

**UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00420

CORAM : SENIOR COMMISSIONER S J KENNER

HEARD : MONDAY, 10 FEBRUARY, TUESDAY,
11 FEBRUARY, WEDNESDAY, 12 FEBRUARY,
FRIDAY, 14 FEBRUARY 2020; WRITTEN CLOSING
SUBMISSIONS 21 FEBRUARY 2020;
SUPPLEMENTARY WRITTEN SUBMISSIONS
23 MARCH 2020; FURTHER SUPPLEMENTARY
WRITTEN SUBMISSIONS 17 JULY 2020

DELIVERED : TUESDAY, 21 JULY 2020

FILE NO. : U 132 OF 2019

BETWEEN : DONALD ANDREW PARNELL
Applicant

AND

THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
Respondent

Catchwords : Industrial Law (WA) - Termination of employment of Deputy Principal - Claim of harsh, oppressive or unfair dismissal - Remedy of reinstatement sought - Alleged denied procedural fairness - Historical sexual assault allegations - Serious misconduct - Allegation of flawed investigation process - Application for suppression - Open court principle fundamental - Principles applied - Evidentiary onus - Briginshaw principles and balance of convenience - Circumstantial evidence - Counsellor confidentiality - Principles applied - Employer had genuine and honest belief based on reasonable grounds - Misconduct established - Application dismissed

Legislation : *Industrial Relations Act 1979* (WA) ss 6, 27(1a), 29(1)(b)(i)
Children’s Court of Western Australia Act 1988 (WA) s 35
Evidence Act 1906 (WA) ss 19A, 19E, 19G, 19H, 36C

Result : Application dismissed

Representation:

Applicant : Mr P Mullally as agent
Respondent : Mr I Curlewis of counsel
“The West Australian” : Mr A McCarthy of counsel - suppression application only

Case(s) referred to in reasons:

Australian Workers’ Union WA Branch Industrial Union of Workers v Hamersley Iron Pty Limited (1986) 66 WAIG 322
Baron v George Weston Foods Ltd (1984) 64 WAIG 590
Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224
Briginshaw v Briginshaw (1938) 60 CLR 336
Crampton v The Queen (2000) 206 CLR 161
Cubillo v Commonwealth of Australia (2000) 174 ALR 97
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893
Hogan v Hinch (2011) 243 CLR 506
John Fairfax Group Pty Ltd v Local Court of NSW (1991) 26 NSWLR 131
Longman v The Queen (1989) 168 CLR 79
Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170
Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677
NU v NSW Secretary of Family and Community Services [2017] NSWCA 221; (2017) 95 NSWLR 577
Palmer v Dolman [2005] NSWCA 361
R v Deputy Industrial Injuries Commissioner; Ex parte Moore [1965] 1 QB 456
Rayney v Western Australia [No. 8] [2017] WASC 66
Re Her Honour Chief Judge Kennedy; Ex parte West Australian Newspapers Ltd [2006] WASCA 172
Re Hogan; Ex parte WA Newspapers (2009) 41 WAR 288
Re Robins SM; Ex parte West Australian Newspapers Ltd (1999) 20 WAR 511

Sangwin v Imogen Pty Ltd [1996] IRCA 100
Scott v Scott [1913] AC 417
 “TK” v *Australian Red Cross Society* (1989) 1 WAR 335
Winkless v Bell (1986) 66 WAIG 847

Case(s) also cited:

Amin v Burswood Resort Casino (1998) 78 WAIG 2441
Attorney-General v Leveller Magazine Ltd [1979] AC 440
Braganza v BP Shipping Ltd [2015] UKSC 17
Bromfield, Re; Ex parte West Australian Newspapers Ltd (1991) 6 WAR 153
David Syme & Co Ltd v General Motors-Holden’s Ltd [1984] 2 NSWLR 294
Director General of Community Services; Re Sophie [2008] NSWCA 250
Gregory v Philip Morris 80 ALR 455
Heard v Monash Medical Centre (1996) 39 AILR ¶3-203
Hogan v Australian Crime Commission [2010] HCA 21; (2010) 240 CLR 651
John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465
John Fairfax Publications Pty Ltd v Attorney-General (NSW) (2000) 181 ALR 694
John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Lovell v Lovell (1950) 81 CLR 513
Mallet v Mallet (1989) 156 CLR 605
M v M (1988) 166 CLR 69; [1988] HCA 68
Miles v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service & Miscellaneous WA Branch 65 WAIG 385
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47
R v Chief Registrar of Friendly Societies; Ex parte Newcross Building Society [1984] QB 227
R v Kwok (2005) 64 NSWLR 335
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47
Rockett v Smith; Ex parte Smith [1992] 1 Qd R 660; (199) 55 A Crim R 79
Russell v Russell (1976) 134 CLR 495
Schaale v Hoescht Australia Ltd (1993) 47 IR 249
SDA v Jewel Food Stores (1987) 22 IR 1
Stearnes v Myer S.A. Stores (Unreported, SAIC Print No. 9A/1973)

Reasons for Decision

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Background

- 1 This is a sad case layered with complexity. It has been a traumatic one for family members of a former student of MacKillop Catholic College in Busselton who attended the College from 1997 to 1998. The applicant, a teacher employed by the respondent in Catholic schools since 1989 and who worked as a Deputy Principal over the last 10 years, most recently at Lumen Christi College from January 2018 to August 2019, was dismissed for misconduct. His dismissal resulted from historical sexual assault allegations made against him by the former student, arising from a school trip to Indonesia between Term 3 and Term 4 in 1997.
- 2 The applicant not only proclaims his innocence of what he described as the most abhorrent allegations that could be made against him, but he also maintained that his dismissal was unfair on several other grounds including that the respondent's investigation into the allegations, which occurred 22 years after the alleged sexual assault, was fatally flawed; that the Investigators had insufficient expertise to conduct such an investigation; that evidence assembled and relied upon by the Investigators was contaminated; that the investigation was not independent of the Catholic Church, as the applicant maintains that it should have been; and that the applicant could not properly respond to the allegations; and that an expert psychologist report obtained by the respondent in relation to the allegations themselves, did not support substantiation of them.
- 3 The applicant seeks an order of the Commission that he be reinstated to his former position as Deputy Principal of the College without loss.

Application for suppression

- 4 At the commencement of the proceedings, the applicant made an application under s 27(1a) of the Act, that the Commission make an order for the proceedings to be heard in camera, alternatively that the identity of the applicant be suppressed. This application was made because the case concerned a claim by the applicant, a teacher of some 30 years' good standing, with an otherwise

unblemished employment record, being dismissed from his position as Deputy Principal of the College, because he allegedly raped a male student 22 years ago. The applicant submitted this is one of the most serious allegations that could be made against a teacher. Also, the allegations made against the applicant contended that the offending took place in circumstances of aggravation, both as to the actual alleged sexual assault, and alleged threats made by the applicant to the former student to harm his family if he disclosed the alleged offending.

- 5 The applicant submitted that in these circumstances, the allegations will be ruinous to his reputation. Notably, according to the applicant, never was a complaint made as to the allegations, either to the police or to education authorities. The applicant contended that even if the Commission found in favour of his claim, given the significance of an historical sexual abuse claim, regarding a student under the applicant's care, this will profoundly affect the applicant's future, whether as a teacher or in any other occupation.
- 6 The respondent neither consented to nor opposed the application and submitted that it was a matter for the Commission to determine. And as the proceedings had attracted some media interest, the application for the proceedings to be heard in camera or for making suppression orders, was opposed by the "West Australian" newspaper, which had a journalist present on the first day of the proceedings. As counsel for the "West Australian" was not available at the time of the application being made by the applicant, the proceedings were adjourned until the commencement of the afternoon session, to enable the newspaper's counsel to appear and to be heard.

Relevant principles

- 7 Without hopefully doing an injustice to the detailed and helpful submissions made by counsel for the "West Australian", it was contended that, after referring to the common law authorities, there was no basis for making a suppression order, let alone an order that the proceedings be heard in closed court. Counsel submitted that no doubt under s 27 of the Act, the Commission has the power to order a matter be heard in camera, having regard to the objects of the Act in s 6 and the common law principles. It was submitted that the paramount principle to apply is that of open justice, so it is only in exceptional cases that a suppression order or a closed court order would be made: *Hogan v Hinch* (2011) 243 CLR 506; *Rayney v Western Australia [No. 8]* [2017] WASC 66.
- 8 Counsel for the "West Australian" set out in his written submissions, some examples regarded as exceptional circumstances, however, importantly for present purposes given the grounds of the application, embarrassment, distress, invasions of privacy or damage are not exceptional circumstances and do not

justify making suppression orders in relation to the identification of parties or a witness (see written submissions par 13).

- 9 Importantly also, counsel submitted that even though the Commission has the statutory power under the Act to make suppression or closed court orders, such statutory powers must be considered and applied consistent with the common law principles: *Hogan* at par 27.
- 10 In a brief reply, the agent for the applicant also submitted that the Commission could have regard to restrictions, by analogy, applying under s 35 of the *Children's Court of Western Australia Act 1988* (WA) that, had criminal proceedings been brought some time after 1997 against the applicant, under that legislation there would be prohibition of publication of the applicant's name because it may have led to the identification of the name of the child. By analogy, the submission was made that in s 27 of the Act, a similar approach could apply. Some reference was also made in response to this issue, by counsel for the West Australian, to s 36C of the *Evidence Act 1906* (WA) in relation to non-publication of names of victims of alleged sexual offences, in criminal proceedings. However, this is not the case and those circumstances have no application.
- 11 After adjourning for a short time to consider the application and the submissions made, I refused the application for suppression or for the proceedings to be heard in camera so as not to disclose the applicant's identity, with my reasons to be published in due course. These are my reasons for so deciding.

Decision on suppression application

- 12 The Commission, as a specialist industrial tribunal and as a court of record under s 12 of the Act, has an obligation, subject to the Act, to conduct its proceedings in public. The exception to this is set out in s 27(1a) which provides:

27. Powers of Commission

...

- (1a) Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.

- 13 This statutory provision, and the powers of the Commission to conduct proceedings in private, also encompasses the power of the Commission to issue orders under s 27(1)(v) of the Act, falling short of in camera proceedings. This includes making procedural orders in relation to the suppression of the identity of

names of parties or witnesses or to suppress the identity of the applicant. However, this statutory power must be construed and applied consistent with the common law principle of “open justice”, so proceedings before courts and tribunals should be in public, unless there exist very good reasons why not. In *Hogan*, in this respect, French CJ said at par 20:

The open-court principle

20. An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.

(Footnotes omitted)

- 14 (See too: *Re Hogan; Ex parte WA Newspapers* (2009) 41 WAR 288 per McLure P at pars 30 to 33). This principle has variously been called “fundamental”; “[laying] at the heart of our system of justice” and “vital to the ... maintenance of public confidence in the administration of justice”: *Re Robins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511 at 514 and 516. Whilst ss 27(1)(v) and (1a) of the Act permit the Commission to make suppression orders or closed court orders, these statutory provisions must be applied against the background of the common law and with minimum intrusion into it. In this respect, also in *Hogan*, French CJ said at par 27:

Beyond the common law, it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced. An example of such a law in the federal context is s 50 of the *Federal Court of Australia Act 1976* (Cth), recently considered by this Court in *Hogan v Australian Crime Commission*. Specific powers to make suppression orders or orders for the exclusion of the public, where such orders are in the interest of security or defence of the Commonwealth, can be found in the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth). There are many other examples of such provisions enacted by State parliaments. Where it is left by statute to a court's discretion to determine whether or not to make an order closing part of a hearing or restricting the publication of evidence or the names of parties or witnesses, such provisions are unlikely to be characterised as depriving the court of an essential characteristic of a court and thereby rendering it an unfit repository for federal jurisdiction. Nevertheless, a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle...

