restriction in respect of the matters addressed in the Statutory Declaration, and the Department has determined it will not take any further action in respect of the Division 10 Inquiry.

(b) By signing this deed, Mr Murray undertakes that he will not apply for employment in the Department, DHHS or the Victorian Teaching Service within two years of the Separation Date.
Conclusion

564. The local performance management process in June 2016 would have been genuinely upsetting for Mr Murray, and in circumstances where the causes of the deficit were beyond his control, was bureaucratic and inappropriate. However, the evidence does not support a conclusion that the process was commenced as retribution for Mr Murray trying to engage DET in rectifying Parkville College’s budget deficit.

565. DET had reasonable grounds to investigate Mr Murray in relation to the 21 December 2016 email leak, as was confirmed by DET’s external legal advice. DET’s conduct as set out in this report does not indicate a haphazard or capricious approach to reaching its decision to commence the investigation or to its subsequent negotiations with Mr Murray resulting in his separation of employment.

566. Mr Murray’s evidence to the Parliamentary Committee suggests the commencement of the investigation delayed his intended resignation, even though DET’s commencement of the investigation could have been seen by Mr Murray as retribution, given the effect this could have on his professional standing.

567. However, the evidence does not support a conclusion that DET unreasonably or wrongly initiated an investigation to punish Mr Murray. The disclosure of confidential information regarding young people in custody, including their names, was a breach of a fundamental term of his contract that may have justified termination, although DET’s legal advice was that a decision to dismiss Mr Murray may have been considered harsh in the circumstances.

568. On the evidence available there is no apparent course of conduct by DET to penalise Mr Murray for his pursuit of the resolution of Parkville College’s budget deficit and funding, or for other reasons outside of his disclosure of the email.
### Victorian Ombudsman’s Parliamentary Reports tabled since April 2014

#### 2018

<table>
<thead>
<tr>
<th>Report Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints to the Ombudsman: resolving them early</td>
<td>July 2018</td>
</tr>
<tr>
<td>Ombudsman’s recommendations – second report</td>
<td>July 2018</td>
</tr>
<tr>
<td>Investigation into child sex offender Robert Whitehead’s involvement with Puffing Billy and other railway bodies</td>
<td>June 2018</td>
</tr>
<tr>
<td>Investigation into the administration of the Fairness Fund for taxi and hire car licence holders</td>
<td>June 2018</td>
</tr>
<tr>
<td>Investigation into Maribyrnong City Council’s internal review practices for disability parking infringements</td>
<td>April 2018</td>
</tr>
<tr>
<td>Investigation into Wodonga City Council’s overcharging of a waste management levy</td>
<td>April 2018</td>
</tr>
<tr>
<td>Investigation of a matter referred from the Legislative Council on 25 November 2015</td>
<td>March 2018</td>
</tr>
</tbody>
</table>

#### 2017

<table>
<thead>
<tr>
<th>Report Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigation into the financial support provided to kinship carers</td>
<td>December 2017</td>
</tr>
<tr>
<td>Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre</td>
<td>November 2017</td>
</tr>
<tr>
<td>Investigation into the management of maintenance claims against public housing tenants</td>
<td>October 2017</td>
</tr>
<tr>
<td>Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus</td>
<td>September 2017</td>
</tr>
<tr>
<td>Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system</td>
<td>September 2017</td>
</tr>
<tr>
<td>Investigation into Victorian government school expulsions</td>
<td>August 2017</td>
</tr>
<tr>
<td>Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board</td>
<td>June 2017</td>
</tr>
<tr>
<td>Apologies</td>
<td>April 2017</td>
</tr>
<tr>
<td>Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board</td>
<td>March 2017</td>
</tr>
<tr>
<td>Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville</td>
<td>February 2017</td>
</tr>
<tr>
<td>Investigation into the Registry of Births, Deaths and Marriages’ handling of a complaint</td>
<td>January 2017</td>
</tr>
</tbody>
</table>

#### 2016

<table>
<thead>
<tr>
<th>Report Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigation into the transparency of local government decision making</td>
<td>December 2016</td>
</tr>
</tbody>
</table>
Ombudsman enquiries: Resolving complaints informally
October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight
September 2016

Report on recommendations
June 2016

Investigation into Casey City Council’s Special Charge Scheme for Market Lane
June 2016

Investigation into the misuse of council resources
June 2016

Investigation into public transport fare evasion enforcement
May 2016

2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 - the effectiveness of statutory oversight
June 2015

Investigation into allegations of improper conduct by officers of VicRoads
June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service
April 2015

Councils and complaints – A report on current practice and issues
February 2015

Investigation into an incident of alleged excessive force used by authorised officers
February 2015

2014

Investigation following concerns raised by Community Visitors about a mental health facility
October 2014

Investigation into allegations of improper conduct in the Office of Living Victoria
August 2014