- 15 Thus, the Commission, consistent with the above, should only depart from the open justice principle, when there exist exceptional circumstances that justify

such a course: *Re Chief Judge Kennedy* [2006] WASCA 172. In *Re Chief Judge Kennedy*, the principles were discussed and Steytler P (Roberts-Smith and McLure JJA agreeing) said at pars 36 – 38:

36 The fundamental importance of openness in the administration of justice has repeatedly been stressed. In this State, the more pertinent authorities have been collected in *Bromfield* at 179 - 183 per Rowland J, and at 193 per Nicholson J, and in *Re Robins* at [5] - [9] per Ipp J. I will not repeat what has there been said, other than by quoting what was said by Gibbs J in *Russell v Russell* (1976) 134 CLR 495 at 520, where he identified the basis for the principle as follows:

"It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' ... This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character."

37 I should also repeat what was said by Samuels JA in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 61, as follows:

"The inquiry must start with the proposition, central to our notions of forensic procedure, that the courts customarily conduct their business in public in order that the integrity, fairness and efficiency of the system, and its administrators, may be maintained by its exposure to public scrutiny. One corollary is the freedom to publish to the public fair reports of the court's proceedings."

(See also, in this last respect, *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476 - 477; and *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 at [20]).

38 Of course, the principle of open justice is not absolute. There are exceptions to it, albeit these are few and strictly defined: *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at 707 per Spigelman CJ; and see *R v Kwok* (2005) 64 NSWLR 335. In this State, at the time of the orders made by the primary Judge, s 635(2) of the *Criminal Code* (WA) provided that, if satisfied that it is necessary for the proper administration of justice to do so, a court may, amongst other things, exclude persons from the court-room during a criminal proceeding and make an order prohibiting publication outside the court-room of the whole or any part of the proceedings (see, now, s 171 of the *Criminal Procedure Act 2004* (WA)).

16 As stated by his Honour above, there can be several circumstances of an exceptional nature justifying a departure from the open hearing rule. However, embarrassment and damage to reputation is not one of them. In *John Fairfax*

Group Pty Ltd v Local Court of NSW (1991) 26 NSWLR 131, in discussing the open justice principle, Kirby P observed at pp 142 – 143:

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: see, eg, *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 (at 307); *Raybos Australia Pty Ltd v Jones* (at 58); *R v Chief Registrar of Friendly Societies*; *Ex parte Newcross Building Society* [1984] QB 227 at 235; *R v Bromfield* Malcolm CJ (at 22); *Rockett v Smith*, per Derrington J (at 7). A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

- 17 Here, the applicant sought an order for the proceedings to be heard in camera or for the suppression of his name, because his reputation as a teacher of 30 years' standing will be damaged. The gravity of the allegations leading to his dismissal, which must be acknowledged, even though arising in employment proceedings and not in criminal proceedings, will have the potential to be very damaging. So much may be accepted. However, it is to be borne in mind that the applicant has commenced these proceedings, of his initiative, to challenge his employer's decision to dismiss him. Aside from the embarrassment and possible reputational damage that may arise, no other grounds were relied upon by the applicant to support the seeking of orders. For example, there was no submission made that the failure to make an order for suppression or the holding of in camera proceedings, would deter the applicant from proceeding with his claim, or may affect the manner in which he exercises any rights in these proceedings: *Scott v Scott* [1913] AC 417; *"TK" v Australian Red Cross Society* (1989) 1 WAR 335.
- 18 In applying the principles discussed above, the considerations advanced by the applicant do not outweigh the public interest in the open justice principle applying and there being the ability for the public reporting of these proceedings in the media. Accordingly, it was for these reasons that I did not grant the orders sought by the applicant.
- 19 However, out of due deference and respect to the deceased student, who was a child at the material time, and his family, the student will be identified in these reasons as "A" and those family members who gave evidence will be identified by their relationship to him. I will adopt the same approach to other students, who were interviewed as part of the investigation into the allegations against the applicant. Also, having regard to doctor and patient confidentiality, where reference has been made in documents in evidence before the Commission, to

medical practitioners who treated A at various times, their names have been omitted. I consider that in accordance with the above principles, this approach to each of these matters is consistent with the due administration of justice.

School trip to Indonesia Term 3 – Term 4, 1997

- 20 A school trip in the September – October school holidays was organised in 1997, for five students at Mackillop College to travel to Indonesia, to study Indonesian culture and language. The organiser of the trip was another teacher, Ms Hunter. Of the five students who went on the trip, the only male student was A. As there was a male student participating in the tour, the applicant was also requested and agreed to accompany the tour group.
- 21 The tour was mainly to the Central Java region and took place over two weeks. According to Ms Hunter, the tour was generally uneventful except for the final day, when due to a problem with the tour group's return flight from Denpasar to Perth, the group had to stay an additional night. Accommodation was arranged by the airline and the group stayed at the Kartika Plaza Hotel. It is on that final night at the hotel that events the subject of these proceedings are said to have taken place. I will return to the detail of these matters later in these reasons.

Return to Perth

- 22 The day after the final night in Denpasar, the tour group returned to Perth and arrived late at night. Students were met by their parents and A, in company with his parents, returned home to Busselton. The applicant stayed in Perth overnight with his then girlfriend at his mother's house. On the return of the tour group, no mention or report was made to the Principal of the College or anyone else, of any inappropriate conduct by the applicant or anyone else, on the tour.
- 23 After the return from the Indonesian tour, A's parents said they noticed A becoming withdrawn and he had some problems at school in completing work on time, which they said was unusual. Both spoke to A and he revealed no difficulties to them. However, by the end of Term 1 in 1998, which was A's Year 12, his parents said that he told them he wanted to leave the College. No explanation was provided for this. Despite attempts by his parents to persuade him to the contrary, A left the College and he was enrolled at another secondary school. However, this did not last more than a few weeks. A did not complete his Year 12 and did not sit the TEE examination. He enrolled in a short TAFE course; however, this was not completed.

- 24 Then A developed some significant mental health problems and engaged in alcohol and drug abuse. His parents said A's behaviour became erratic and he ceased participating in many of his prior interests and become socially isolated.

20 years pass – disclosures made to family

- 25 In March 2017, A's parents said they had contact from him and described him as in a distressed state. They said this contact led to A disclosing to them he had been experiencing the return of memories suppressed for many years. During a couple of weeks, A told his parents that while he was on the Indonesian tour, on the last night whilst staying at the hotel, he had been raped by the applicant.
- 26 A's parents said that in discussing the disclosures with him, A did not wish to formally progress the matter through legal avenues. However, with the encouragement of his parents, A sought counselling and support from an organisation providing such services. Apparently, part of the therapy, engaged in by A, was to write out his memories of the events. These disclosures were recorded in a letter from A's parents to Ms Jones at the Catholic Education Office dated 6 February 2019.
- 27 A's sister received a text message from him on or about 18 March 2017 which said that he had been raped by the applicant. She rang him immediately on getting the message. In this conversation, A's sister said he told her in detail what had occurred on the final night in Bali. A and the applicant had to share a room at the hotel, due to how the rooms at the hotel had to be allocated. A told his sister that the applicant took him and other students to a bar and he bought alcohol for them. This included "B52 shots" which A told his sister he recalled specifically. Some of the conversation and comments said to have been made by the applicant made A feel uneasy. His sister said that A told her he then left the applicant's company and re-joined the other students.
- 28 His sister recounted the detail of A's disclosures to her. This described how the applicant had, on their return to the hotel room, sexually assaulted him. He recounted to his sister he was crying after the assault. The applicant had showered and seemed proud of himself. A told his sister of all the blood in the shower and how the applicant told him he had done it before. A also told his sister that the applicant had told him that the applicant had been raped himself by his own brother.
- 29 A's sister said that A told her that to cover things up, the applicant had yelled out of the window of the hotel room to make it sound like an argument had occurred, to account for some commotion in the room earlier. A told her that the applicant

had said to A he knew where he lived as he regularly rode his pushbike past his house. This was said to be to threaten him.

- 30 The following morning, A said to his sister he was spoken to by either the other students or Ms Hunter, who said that they had heard a noise coming from the room he and the applicant had shared the previous night. They thought they heard crying. There was some suggestion that the applicant had told the other students that A had tried to hit him. A also told his sister that the applicant had been angry with him on the plane on the way back to Perth. Both A's parents and his sister said that once he had spoken to them about the events on the Indonesian tour, his behaviour improved considerably. They said that he visited them more often and played music again. In October 2018, A died.

Allegations made February 2019

- 31 By letter of 6 February 2019 A's parents wrote to the Catholic Education Office in relation to the disclosures made by their son. On 12 February 2019, a meeting took place between A's parents and Ms Jones and Mr Wong of the Catholic Education Office. Whilst the letter was written on 6 February 2019, it was given to Ms Jones in that meeting. The purpose of the meeting was to discuss the allegations made against the applicant, who was then a Deputy Principal at Lumen Christi College, in relation to conduct which had occurred over 20 years prior. At the same meeting, A's parents also showed to Ms Jones and Mr Wong a copy of typewritten notes found after A's death. These notes were said to be A's description of what occurred on the Indonesian tour, which were made by him in therapeutic sessions with the counselling service he had been receiving help from. The upshot of the meeting was that A's parents asked Ms Jones and Mr Wong what they would do, and they were told that given the seriousness of the allegations, there would have to be an investigation.
- 32 On 14 February 2019 at Lumen Christi College, a meeting took place between the applicant, the Principal of the College Ms Prendergast, Ms Jones and another Catholic Education Office employee, Ms Taylor. The applicant was informed of the allegations and he was given a copy of a letter of the same date, from Ms Sayce, the Executive Director of the Catholic Education Office. Materially, the letter, formal parts omitted, provided:

I write to confirm the matters discussed with you during today's meeting which was attended by Ms Karen Prendergast, Principal of Lumen Christi College, Ms Carmen Jones, Team Leader Employment Relations at Catholic Education Western Australia (CEWA) and Jayne Taylor, Employment Relations Consultant at CEWA.

I confirm that CEWA is in receipt of allegations of a very serious nature regarding your conduct with a former student of St Mary Mackillop College (formerly known as

Mackillop Catholic College) in Busselton in 1997. On the basis of the information available, I have decided it is necessary to conduct a formal investigation into the allegations, in accordance with CECWA Policy Unsatisfactory Performance and Misconduct (the Policy). I confirm a copy of the Policy has been provided to you alongside this letter.

Specifically, it alleged that while you were employed at Mackillop Catholic College, you attended a tour to Indonesia with a group of five students and one other supervising staff member in the school holidays between Term 3 and Term 4 of 1997. Following a flight delay that led to the tour group staying in Bali for an additional night, you shared a hotel room with a Year 11 student, [A]. It is alleged that during dinner at the Hardrock Hotel that evening, you bought alcoholic drinks for [A], then back in the hotel room, you:

- a) Climbed naked into A's bed;
- b) Forced yourself on top of A and pushed his face into the pillow;
- c) Said words to the effect of *"I am going to hold you down until you pass out. I am not gay. I am a rapist and an opportunist. I fuck men that are queer"*;
- d) Sexually assaulted A by penetrating him anally;
- e) Threatened A with words to the effect of *"Try escape or make any noise and I will knock you out and do it to you again"* and *"If you tell anyone about this, no one will believe you. I know where you live. I swear to God, if you say anything I will kill you and I will kill your parents"*.

If substantiated, these allegations may constitute serious misconduct as set out in the Policy, in breach of:

- Your duty of care obligations to As in your care; and
- Your contract of employment.

This in turn could lead to disciplinary action being taken against you, up to and including the termination of your employment.

- 33 Whilst the letter initially sought a response from the applicant by 21 February 2019, after taking legal advice, and his then solicitor writing to the Catholic Education Office, the applicant was given an extension of time to respond to 14 March 2019. In his letter of response of 14 March 2019 (see Attachment E to the Final Investigation Report, exhibit R5) the applicant repeated his denial of the allegations against him communicated by his then solicitor on 21 February 2019 and said:

I am not sure what I can add. The allegations are heinous and sickening. The words and actions listed in these allegations are inconceivable and did not happen. They are utterly offensive and false. I have never engaged in any conduct which is remotely close to that alleged in your letter. My exemplary record with CEWA since 1990 has been centered on my total commitment to the dignity of the individual and so has my broader life. Everything about these allegations is the antithesis to how I have consistently behaved.

Other relevant information:

- I first became aware of these allegations at our meeting. They are, and remain, extremely distressing to me. My distress has been compounded because, whilst I recognise that in carrying out your investigations there was no obligation to share the information that A (name omitted) was deceased, finding this information out that evening had the effect of compounding my distrust and disbelief in the transparency of the process.
- I generally had positive interactions with A (name omitted) on the Indonesian Trip but had two occasions- once at the beginning of the trip and once on the last morning- to speak to him about smoking cigarettes.
- From the end of 1998 (when he finished Year 12) to March 2017 I had no contact whatever with A (name omitted). In March 2017 I received a series of tweets from A (name omitted). I could not make any sense of the tweets. I did not know what they meant or to what they were referring. I did not respond to the tweets and blocked A (name omitted) from my twitter account. Screen shots of these tweets are attached. Other than the tweets I had no communications or contact with A (name omitted) post Year 12 and limited contact only in Year 12.
- I remained at Mackillop Catholic College through to the end of 1999 before returning to Perth and working at St Norbert College. I applied for the position of Principal of St Mary Mackillop College in 2016 and was interviewed for the role.

The investigation

- ³⁴ The investigation into the allegations is set out in the Final Investigation Report annexed to the witness statement of Ms Jones, the Employment Relations Team Leader for the Catholic Education Office. Those conducting the investigation were Ms Jones, Ms Taylor, an Employee Relations Consultant, and Mr Wong, the Coordinator Child Safe Team for the Catholic Education Office. The investigation started in February and concluded in August 2019. The process adopted by the investigation involved consideration of various policies of the Catholic Education Office including the “Child Protection Policy”, the “Child Protection Procedures – Dealing with Allegations of Misconduct and Serious Misconduct against Staff in Catholic Schools” and the “CECWA Policy Unsatisfactory Performance and Misconduct”.
- ³⁵ As the investigation raised allegations of serious misconduct against the applicant as a teacher and a Deputy Principal, the latter policy was important. The standard of proof adopted by the Investigators was on the balance of probabilities. Documentary evidence considered by the investigation included the letter of complaint from A’s parents and the two typewritten statements (erroneously described as handwritten in the report, which I will refer to as “the Statements”) that A’s parents found amongst his belongings. Contact was initially made with WA Police concerning the allegations. A copy of an Incident Report from WA Police, recording the contact made by Ms Taylor, was obtained under summons

issued by the Registrar. It was tendered as confidential exhibit C1. It records the contact made by Ms Taylor reporting the incident and that WA Police have no jurisdiction over the matter as the victim was deceased and the alleged assault took place overseas. I note the supplementary written submissions made by Mr Mullally on 17 July 2020, in relation this document.

- 36 Several persons were interviewed in connection with the allegations. These included A's parents; the applicant; Ms Hunter; two other students who participated in the Indonesian tour in 1997; A's sister; and one of his close friends. A written record of all the interviews were made, with interviews conducted either in person or by telephone. In the investigation, observations were made in relation to the difficulties associated with the time since the alleged conduct took place; some credibility issues with one or two witnesses; and importantly, that much of the evidence gathered was hearsay.
- 37 The applicant was interviewed on 15 March 2019. He responded to the allegations and answered questions as follows. After asking about the trip before arriving in Bali, amongst others, the applicant told the Investigators that:
- (a) they went straight to Bali for two nights. It was supposed to be one night but ended up being two nights after a flight delay. He had no distinct memories of Bali. He recalled going on a big walk through Kuta but the students did not enjoy it as they got harassed.
 - (b) the group went to the airport the next day and waited for several hours before finding out that the flight had been delayed. They then went to a hotel. He was unsure if it was the same hotel they were in the night before but would lean towards them being in the same hotel.
 - (c) when asked about the room set up and where everyone was staying he was not sure how many rooms they had, but they were in the same location. He said he believed it was the same room set up on both nights and he could not recall any different set-ups. He said he recalled the hotel being a flat or low-level hotel, and it wasn't a skyscraper.
 - (d) he said that when they got back to the hotel from the airport there were still some logistics to arrange in terms of informing families of the delay. He didn't remember the group going anywhere for dinner but that would normally happen. When he was asked if it was a nice hotel the applicant recalled it being a comfortable hotel and it had a beautiful pool.
 - (e) when asked whether the group went to dinner at the Hard Rock Hotel and the applicant buying drinks for A he said that he never purchased alcoholic drinks, and certainly not for A. He was asked if he had his own room in the hotel and the applicant stated yes and he did for the whole trip.
 - (f) when asked about the rest of the allegations that the applicant sexually assaulted and threatened A the applicant denied them. He said none of that happened. They were not in the same room.

- (g) the applicant was asked if he remembered who else was on the tour and he recalled the five students: A, T, B, S, and another although he was not certain about this student's first name.
- (h) the Investigators referred to the applicant's written response where he did not dispute staying at the Hard Rock Hotel. The applicant said he had no memory of the Hard Rock Hotel as distinct from staying at the hotel. He did not recall having dinner there, but it is likely they had dinner at the hotel they were staying at. They had agreed on the second day/night in Bali just to stay at the hotel as it had not been a pleasant experience on the first day. The hotel was comfortable and had a nice pool.
- (i) he was asked to clarify that he believed they stayed at the same hotel on both nights and he confirmed that he had no memory of two distinct locations. The applicant was asked to clarify that he had no memory of the Hard Rock Hotel to stay, eat or drink at. He stated he did not dispute that they stayed at the Hard Rock Hotel but he could not recall it.
- (j) the applicant was asked to clarify his memory that dinner on the last night was at the hotel restaurant and he stated that his memory was that they were all tired and didn't want to leave the hotel and they still had some logistics to organize.
- (k) he was asked if he had any memories of the trip home to Perth and he stated that he did not recall anything which means it must have been a smooth trip. The applicant was asked if he remembered anything from the plane trip back to Perth such as who sat where and he said he could not recall.
- (l) when he was asked what happened when they reached Perth Airport the applicant said he had no recollection of what was arranged regarding transport from Perth to Busselton as this would have been organized by Ms Hunter. He could not recall anything significant happening at Perth Airport.
- (m) the Investigators returned to the issue of accommodation in Bali. The applicant was asked to clarify what he meant when he used the term "strongly believe" in relation to not sharing a room with A and did this mean there was a chance he did share a room with A? The applicant stated that "no, he was being cautious with language." He added that he has been on many tours, trips and camps and has never shared a room with a student. He said he recalled having to make some phone calls to sort out logistics and did not remember a student being present when he did this. He said he spent a lot of time in the room so would recall if A was there too.
- (n) the Investigators referred to the applicant's written response where he spoke to A twice about smoking on the trip and asked the applicant to explain those interactions? He said he found cigarette butts on a table in the student area outside their rooms. He said they were smoked by A. He said he could not recall whether he found them outside or inside.
- (o) the applicant was asked if he had any recollection of the student rooms and replied he did not recall, only that they were all together. He said there was a shared or common area. He did not recall it being five single rooms, it might have been a house with separate rooms but they did not have a room each. He could not say definitively. When asked on a scale of 0% to 100%, where did he sit with his memory of sharing a room with A he confirmed he was 100% sure he did not share a room with A.

- (p) the Investigators asked the applicant to clarify what happened when he found the students had been smoking? He recalled the students were A and T. He had already spoken to them re smoking cigarettes at the start of the tour. He was sharp with them, recalls trying to use the discussion as a chance to try to get them back on track for the rest of the trip. The applicant said he told A and T he was disappointed and asked them not to spoil what was left of the trip. On the first day of the tour he had physically seen A and T smoking. He had a constructive conversation with them after that and made it clear the trip wouldn't work if they couldn't trust them. He discussed consequences. He said he talked to them both about the breach of trust but tried to focus on getting through the last day.
- (q) when asked to describe his general interactions with A before and after the tour the applicant said he had virtually no interactions with A outside the tour. He typically taught a lot of students, but had no real knowledge of A before the tour. Had a fair bit to do with A in 'S' (Solo). They were positive interactions. He did not recall much about their interactions other than the smoking situation. He did not have much to do with A after the tour either.
- (r) when asked if he ever caught up with A after the tour the applicant said no, it wasn't a close relationship.
- (s) the Investigators asked the applicant to discuss the tweets he received from A and why he was confused by them. The applicant said they came out of nowhere. He does not normally access Twitter a lot and he only saw the messages on two occasions, even though there was a long string of messages. He said they didn't make any sense. They just start off with a string of emoji's then go into words like "I've got a bone to pick with you". He said he found it very unsettling and he did not know what they were about.
- (t) he was asked to clarify whether he knew they were from A and he confirmed that he did because they had his name on them. He said that after he saw the tweets he tried to reflect on the Indonesian trip and whether he might have said something untoward to upset A but he was sure he hadn't. As the messages continued he blocked A. The applicant said he may have mentioned the messages to his wife. He did consider taking it somewhere but he was not sure where he would have taken it. He said if he had his time again he would have reported it. The applicant said that once he had blocked A he could have found another way to get in contact with him but he did not do so.

38 A's parents were interviewed on 12 February 2019. In summary, the interview notes are as follows:

- (a) A's father explained that the document (the Statement) was his son's account of what happened to him and made in a therapeutic intervention through the counselling service (name omitted), where he was told not to use the name of his abuser so he called them/him the Elephant. The Elephant was Don Parnell, current Deputy Principal at Lumen Christi College.
- (b) A's father said he had no doubt that what was outlined in Part 2 of my soul occurred because the boy who went away (to Indonesia) was not the boy who came back. He said that within the first week of A coming back (his wife) said to him that A had

changed. Previously he was a happy mischievous boy, and a hero to his sister. But there was an insidious deterioration in his behaviour.

- (c) He said that the event occurred when A was in Year 11, between Term 3 and 4. The applicant was A's English Teacher in Year 12, and for no reason, A left the school in Term One Year 12. Previously he was a straight A student. A's father said that Ms Hunter, A's Indonesian teacher, also noticed a difference in A. They had tried to contact her to inform her of A's death and she was very upset.
- (d) A's father told the Investigators that Ms Hunter clarified the arrangements, and that the return flights from Indonesia were changed. That there were two girls in a room, Ms Hunter and two others perhaps in the other room, and A in a room with the applicant.
- (e) He said that A had sat on this for 20 years. Then he had a revelation and was able to talk about it. A's father said he worked in mental health for 40 years. A talked about leaving his body while this (the assault) happened and looked at pictures on the wall, and after a while he could recall that picture in detail - this is dissociation.
- (f) A's father talked about A having self-destructive behaviours, alcohol, drugs, and low self-esteem. He said that when A revealed this to us (his family) his behaviour with the family greatly improved. A also got back into his music and joined a band which had all waned over the past 10 years. He described it as a textbook response to what had happened to A.
- (g) He claimed that Ms Hunter told him that she recalled the two girls who were also on the tour coming to her and saying there were horrible noises coming from A and the applicant's room, but she did not go to the room. A told them (his parents) that he was crying like a baby on the night, and the girls said that the next day they asked the applicant and A what had happened the night before, and that they had heard a baby crying.
- (h) A's father said they had done some investigating and they knew that the applicant lived around the corner from them at the time of the incident. (when asked how he knew this, he said they had lived in the town for 30 years so they spoke to some people they knew involved in Catholic Education and found out his exact address).
- (i) He confirmed that A told them, his parents, 18 months before he died, and told them it was the applicant, around March 2016. He was 36 years old when the revelation happened. He said that a psychiatrist gave A psychiatric help, and he did not agree with his diagnosis. He treated A for depression and bipolar, and he gave him anti-depressants.
- (j) A's father confirmed the timeline, that A was in Year 11 in 1997, and that the incident happened between Term 3 and Term 4 in the holidays, and that in 1998 A was in Year 12. A's mother said she had asked A at the time if he was alright, she thought/assumed that he may have had a knock back from one of the girls who was on the trip who she thought he liked. His mood became withdrawn, quiet, he used to be everyone's friend, and was an A student in History and Science. He wanted to go to university to study science. Then they started getting notes home from the school saying he wasn't doing his homework. As to A's academic decline, they just thought it was adolescence, they did recall the school calling them about A not doing his work.

- (k) A's father said that A left school at the end of Term 1, Year 12 in 1998. He thinks this was because the applicant was A's English teacher. Around week 4 of Term 1 A turned up at his mate's place and said he wouldn't be going back to school. His parents talked him into going to the State school, mid Term 1, but he did not last long, so he went to TAFE to do a land care course. He also advised that A had done 6 years of guitar lessons with Taj Burrows father, the commitment was there, then he had a total change when he got back from Indonesia.
- (l) When he was asked whether A had considered going to the Police, A's father advised that A chose not to do anything himself with this, he felt he wasn't strong enough, and couldn't handle cross-examination, if there was a court case, and he could not relieve it all. He was 36 at the time and he chose not to. And they both supported him in that. If they'd known more at the time they feel they could have done more. They trusted the teachers.
- (m) A's father said that A told him that the applicant spoke about previously doing this before, and that his older brother did it to him and that's why he did it to A. He has confirmed that the applicant has an older brother who is a rugby player.
- (n) He said his memory was that the counselling service went to the Police, to see if the applicant was on the "list". Detectives interviewed them in Busselton, January 2019, around the 3rd, and they indicated that as A was deceased there wasn't anything they could do. He also said that the counselling service told them to contact Catholic Education, the Police said they wouldn't give advice but that as parents, they would contact Catholic Ed too.
- (o) When asked what they would like to see happen he thinks it should be investigated, in an open, honest, and transparent manner, and for us parents to be included in that process.
- (p) A's father gave a document to the Investigators titled "Part 4 of My Soul the next step" and explained this was another piece written by A as part of his treatment at the counselling service. In it, A says he'd like to sit down in a room with "The Elephant" and his parents and his parents would like to meet with the applicant. A's father said that he had thought about confronting the applicant, just waiting after school in the car park and walking up to him and saying, "you've been waiting for me for 20 years haven't you".
- (q) The Investigators asked A's parents for clarity around the documents they had handed to them, titled "Parts 2 and 4". His father said they had found them in A's belongings after he passed away. That was the first time they had read them.
- (r) The Investigators asked A's father about the girls on the trip, and he said they were S and B, both inaugural students of the College like A. At the 20-year reunion, he went to that, spoke to the previous Principal Peter Glasson and Clive Johnson. B was a teacher in Germany. The two other girls, one was Chinese or Vietnamese and her name was J. They said they heard she died in Perth last year. The other girl was T, they have spoken to her and she had nothing to add. She confirmed she remembered the night at the Hard Rock Cafe, swimming in the pool, they live around the corner from her family.

- (s) A's father was asked whether he was sure A was referring to the applicant. He said he was absolutely sure. There were only five students and two teachers on the excursion and it was the applicant.
- (t) He talked about what happened to A in the years after the incident, that they took him to get counselling help, for depression, he went to the GP, a few years after. When they took him to the GP they got him antidepressants. A tried them but they did not agree with him. A's father did not agree with the diagnosis of depression, or the diagnosis of bi-polar, he thinks he had PTSD. In 2010 A was diagnosed with bi-polar and given lithium, he did not like it at first but then it stabilized him so he kept with it.
- (u) He told the Investigators that A's psychiatrist was (name omitted) but for the bi-polar diagnosis he was admitted to Sir Charles Gardner Hospital for three weeks on a voluntary hold. Then he went to see (name omitted). He started out at a Clinic with (name omitted), he left, then (name omitted) took over. They were not frequent visits though. They tried to get A to meet with other people but he didn't go.
- (v) A's father said that A lived with them for most of the time. He moved out in 2010, but he would go and come back, as he couldn't settle. He had insomnia, he would walk the streets and wouldn't take anything for sleeping. He said that in 2016 A rang his parents to tell them he'd gone to the counselling service and about the incident, and they went straight to him, he was around home a lot. They said they would support him 100% in what he wanted to do. They told him the counselling service are the specialists, go to them, and they got some information for parents dealing with it.
- (w) He said that A had his own place for the last two years, they assisted him in getting a place. He had a stable base, and maybe that's why he disclosed at that time. A also had a friend, Scott, who he told about the incident. A didn't tell anyone else, he told no-one from the time of the incident to 2016, and then only told his parents and Scott after that.
- (x) The Investigators asked A's father if A ever tried to contact the applicant and he said he thought he did via Twitter, but he only used emojis, and the tweets had since been removed.

39 Ms Hunter was interviewed by the Investigators on 15 March 2019. In summary, her responses on relevant matters were as follows:

- (a) When asked about the tour group's accommodation generally, about the rooms, Ms Hunter said that the whole trip the applicant and A had their own rooms, so did she. Only the girls shared.
- (b) She also commented that the applicant was always going off having a smoke. The kids knew he was doing that, but he tried to hide it. Ms Hunter said she spoke to him about it, said it was stupid because the kids knew what he was doing, and he started drilling her, talking to her about mentorship, saying you cannot be friends with these kids. Ms Hunter said her counsellor has since told her that this was the applicant grooming her.
- (c) Ms Hunter said they stayed in Solo for a week. They then got the train from Solo to Surabaya, then a boat to Bali, then to Denpasar. When they got to Bali, they stayed

overnight. She said they stayed at the Adhi Dharma hotel in Bali, she remembers that was the hotel as that was where police caught the Bali Nine. They had their own rooms. That was the end of the trip. Ms Hunter reconfirmed their trips home, called the Principal Peter Glasson, and used the phone at the hotel. They left for the airport and the parents left from Busselton. They were flying Sempati Air.

- (d) When they got to the airport a western woman came out in a Sempati Air uniform and Ms Hunter realised that there was a problem. The woman said they have had to put 75 people off the flight as the plane was not a 747. Ms Hunter protested and told her the student's parents were on their way to the airport to meet them and they had to get on the flight. She said she "lost her battle" with the Sempati Air woman, and they had to find accommodation. They got a three-bedroom villa.
- (e) The applicant suggested that he and A would share a room. The girls all shared and we had a lounge room. The hotel was called the Kartika Plaza. It was a villa connected to the hotel, and at the front of the hotel near the road so not ideal, but they had no choice. As it was school holidays there were not many places available.
- (f) Ms Hunter said that the next day everything was fine, when they were leaving that Sempati Air woman tried to charge them for the night and Ms Hunter refused and left in the taxi. Ms Hunter said that "Roxanne", the Sempati Air woman, might have been the one who suggested the Kartika Plaza.
- (g) She said after they got home, A started to not hand in his schoolwork. She would see him around the place, walking around during classes, there are some kids who go to a third world country and when they come back they appreciate everything more, not A, which was unusual, then the next year he left school.
- (h) The Investigators asked Ms Hunter about that last night in Bali and what happened. She said she was mainly in the foyer of the hotel, ringing parents, ringing Peter Glasson the Principal, as he had to go to the airport to let the parents know the flight was delayed.
- (i) She was asked to clarify when they got to the villa, how did they divide the rooms? Ms Hunter said she didn't remember, but she knew she and the applicant couldn't be in a room together, or either of them in with the girls, "so there was no other option."
- (j) Ms Hunter was asked whether they ever went to the Hard Rock Cafe. She said that the night before, the last night, the applicant took the students to the Hard Rock Cafe and bought them drinks. She only found this out when she got back to Perth, as one of the girls told her.
- (k) She said on the last night the girls were in the lounge room, up watching the movie "Scream" and A was in the bedroom with the applicant. Ms Hunter asked where A was, and why wasn't he watching the movie with the girls. The girls said he had gone to bed and was in the room with the applicant. Student S said to her why don't you go and knock on the door. Ms Hunter had been in the foyer making phone calls.
- (l) Ms Hunter again made the comment that she never even thought, at the time, but A's disposition changed so much, she always wondering what had happened. When his father contacted her, it was no surprise. She knew something had happened because she knew A so well, from teaching him and the trip to Indonesia. When asked if she ever spoke to A or anyone about his change in behaviour, Ms Hunter said she thinks

she spoke to A's mother about him losing languages and levels. She clarified that before the trip, A was handing in his work, but then he became really jittery. Before the trip A was personable and polite. She was asked if he had any friends, and Ms Hunter said he didn't have a group of boys he hung around with, no-one stood out. He was the type of student who was friendly with girls and boys. Ms Hunter said she had an office facing the quadrangle and she would see him wandering around and she would go out and ask him what he was doing.

- (m) Ms Hunter was asked about the setup at the Kartika Plaza Hotel and did they all share a bathroom. She said no that each bedroom had its own ensuite. She said that one night the students were in the pool, drinking cocktails, and that was the first time she caught them drinking cocktails. When asked for clarification of when this occurred, she said that on the first night (the first night in Bali) the students went for a walk with the applicant and they went to the Hard Rock Cafe, and Ms Hunter stayed at the hotel. The second night (in Bali) they got room service. The students were keen on not eating more rice so they all had different things they wanted. She did not remember where they ate. She said that they possibly took food to their rooms.
- (n) She told the Investigators that the girls then watched "Scream", and she did remember the applicant and A going to bed earlier. And S wanted her to knock on the door. Ms Hunter did not know why and didn't knock on the door. She said if they were asleep she did not want to wake them. S did not expand on why, she might have said that she heard banging noises, but did not seem worried. She just said maybe you should go and check on them.
- (o) The Investigators asked Ms Hunter to clarify what happened the night the students were in the pool drinking, and who was in the pool. She said that Jack, their 19-year old Indonesian gopher, was there, he accompanied them from Java, it was inappropriate for unaccompanied females to be walking around. Jack had left, the first night in Bali he was there but then he left. She said all the students were in the pool, she wasn't sure if they were all drinking though. The drinks were coloured, she had thought maybe they were just soft drinks. The applicant and all the kids were in the pool the first night.
- (p) Ms Hunter said she thought on the last morning in Bali the flights were at about 9 or 10 am. She did not remember anything specific about the applicant on the morning or A as she was organizing, and reconfirming flights beforehand. With the experience of the day before she went and did all that. She had to go to the Sempati Air office to reconfirm. It wasn't far from the Kartika Plaza Hotel. She said she left the applicant to organize the students. She did not specifically remember seeing anything that morning. She said she thought they were all sitting together on the flight back to Perth.
- (q) In relation to her conversations with A's father, Ms Hunter said that he did not give her the statements that A wrote. They just spoke over the phone, and she couldn't go to A's funeral. He telephoned her in 2017, then rang back to tell her that A had died. Ms Hunter said A died when he was in his thirties. From the research she has read that's the age people have the courage to come forward. She said she did not have any contact with A after he left school. The last she heard he left school and she always wondered what happened. Ms Hunter said A declined in term 4, stopped handing in work and when she asked him he was very cagey and quiet. He was the

opposite of the others who knuckled down. It was an opposite effect, and she wondered what happened to him.

- (r) She said initially she thought the applicant had just touched him up, now she knows it was full rape. Ms Hunter clarified that she got the first impression from the first call from A's father in 2017, and that he disclosed the information regarding A's alleged rape in the more recent telephone call with her.
- (s) Ms Hunter was asked about her contact with A's sister. She said she was in contact with her from 2010 to 2015, as she worked at the chemist in Margaret River. Ms Hunter had spoken to her recently and A's sister had told her that A had drug issues. Ms Hunter said she has no doubt the sexual assault occurred. She knew the applicant was at Lumen Christi College in pastoral care.
- (t) She clarified the differences she observed in A after the trip. She said it was flightiness and he was jittery. Ms Hunter said she noticed, after the event, he was at school dashing about behind poles, avoiding you it was so stark and a total departure from his personality before. She said that for 20 years she had wondered what happened. She said A was not avoiding her.
- (u) Ms Hunter commented that from the way A wrote his statements coupled with her research and experience now, in hindsight she thinks that the applicant was grooming her as well, so that she would not doubt him. She said that if she had any doubts about the applicant at the time she never would have put them in a room together. As to grooming, Ms Hunter said she meant the way the applicant tried to mentor her when she did not want to be mentored.
- (v) She said on their return to Perth Airport her boyfriend picked her up. She spoke to all the parents, and then it was all over. It was the weekend, and then school went back the next week.

40 Two students who went on the Indonesian tour were also interviewed by the Investigators. One of them, B, was interviewed by telephone on 4 April 2019 as she was then living in Germany. B confirmed her attendance on the Indonesian tour in 1997 and recalled the names of the other students and that two teachers led the tour group, Ms Hunter and the applicant. She remembered the applicant being present as a chaperone as there was also a male student on the tour. B's recollection of events on the tour was not particularly good, apart from confirming the locations they went to. In relation to the last two nights in Bali, B did recall the flight delay and the need to stay an extra night but could not recollect the hotel location on the last night. She did say she shared a room with another student, S, most of the time and that two of the other girls shared a room. B recollected that on the last two nights the group did stay in a hotel and not in homestay accommodation, as in Java. She did recollect that the hotel had a pool.

41 In relation to what occurred on the last two nights of the trip, B did not think the students consumed alcohol but possibly the Indonesian teacher did. She remembered a student smoking in Java. B did not recollect the sleeping arrangements whilst the tour group was in Bali. She said that she could not recall

where the teachers slept, did not recall A and the applicant sharing a room, but did recall he did not share a room with the girl students. B did recollect going to the Hard Rock Café, however.

- 42 Another student on the trip, S, was also interviewed on 4 April 2019. S recalled there were five students and two teachers on the tour. S had a limited recollection of the applicant but had some recollection of calling him "Parnie" and she thought he was an English teacher. S appeared to have some recollection of the locations that the tour group visited but not in any detail. She referred to the flight delay on the return trip back to Perth from Bali. She referred to the airline putting the group up in a hotel. She described it as a big hotel with two villas and they were self-contained with kitchens and a bedroom up on the top. S thought that the students had their own rooms and that they were in two villas. She said that she generally roomed with student B for most of the time and she seemed to think there were three bedrooms in each villa so, rooms for the group.
- 43 When she was reminded there were seven people on the trip, five students and two teachers, S was a little less clear. She seemed to think on the final two nights in Bali the group stayed at different hotels. She referred to the first hotel being just rooms. S described there being villas in the second hotel and said she had a photo of three of the girls sitting outside one room which were tiled and recalled tiling and steps up to the rooms. She said that no teacher roomed with her, and if she did share a room it would have been with B or another student, T. She did remember a grand resort with a pool. S said that they had dinner by the pool.
- 44 In relation to the second night, S said she could not recall who shared with who. But she did say as a 16-year old girl she would not have stayed in a room by herself. She also said that the teachers were not around much for those last two nights.
- 45 As to the accommodation arrangements generally, S said that A never shared with girls on the trip. The group did not have their own rooms at other locations so occasionally they did have to share with the teacher. As for the last night, given that the airline had paid for the accommodation, it was what she described as a "bunk in" situation. Whilst S was initially asked whether on the trip, she drank any alcohol and she said no, given that most teenagers around the group in Indonesia were Muslims and they did not drink. However, S was later asked whether she went to the Hard Rock Café and she said yes, the group did go there and they had karaoke on at the time and she did think that they were drinking alcohol there. S recalled that cocktails came in huge glasses and she assumed that they ordered it. She described it as being dark and loud like a nightclub, but she could not recollect whether the teachers were present.

- 46 When asked whether at some point, she remembered being in a room with the other girl students watching a movie, she said yes, highly likely. She said that when spending time together on the last night the students stayed in, had room service or food in the room and they watched a movie. When asked whether the students had their own bathrooms, S said that each room had its own bathroom. But she could have been sharing with B. S seemed quite sure that they (presumably the airline) gave the group two villas next to each other and that they all shared a bathroom upstairs. She thought maybe A stayed in her villa. Either that, or he was in the other villa, because she recalled him being upstairs and he either stayed there or was looking about and stayed in the other villa. But she could not be sure.
- 47 A friend of A's, Mr Bardowski, was also interviewed by telephone on 12 April 2019. He was a friend of A's and had known him since working together at a petrol station in 2002. He said that in late 2017 or early 2018 (he could not be sure of the timing), A told him what happened on the school trip in Indonesia. He told him what he had gone through and how he had processed it. Mr Bardowski said A told him it had been buried in a dark corner of his mind and he had dreams and was remembering what happened to him. Mr Bardowski confirmed that A had difficulties with drugs and depression and was diagnosed with bipolar and ADD. He was on various medications for these conditions.
- 48 Mr Bardowski's memory was not good, but he said as far as he recollected, A told him that a teacher was in the same room with him on the trip and raped him. A described what had happened near his bed and the noises he heard and after he had been assaulted, the teacher threatened him. Mr Bardowski referred to A telling him he was about 19 and had difficulties with drugs. He also mentioned that he had spoken to A's father at A's funeral, and that Mr Bardowski, in conversation with A's father, informed him of what A had told him. A's father told Mr Bardowski that the Investigators may be in contact with him to speak with him about the matter.

Referral to expert

- 49 In May 2019, the Investigators concluded that based on the materials obtained to that point, it was decided to obtain expert advice on aspects of the investigation. The person identified was Dr Chamarette, a psychologist with extensive experience and qualifications in cases of adult victims of child sexual abuse. Dr Chamarette was asked to advise on the reliability of the Statements that A made. This was also sought given A's history of alcohol and drug abuse, and that A also disclosed in his counselling, another but unrelated sexual assault on him

several years after the Indonesian tour in 1997. Dr Chamarette was asked if these factors may have influenced the credibility of A's version of events.

- 50 Dr Chamarette's opinion was also sought on the credibility of the applicant's responses to the allegations. The applicant was afforded the opportunity to meet with Dr Chamarette, but he declined to do so.

Expert report

- 51 In her report to the investigation team, dated 24 July 2019, Dr Chamarette concluded in relation to the Statements made by A that:

There doesn't seem to be any doubt that A believed himself to have been a victim of sexual assault from Mr Don Parnell (even though he had blocked it out for 20 years) and that this appeared to have substantially altered his behaviour, school attendance and adjustment and may have contributed to his alcohol/drug addiction and depression (PTSD). The literature on delayed recall and disclosure of sexual assault in childhood supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997.

- 52 As to the therapeutic context in which the Statements were said to have been made, Dr Chamarette observed:

It is understood that [A] wrote two undated statements which are the basis for the allegations of historical child abuse in the course of counselling with (name omitted), a specialist sexual assault/abuse counselling service based in (location omitted). There is no indication of the context in which he provided this. If documents were made in the course of therapy they may contain emotional truth of the experiences being worked through but not necessarily strictly factual or accurate accounts of what occurred and which people may have been involved even though he named Mr Parnell as one of the two people from whom he told his sister that he had experienced sexual assault. There is also uncertainty as to intent of the writing as he had stated to his parents that he did not want to pursue the matters through the Police. [A] told his sister in 2016 that he had forgotten or repressed all memory of the incident in Indonesia for 20 years and also a subsequent unrelated rape experience which he was reminded of by meeting the person involved which had apparently re-activated his memories and recall of both instances. This pattern of receiving a "trigger" which recalls historical material is very frequent and a characteristic of disclosure of historical abuse.

- 53 Overall, as to the Statements, Dr Chamarette concluded that:

In summary, I find A's accounts credible and compelling with regard to his belief that it occurred but would not support his written statements as being totally accurate and factual in all aspects because of the therapeutic context in which they are written as opposed to affidavits or official or formal complaints. I do not regard his drug use as a sufficient explanation that his memories are drug-induced or delusional though I could see the

possibility of conflation with other sexual trauma as a question which it is not possible to resolve.

- 54 In terms of considering the applicant's response to the allegations against him, Dr Chamarette said:

Basing my response to this question upon the applicant's denial and shock in the face of the allegations rather than a face to face interview makes clinical judgement difficult. The main challenges to his credibility in response to the allegations revolve around his vagueness or inaccuracy in relation to the events. e.g. 1) his lack of definite memories and his apparently inaccurate denial that he shared a room with the only other male in the party when it was in a 3 bedroom villa. e.g. 2) his inability to recall that he had then had [A] in his English class and that he had dropped out after 1 term in 1998.

Some people might see his lack of accurate memories or any memories as consistent with his denial that anything untoward occurred. However it can also support the idea that just as [A] blocked out his memory, that Don Parnell may also have been appalled or traumatised by the events and blocked the entire period out of his mind. This is more credible to me than that he is lying as he would not have become so distressed.

- 55 Finally, in terms of two of the three possible options identified by the Investigators in their interim report, that being that "Allegations Substantiated" and "Allegations unable to be substantiated or disproven", Dr Chamarette expressed the following opinion:

"Option One: Allegations Substantiated.

While this is cogently presented in the Preliminary Investigation Report, the comments made above regarding the possibility that while something may have occurred and that [A] sincerely believed and recalled the sexual assault in great detail, the material which presents the evidence is significantly flawed in that it did not come from his intent to pursue the complaint himself but to make it known to his parents and to seek resolution and occurred in a therapeutic context which remains unclear. You may need legal advice as to whether "on the balance of probabilities" this would be considered sufficient in an Australian context.

Option Two: Allegations Unable to be Substantiated or Disproven.

The arguments for this finding are well outlined in the Preliminary Investigation Report and I find them more persuasive than those for substantiation. While I don't find the evidence for substantiation of the allegations convincing neither do I see any strong support for disproving the allegations and providing sufficient grounds for exoneration of the applicant simply on the basis of his strong denial."

- 56 I should note that members of the investigation team suggested, when called to give evidence by the respondent, that Dr Chamarette went outside of her brief when making the above observations in relation to options one and two.

The investigation outcome

- 57 The Final Investigation Report was dated 2 August 2019. The Report summarised the procedure adopted, the allegations, and other matters, including the documents provided and a summary of interviews with witnesses and the referral to Dr Chamarette for an expert opinion. It referred to her conclusions on the two statements from A and the applicant's credibility, but not her comments on the two outcome options canvassed in her report.
- 58 Under the heading "Findings and Outcomes" (parts were redacted dealing with material in the nature of legal advice and options), the following is stated:

8. Findings and Outcomes

As it appears there are no longer any viable lines of enquiry in this investigation process, findings must now be reached on the "*balance of probabilities*", based on the information currently available.

REDACTED

* It is noted that one element of the allegations as put to Don Parnell is likely incorrect- A's statements indicate that the alleged assault occurred on the final night in Bali after the group had dinner and drinks at the Hardrock Cafe. Witness evidence appears to indicate that the group had dinner at the Hardrock Cafe on the preceding night. This is not considered to be fundamental to the veracity of the allegation of assault but has been taken into consideration.

a. Option One: Allegations Substantiated

The first option is to reach a determination that the allegations are substantiated. This can be justified as the standard of proof for a workplace investigation is "*on the balance of probabilities*"- this means the determination must be reasonable but is also somewhat subjective. In other words, "*is it reasonable to determine based on all the information currently available to us that this incident is likely to have occurred?*". While witness evidence was largely unhelpful and in some instances, unreliable, there are a number of factors that would support this as a reasonable determination:

1. The level of detail with which A described the alleged assault is very compelling, and his version of events as outlined in his written statements remained consistent with each person he recounted the incident to including [A's parents], [A's sister] and Scott Bardowski.
2. A's statement outlined the sequence of events during the trip to Indonesia in great detail and by all other accounts, his recollection of the trip is accurate. The question then remains, if he had such a clear and accurate recollection of the trip (when they went, who was there, where they visited, the activities they participated in, the flight delay in Bali etc.) , why would the alleged assault as recounted in his statement be fabricated or incorrect?
3. It could be argued that A had a personal issue with Don Parnell which compelled him to fabricate this allegation against him, however this would make little sense. If A had a personal vendetta against Don Parnell and fabricated the

alleged assault for the purpose of tarnishing his reputation , one can only conclude that he would have openly told many others about the alleged assault in an attempt to disparage him long before 2016/2017 when he finally disclosed it to his family.

4. A's "tweets" to Don Parnell in March 2017 demonstrate that he was trying to communicate with Don Parnell about something that happened or they discussed in the past. It remains unclear why A would send these "tweets" to Don Parnell if they had no history other than both attending the trip to Indonesia.
5. A sought counselling support from (name omitted), a service specialising in counselling for victims of sexual abuse. It is highly unlikely that unless the alleged assault did occur (or at the very least A himself truly believed it happened), that he would have sought this type of help.
6. A's pattern of disclosure is consistent with statistics for adult survivors of child sexual abuse in that he disclosed some twenty years after the alleged incident. Further, A was reticent to report the incident to the Police for fear of having to relive it.
7. Witness evidence from Clarissa Hunter and A's family regarding the change in A's behaviour following the trip to Indonesia would further support the likelihood that the alleged assault occurred as the reported change in A's behaviours are consistent with those typically demonstrated by survivors of sexual abuse, including becoming withdrawn and antisocial.
8. Witness evidence from Clarissa Hunter does serve to support the allegation that A and Don shared a hotel room in Bali.
9. Don Parnell has denied the allegations but has failed to provide any compelling evidence to suggest that he did not in fact share a room with A in Bali (i.e. he was unable to say what the hotel sleeping arrangements were on that final night in Bali) and has also demonstrated a tendency to respond dishonestly to questions asked of him. For example, he categorically denied that he purchased or drank alcohol with students on the trip, however it was confirmed by witness evidence that this did in fact occur.
10. Each of the above arguments has been supported by the expert opinion of Christabel Chamarette, although it is noted that A's statements were written in a therapeutic context and cannot be taken as statements of fact.

For the reasons outlined above, it is reasonable to conclude that on the balance of probabilities, the allegations are substantiated. The recommended outcome for Karen Prendergast to consider in this instance would be a finding of serious misconduct and the termination of Don Parnell 's employment.

REDACTED

- ⁵⁹ In terms of recommended steps, the Final Investigation Report refers to Ms Prendergast, the Principal at Lumen Christi College, writing to the applicant informing him of the outcome of the investigation and that the substantiation of the allegations amounts to serious misconduct, warranting summary dismissal.

This occurred and the applicant was summarily dismissed for misconduct by letter dated 20 August 2019.

The applicant's challenge and the employer's response

- 60 On behalf of the applicant, several submissions were made as to the attack on the findings reached by the respondent, following the investigation and its outcomes. This was all in the context of the applicant's steadfast denials of the allegations against him.
- 61 First, the applicant maintained there was no direct evidence against him to substantiate the allegations that he sexually assaulted the student. As A had died in October 2018, much of the evidence arising from the investigation, and as given in these proceedings, was hearsay. Some of it was circumstantial. Second, the applicant contended that aspects of the investigation and subsequent findings were flawed. Several significant findings of the investigation were not supported by any evidence, let alone only hearsay evidence, as the submission went. Third, several persons spoken to and interviewed by the Investigators, had, it transpired, been contacted by A's father in the months before the investigation. This included Ms Hunter, the Indonesian teacher who was the school tour organiser. The submission was this evidence had been tainted.
- 62 Fourthly, the applicant submitted in effect that the Investigators had reversed the onus of proof, so it seemed in relation to aspects of the Final Investigation Report, it was for the applicant to disprove the allegations made against him. Fifthly, it was contended that simple facts were not checked by the Investigators. For example, the allegation that the applicant admitted to A in the hotel room he had been sexually assaulted by his older brother. The applicant submitted that he did not have an older brother, and this was never checked with him. However, the evidence in these proceedings was that the applicant did have a younger brother. Also was the allegation that the applicant told A he knew where he lived as he rode his pushbike past their house. The applicant submitted that he did not have a pushbike in 1997 and could not have done what was alleged. It was not denied however, that the applicant lived close to A's parents' house at the material time.
- 63 Sixthly, the applicant contended that allegations about having dinner on the last night at the Hard Rock Café was not supported by any evidence. The assertion that the applicant purchased alcohol for the students was said by the applicant to be based on third-hand hearsay as reported by one female student only, and not any other. Finally, the applicant maintained that the Investigators, as reflected in the Final Investigation Report, did not turn their minds to the appropriate level of proof required, given the seriousness of the allegations. The applicant contended

that the civil standard of proof, as discussed and applied by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 should have been applied. This meant there would have needed to be a level of certainty on the evidence, consistent with the gravity of the allegations made. This was especially as one of the Investigators, Ms Taylor, is a legal practitioner.

- 64 Overall, the submission was made by the applicant that the investigation and its outcome was hopelessly flawed. The applicant's summary dismissal based upon it was harsh, oppressive, and unfair. There was no valid reason for his dismissal. The applicant also submitted that he cooperated with the investigation and his employer, despite legal advice to the contrary.
- 65 For the respondent it was contended that based on the totality of the evidence, including the oral interviews and documents, the Investigators could come to the conclusion on the balance of probabilities that the applicant's misconduct had been established. The conclusions reached by the Investigators were substantially based on disclosures made by A to his parents and to his sister. This evidence according to the respondent was "consistent and compelling". The submission was also made these conclusions were consistent with the evidence called in these proceedings from the counsellor, to whom A made the disclosures in his therapy sessions.
- 66 And, the respondent contended, particularly given the Royal Commission into Institutional Responses to Child Sexual Abuse, that the approach to the civil standard of proof set out in *Briginshaw* should not be adopted by the Commission. Rather, given the highly unusual circumstances, the standard of proof should be that applicable to the National Redress Scheme, which is a "reasonable likelihood" threshold.
- 67 The respondent contended that despite the seriousness of the allegations, the respondent conducted as thorough an investigation as it could, absent the police doing so, given that the conduct took place outside of Australia. It was submitted that the applicant was given a fair go in the investigation and that the respondent followed its relevant policies in its investigation of allegations of serious misconduct. It was therefore submitted that the respondent had a valid reason for the dismissal of the applicant and his dismissal was not, in the circumstances, unfair.

Some issues arising and the standard of proof

Briginshaw approach

⁶⁸ Commission proceedings, being civil, the standard of proof to be applied is that applicable to civil proceedings generally, that being on the balance of probabilities. In cases of misconduct, for example involving serious allegations by an employer, depending on the gravity, the civil standard still applies, but consistent with the principles in *Briginshaw*, whereby a higher level of satisfaction of proof is required. As Dixon J said in *Briginshaw* at 361 – 363:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed.

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

...

This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

⁶⁹ This situation most often arises in civil cases where a central issue is whether the facts in question also amount to the commission of a crime. As the learned author in *Cross on Evidence* Australian Edition (loose-leaf) expresses it at par [9050]:

[9050] Civil Standard

Special considerations apply when the question of whether facts amounting to a crime have been proved arises in other proceedings. The difficulty is that the court in those proceedings is placed in a dilemma in which it must abandon either consistency of standard of proof as between two different proceedings relating to the same issue, or abandon it as between two different issues arising in the same proceeding. Such a dilemma can arise in administrative proceedings for the recovery of compensation for criminal injury. It can also arise in an ordinary civil case. Damages are claimed by A for a libel in which B referred to A as a bigamist; the insurers defence to an action on a policy of fire insurance is that the insured was guilty of arson; or the plaintiff simply claims damages for a conspiracy to defraud. Although in England there are some cases supporting the application of the criminal standard, in Australia (and in other English cases) the law is that the civil standard applies, though the gravity of the issues must be borne in mind. That approach is commonly employed where civil proceedings are brought in relationship to contraventions of those parts of the Competition and Consumer Act 2010 (Cth) which can be the subject of criminal prosecutions, and where civil proceedings are brought under that Act for a penalty. The approach does not change the civil standard of proof. It merely reflects the perception that members of the community do not ordinarily engage in serious misconduct. “Some things are inherently a great deal less likely than others. The more likely something is, the more cogent must be the evidence required to persuade the decision maker that it has indeed happened” (citing *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639).

(Footnotes omitted)

- 70 (See also: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170; *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97).
- 71 It has been held this principle applies in proceedings not subject to the rules of evidence where an allegation of child sexual abuse has been made: *NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221; (2017) 95 NSWLR 577. In *NU*, the issue arising was making protection orders under the *Children and Young Persons Care and Protection Act 1998* (NSW), which are civil proceedings. However, under that legislation, the rules of evidence do not apply, unless the court makes an order that they do. Section 140 of the *Evidence Act 1995* (NSW) refers to the civil standard of proof in civil matters, but this is subject to the nature of the subject and the gravity of the matters alleged (i.e. the *Briginshaw* approach). In deciding the appeal and the standard of proof in *NU*, even though the court at first instance was not bound by the rules of evidence, after setting out s 140, Beazley P (McColl JA and Schmidt J agreeing) said:
50. The parties made no reference to s 140 in their submissions. Whilst proceedings under the Care and Protection Act are civil, the general position is that the rules of evidence do not apply unless the court makes an order that they are to apply to the proceedings or to part thereof: s 93(3). It would follow, in my opinion, that the *Evidence Act*, s 140

would not apply to the assessment of evidence in a legislative framework where the rules of evidence do not apply.

51. It was suggested that the decision of this Court in *Director General of Community Services; Re Sophie* [2008] NSWCA 250 at [48] was authority that the *Briginshaw* standard applied to a case such as the present and, accordingly, that his Honour was correct in considering that he was required to determine whether the allegations of sexual abuse had been made out on the *Briginshaw* standard.
 52. In *M v M*, the High Court considered that the Family Court should not make a positive finding as to the truth of an allegation of sexual abuse unless satisfied according to the civil standard of proof, having regard to the factors mentioned in *Briginshaw v Briginshaw*, per Dixon J at 362:

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.”
 53. The *Briginshaw* standard, like the principle in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, is often misunderstood. Correctly applied, as the Court stated in *Re Sophie* at [50]:

“... The requirement stated in *Briginshaw v Briginshaw*, that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, per Mason CJ, Brennan, Deane and Gaudron JJ; *Palmer v Dolman* [2005] NSWCA 361 at [41]-[47] per Ipp JA (with whom Tobias and Basten JJA agreed).”
 54. I accept that where there is an allegation such as of sexual abuse in circumstances such as arise in this case, it is appropriate and necessary to apply the *Briginshaw* standard, as properly understood. Indeed, it is generally accepted that there is no underlying conceptual difference in the application of the *Briginshaw* standard and the *Evidence Act*, s 140.
- 72 Given the gravity of the allegations in this case, the *Briginshaw* approach should be adopted.

Nature of the evidentiary onus – misconduct cases

- 73 Another matter that arises, is the approach to be taken to assessing the actions of the respondent, as the applicant’s dismissal was summary for misconduct. This is in the context of the overall burden to establish unfairness, still resting on the applicant. In his written opening submissions, the applicant referred to “the evidentiary onus” on the respondent to establish on the evidence, that the alleged sexual assault, providing the basis for the applicant’s summary dismissal, took place. Reliance was placed on a decision of the Full Bench of the Commission in

Winkless v Bell (1986) 66 WAIG 847. The applicant also submitted that whether the alleged misconduct occurred is a conclusion of fact, and the decisions of the Full Bench in *Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 and the Industrial Appeal Court in *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 were cited in support.

- 74 The respondent contended that as the police could not investigate the allegations, and it involved a teacher in its school system, the respondent had to investigate under its relevant policies. It did so to the best of its ability and in all the circumstances it was as thorough as it could be. The respondent submitted that this did not and could not be to the standards of the police, given this was an industrial matter.
- 75 Given the disparity in the submissions of the parties on this important point, I directed my Associate to write to the parties on 9 March 2020, after the hearing and the reserving of the Commission's decision, to raise two questions. Formal parts omitted the letter relevantly provides:

In the written summary of submissions of the applicant it is contended at par 9 that the respondent carries an evidentiary onus of establishing that the conduct of the applicant took place and cites a decision of the Full Bench of the Commission in *Winkless v Bell* (1986) 66 WAIG 847. Furthermore, it is submitted at par 10 of the outline that whether the alleged misconduct of the applicant occurred is a conclusion of fact to be reached by the Commission and the cases cited in support are *Garbett v Midland Brick* [2003] WASCA 36 and *Minister for Health v Drake-Brockman* [2012] WAIRC 00150.

In *Drake-Brockman*, an issue arose on an appeal to the Full Bench as to the Commission's conclusions at first instance in relation to the evidentiary onus in the case of a summary dismissal for misconduct. The Full Bench observed that there was some disparity in approach to the obligations on an employer in cases such as *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224; *SDA v Jewel Food Stores* (1987) 22 IR 1 and *Sangwin v Imogen Pty Ltd* [1996] IRCA 100 on the one hand and in *Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 on the other. These matters were discussed by the Full Bench at pars 49 - 62.

In particular, the Full Bench in *Drake-Brockman* appears to have distinguished cases where allegations of dishonesty, personal safety and issues of public interest arise, where the approach in *Bi-Lo* is appropriate, and other factual circumstances, such as where abusive language is used in the workplace, where the approach in *Newmont* is appropriate.

Given this apparent factual distinction drawn by the Full Bench in *Drake-Brockman*, the Senior Commissioner requests further written submissions from the parties on this point. In particular, reference is made to par 59 of the reasons of the Full Bench in *Drake-Brockman* (at p 90 of the appellant's Book), where reference is made to *Sangwin* to factual examples of health care workers or childcare providers, where allegations of serious physical abuse are made and where the approach in *Bi-Lo* would be appropriate.

- 76 In his supplementary written submissions, the applicant contended that the observations by von Doussa J in *Sangwin v Imogen Pty Ltd* [1996] IRCA 100 were obiter and are not binding on the Commission. That in *Drake-Brockman*, the Full Bench commented at par 58 that sometimes it may still be appropriate for the Commission to be satisfied that the misconduct occurred. As to the second aspect of *Drake-Brockman* raised in the letter, that being the nature of the investigation to be conducted, the applicant submitted that even accepting the industrial and employment environment of the investigation, the test of a “full and extensive investigation” requirement was not met. Reliance by the respondent on hearsay evidence, a witness described by the Investigators as “erratic and unreliable” and failing to properly check facts, meant that the investigation was compromised.
- 77 But the respondent submitted that the present case was on all fours with the factual examples postulated in *Sangwin*, and as referred to by the Full Bench in *Drake-Brockman*. The factual scenario postulated in *Sangwin* was a health worker or childcare provider accused of serious physical abuse. There, the court held that the employer, after a sufficient inquiry, if it held an honest belief on reasonable grounds, then it was bound to dismiss the employee as a part of its duty of care. On this basis, the respondent contended that the approach in *Sangwin* and in *Bi-Lo* is appropriate, as endorsed by the Full Bench in *Drake-Brockman*. In this context, the respondent submitted that child sexual abuse is a serious public interest issue.
- 78 In *Drake-Brockman*, an issue for consideration was the divergent approaches between decisions of the Commission in summary dismissal for misconduct cases. An approach, referred to often by the Commission in its decisions, is that of the Full Bench of the South Australian Industrial Relations Commission in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. Here, which involved the dismissal of an employee for dishonesty in stealing the employer's property, in considering the approach to adopt in such cases, the Full Bench said at 229 - 230:

An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the

misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

If a fact or facts come to light subsequent to the dismissal which cast a different light on the commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.

The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time. See *Gregory v. Philip Morris* 80 A.L.R. 455 at 471; see also *Stearnes v. Myer S.A. Stores* Print No. 9A/1973 at p.5.

Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the enquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations.

- ⁷⁹ This contrasted with the approach taken by this Commission in cases such as *Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677. In *Newmont*, which was a Full Bench appeal where an employee was dismissed for using abusive language twice, besides poor work performance, O'Dea P said at 679:

At this point it is convenient to recall that in cases of this kind the question to be investigated by the Commissioner is not a question as to the respective legal rights of the employer and employee but whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right. (*Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous WA Branch* 65 WAIG 385 (*The Undercliffe Nursing Home Case*)). The termination was exercised in the present case by notice of summary dismissal in such a case there is an obligation upon the employer to show on balance that the misconduct had in fact occurred. That obligation may conveniently be regarded as an evidentiary onus, as distinct from the obligation which remains with the party who alleges that there has been oppression injustice or unfair dealing on the part of the employer towards the employee.

- ⁸⁰ The Full Bench in *Drake-Brockman* reconciled these two approaches having regard to the factual circumstances. At par 61 the Full Bench distinguished *Newmont*, because it involved no "issue of personal safety, protection of an enterprise from dishonesty or any issue going to the public interest". However, at par 58, referred to above in the applicant's submissions, the Full Bench also said:

"Even when the test in *Bi-Lo* is applied, it may still be appropriate in some matters for the Commission to draw a conclusion as to whether or not misconduct had occurred".

- 81 It is not clear with respect, what the Full Bench was referring to in the above paragraph, as it appears to be inconsistent with the discussion immediately preceding it. Given the analysis by the Full Bench of the authorities, and the basis of the distinction drawn between them, then it seems unless this issue is revisited by the Full Bench on another occasion, it is, depending on the facts, the *Newmont* or the *Bi-Lo* approach, but not a mixture of both. I am of the view that as discussed in *Drake-Brockman*, in situations such as the present, where serious allegations of sexual assault or physical assault are made against an employee, as postulated in *Sangwin*, the approach in *Bi-Lo* is appropriate.
- 82 A related issue is whether there is any conflict between applying the approach to the balance of probabilities test, as applied in *Briginshaw*, and the approach to cases of summary dismissal for misconduct in *Bi-Lo*. I do not consider there is. In *Bi-Lo*, the Full Bench of the South Australian Industrial Relations Commission in the passage set out above at par 81, commented that "the gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct." Thus, in a case such as the present, where allegations are most serious, the nature and extent of the inquiry needs to reflect this. I see no reason to not apply the approach that those investigating in such a matter, would need to feel an "actual persuasion" of the affirmative conclusion on the material before them, which should not be based on "inexact proofs, indefinite testimony of indirect inferences".
- 83 As to the standards to apply in any investigation for misconduct, the Full Bench in *Drake-Brockman* observed at pars 107 - 109:

The principles enunciated in *Bi-Lo* and in *Sangwin* establish that a 'full and extensive investigation' by an employer is to be conducted. Such an investigation is one that entails an investigation of relevant matters surrounding the alleged misconduct that is reasonable in the circumstances. An employer is not required to investigate alleged misconduct 'at large'. What should drive an investigation that meets this duty is the gathering of any information that is available that is centrally relevant to whether the employee in question has engaged in conduct that can be characterised as misconduct.

When conducting an investigation, employers are not required to have the skills of police Investigators or lawyers, but instead should only be expected to operate in a practical way in a commercial and industrial environment: *Schaale v Hoescht Australia Ltd* (1993) 47 IR 249, 252; *Heard v Monash Medical Centre* (1996) 39 AILR ¶3-203 and *Amin v Burswood Resort Casino* (1998) 78 WAIG 2441, 2442.

Whilst an employer must ensure that an employee is given detailed particulars of the allegations, an opportunity to be heard in respect of the allegations and an opportunity to bring forward any witnesses he or she may wish to answer, an employer is not bound to investigate every avenue that may be suggested to him or her. An employer is only

required to act fairly and reasonably in the circumstances and gather relevant information that is critical to the issue whether the alleged conduct occurred.

- 84 The applicant submitted, as noted above, that the investigation undertaken by the respondent did not meet the standard. Whilst not objecting to the proposition that the investigation must be "full and extensive", earlier the applicant maintained this standard was not met. Even though the investigation took place in an employment setting, the applicant contended that the investigation lacked the required care, accuracy, reliability, and integrity.
- 85 The respondent contended this is the appropriate test and that the investigation conducted by the Investigators satisfied it. It submitted that the investigation obtained what information was reasonably available and conducted their inquiries thoroughly and responsibly in the circumstances. Whilst the standards of the police cannot be reasonably expected in a workplace investigation, being undertaken in an employment and commercial environment, an investigation in circumstances such as the present, still needs to satisfy the *Bi-Lo* test of rigor, as I have mentioned above in par 85.

Circumstantial evidence

- 86 Many of the contentions advanced by the parties also involve circumstantial evidence, with the only direct evidence being from the applicant himself and Ms Hunter. Circumstantial evidence is indirect evidence, from which inferences may be drawn as to the existence or non-existence of facts in issue. There is a distinction between criminal and civil proceedings. The principles applicable in civil proceedings were set out by the Court of Appeal of New South Wales in *Palmer v Dolman; Dolman v Palmer* [2005] NSWCA 361. Here Ipp JA (Tobias and Bastian JJA agreeing) said at pars 35-39:

- 35 The relevant principle in regard to civil cases was expressed by the High Court in the case of *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5, in a passage that has been repeated many times. The passage is:

“Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: (see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674, at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in

favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise ...”

36 This statement in Bradshaw was adopted in *Luxton v Vines* (1952) 85 CLR 352 at 358; *Holloway v McFeeters* (1956) 94 CLR 470 at 480 to 481; *Jones v Dunkel* (1959) 101 CLR 298 at 304; and *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161 and 168.

37 In *Chamberlain v R (No 2)* (1984) 153 CLR 521 Gibbs CJ and Mason J said at 536:

“When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged ...”

38 In *Doney v R* (1990) 171 CLR 207 Deane, Dawson, Toohey, Gaudron and McHugh JJ said at 211 that when a lesser standard of proof than beyond reasonable doubt will suffice, “the existence of other reasonable hypotheses is simply a matter to be taken into account in determining whether the fact in issue should be inferred from the facts proved”.

39 On these authorities, it is sufficient in a civil case that the circumstances raise a more probable inference in favour of what is alleged. (See also *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125).

87 I will adopt and apply the above approaches in determining this matter. Importantly, in these proceedings, the issue to decide is not whether the applicant was guilty of the alleged conduct, in a criminal liability sense. Rather is it whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred.

The evidence

The applicant

88 The applicant testified that he was not involved in the planning of the Indonesian tour. Ms Hunter, who was then the School's Indonesian teacher, was responsible for this. The applicant said that as there was a male student on the trip, which was A, the School Principal, Mr Glasson, asked him to go too. The purpose of the trip appeared to be to develop the students' Indonesian language skills for their TEE Indonesian language studies.

89 The trip commenced in Yogyakarta. The applicant had no real memory of this first part of the trip. He did recall however, that he caught both A and another student smoking. The group then travelled to Solo for several days. The applicant testified that he and the girl students stayed in a homestay. The girls stayed downstairs and he had a room upstairs. The applicant said he could not recall if

A was staying in the same home or had a room in a home next door. Apparently, Ms Hunter was staying elsewhere. On the Solo portion of the trip, it was the applicant's evidence there had been little structure planned for that portion of the trip and this concerned him. He said that Ms Hunter was often not around with the students and was elsewhere with friends. He said he had to make plans for the students' activities.

- 90 From Solo the tour group travelled to Surabaya by train. Then they caught a plane to Bali. According to the applicant, the group did not travel by boat to Bali as Ms Hunter claimed in her witness statement. Whilst in Bali the group spent three nights and three days, although in his interview with the Investigators, the applicant said that he initially thought the group stayed in Bali for two days. He obtained this information from the Mackillop Catholic College 1997 Yearbook which contained an article about the trip.
- 91 On the first day the applicant said the group travelled into Kuta either late in the afternoon or the early evening. The experience was not a comfortable one and the group were harassed. That evening the group had dinner at a café which may have been the Hard Rock Café as it had a western feel. It was not the case, according to the applicant, as asserted by Ms Hunter in her witness statement, that she remained at the hotel whilst the applicant and the students went to dinner at the café. He testified that he had never been to Bali previously and found the initial experience at Kuta quite an ordeal. His evidence was that he never would have taken a group of students through this area whilst the trip leader, with experience in the region, remained back at the hotel. The applicant strongly denied that he ever purchased alcohol for students on the trip as referred to in the Final Investigation Report.
- 92 On the following day, the group were preparing to leave to return to Perth. The applicant testified there was a problem with the airline overbooking their flight home, which required the tour group to stay on for a further night at a hotel. The applicant did not recall the name of the hotel where the group stayed for the final night but accepted that it was the Kartika Plaza Hotel. According to the applicant's best recollection, he believed that the students were accommodated in a three-bedroom villa and he and Ms Hunter had a separate villa each, which would be three villas. The applicant testified that he recollected having to walk a short distance over to see the students and it was easier to speak with the students as a group that way. The applicant strongly denied the assertion made by Ms Hunter in her witness statement, that he said because of the accommodation arrangements, he and A could share a room. The applicant said that he had never done this before, and it would be highly irregular for a teacher to share accommodation with a student.

- 93 The applicant testified that in Ms Hunter's statement to the Investigators, it was not clarified by her where she slept. The applicant testified that he was cautious when responding to questions by the Investigators in relation to the accommodation arrangements by using the words "strongly believed" and "to the best of my recollection" as he said he was cautious about expressing unequivocally anything that he could not prove. The applicant said he had taken advice from his then lawyer in relation to the difficulties of proving a negative.
- 94 As to recollections generally, the applicant said that he had had only a vivid recall of matters that were exceptional, given the passage of 22 years since the events. The applicant gave an example of Ms Hunter's assertion that the tour group travelled by boat from Java to Bali rather than by plane, saying that had this occurred it would have been an exceptional event he would have remembered. The applicant, when questioned by the Investigators, said that he was ultimately 100% sure that he did not share a room with A because during the interview, he had just discussed making telephone calls from his room and then walking over to where the student accommodation was to speak with them. It was on the next morning that the applicant saw an ashtray and discovered that A and the same other student had been smoking once again.
- 95 When asked in cross-examination about catching both A and the other student smoking twice, and why he did not report this to the Principal, Mr Glasson, on their return from the trip, the applicant testified that having caught them twice, once at the beginning of the trip and once when the trip ended he wanted to end the tour on a good note. The applicant described catching both A and the other student smoking twice was exceptional and that was why he specifically recollected it. This did not ever occur on school trips away that he had participated in previously.
- 96 The applicant gave evidence that on the final evening Ms Hunter telephoned Mr Glasson to inform him of the group's delayed departure and the applicant telephoned his then girlfriend to inform her of the same thing. He said that he had checked with the students that they had also contacted their parents and informed them of the changes. According to the applicant, the group did not leave the hotel on that last night. The applicant believed that the tour group may have had a banquet meal together at the hotel but accepted that the students may have also eaten in their rooms. The applicant said that his recollection and the recollection of the students interviewed by the Investigators was important because it contradicted A's Statements that on the last evening the group went to the Hard Rock Café, which was where he said that the applicant purchased alcoholic drinks for him. The applicant said that he did not go near where the students were staying and did not go into any student's rooms and strongly denied that he shared a room with A. The fact that when he caught A and the other

student smoking again, and found the ashtray with cigarette butts in it in a central living area, led him to believe that his view that the students were accommodated in a three-bedroom villa, which would have included a central living area, was correct.

- 97 The applicant had little recollection of the return flight back to Perth. He strongly denied there was any confrontation on the flight as asserted by A in his Statements, to the effect there were harsh words exchanged between he and A including threats and swearing, witnessed by other students and involving a discussion with Ms Hunter. The applicant said if this had occurred it would have been reported back to the Sschool Principal.
- 98 The applicant recollected that A left the School early in Year 12. He said he did not recall him in his English class in the first term of that year and commented that it was not unusual for some students to drop out of Year 12 given the demands of Year 12 study, and that the School planned for about a 10% withdrawal rate in that year.
- 99 After 1998 the applicant testified that he had no contact with A until March 2017. In this respect he said that he received several "tweets" from A. The applicant could not make sense of them and did not know what they meant or to what they were referring. Ultimately the applicant said that he blocked them from his account. He did say that the tweets concerned him but did not respond or do anything about them. He denied that he brushed this contact under the carpet but said he was annoyed to receive them. These tweets were received by the applicant between 23 March 2017 and 1 April 2017. There were several. Some tweets contained messages. A tweet dated 23 March 2017 contained the message *"I have a bone to pick with you"*. A tweet dated 1 April 2017 said, *"Was it something I said"*. Two tweets on 31 March 2017 said, *"I remember what we spoke about"* and second, *"I believe I will be okay. I'm sorry for being so understanding about something you have to go back to"*. A further tweet on 1 April 2017 contained the message *"You fly back to school now, deputy principal Parnell. Fly, fly, fly..."*.
- 100 In relation to the smoking issue on the tour and the tweets received by him many years later, the applicant denied that he deliberately did not report the smoking or receiving the tweets, to shield himself from A's allegations.
- 101 On 14 February 2019, the applicant testified that he was walking past the office of the Principal at Lumen Christi College, Ms Prendergast. He was called into the office and he saw that both Ms Taylor and Ms Jones from the Catholic Education Office were present. He said that he noticed there was a "serious atmosphere" in the room and Ms Taylor described to him the allegations made by A, set out earlier in these reasons. He said she "launched" straight into them with

no real introduction. He was given a letter setting them out. The applicant said that he took legal advice but contrary to advice, he replied to the allegations in his letter of 14 March 2019. He also participated in an interview with the Investigators on 15 March 2019. Whilst the applicant was initially critical that his interview with the Investigators was not recorded, rather Ms Jones asked questions and Ms Taylor took notes, he later accepted this did not impact on the interview itself.

- 102 The applicant also said that after his initial interview, he discovered, contrary to the allegations against him, that the Hard Rock Hotel did not exist in 1997 as it was not built until 1998. He contacted the Investigators and informed them of this and changed his statement. And the applicant testified that by about April 2019, he learned the allegations against him had been made public by A's father who had told members of the MacKillop College community and others in the local area about it. And he learned A's father had also spoken to one student (who was not interviewed) and Ms Hunter, and that Ms Hunter had read A's Statements. Whilst the applicant was critical of aspects of the investigation including these matters, he did accept that he knew the allegations against him, maintained his denial and understood that he had a case to answer. Whilst the applicant said he was shocked to learn that A had died in October 2018, and had not been told this by the Investigators, he did accept that it was not strictly material to his denial of the allegations.
- 103 The applicant said that given the circumstances, and the imposition of conditions on his registration by the Teachers Registration Board, he has not sought alternative employment since his dismissal.

Character evidence

- 104 Several character witnesses gave evidence on the applicant's behalf. Their witness statements were tendered by consent and they were not cross-examined. These included Mr Holt, a teacher in the Catholic Education system for 19 years at various schools. He knew the applicant when he was employed as a teacher at Mackillop Catholic College for several years and testified as to the applicant's exemplary performance as a teacher and sports coach. He testified the applicant was highly respected and valued by his students, colleagues, and the parent body. Mr Holt said that he recalled the Indonesian tour in 1997 taking place, and on the tour's return to the College, said he noticed no change in the applicant's behaviour and nor was anything untoward said about what occurred during the trip.
- 105 Mr Holt recalled A as a student at the College. He described him as an average science student and whilst enjoyed the subject, was introverted. He recalled that A enjoyed music and football. Mr Holt mentioned that he ran into A in 2002

when he was working at a Caltex petrol station and spoke with him. Mr Holt said that he seemed anxious, skittish, and somewhat vague. A told him he was not enjoying his work and "was not in a good space". Mr Holt concluded from this discussion that A might have been using drugs.

- 106 Mr Holt also referred to A's father and recited an incident in relation to a school football match when A had missed the transport to the game and Mr Holt was confronted by A's father, who became aggressive and verging on physical with him, as A had been left behind. Mr Holt described the allegations against the applicant as "tumultuous" and that he was flabbergasted that such allegations had been made against the applicant who he regarded as a long serving, effective and loyal educator in the catholic system, whose integrity was beyond reproach.
- 107 Ms Kim O'Brien is another teacher who also worked with the applicant at Mackillop Catholic College in Busselton from 1997 to 1999 and shared an office with him. Ms O'Brien said that she always found the applicant a dedicated teacher who was hard working and committed. Ms O'Brien recollected the Indonesian trip and noticed no change in the applicant's temperament or behaviour on his return, nor any tension between the applicant and A. Both Ms O'Brien and the applicant were co-ordinators of pastoral care at the school. Ms O'Brien said that the applicant was very engaged in this role assisting students and parents. In 1999, Ms O'Brien said that the applicant lived close by to her and her husband and they got to know him well and socialised.
- 108 Mr Greaves is a qualified teacher and works for the Clontarf Foundation. Previously between 1995 and 1999 Mr Greaves was a teacher at Mackillop Catholic College in Busselton. He said that he got to know the applicant well as a part of the English department at the school. Mr Greaves said that he found the applicant to be diligent, dedicated and a professional teacher and was always loyal to the values and principles of the school and to his fellow staff members.
- 109 Mr Greaves recollected A as a student at the school. He was in some of his classes whilst he was a teacher there. Mr Greaves described A as a quiet student, affable and quite intelligent. He also described him as "a little quirky" and said that A had a different group of friends all similar. Mr Greaves said that A did lack some confidence.
- 110 Mr Greaves recollected the Indonesian tour taking place, involving the applicant, Ms Hunter and a group of Indonesian language students. On the return of the tour group, Mr Greaves said that he had not, to the best of his recollection, noticed any change in A's behaviour or academic performance at school. Mr Greaves said that the College had a good system of pastoral care and the staff knew of problems with students. He said that had A displayed to him any noticeable change, he would have contacted A's parents. Mr Greaves also said

that he knew A's father quite well, as A's father was involved in school activities as a parent. He described A's father as approachable and Mr Greaves was confident that if there had been difficulties experienced by A, then his father would have brought them to his attention but nothing was ever said to him while he was a teacher at the College.

- 111 Mr Greaves said that he recalled meeting A's father at a social function in 2014. He recollected A's father telling him that A's time at the College was not a good one and that he was dealing with his "demons" and was having difficulties, which A's father did not elaborate upon. A's father referred to A's life as being "messed up" and Mr Greaves had the impression from his conversation with A's father that A may have been involved with drugs.
- 112 Finally, is the character evidence of Mr Melton. Mr Melton has been a Principal for 25 years and a Deputy Principal for 14 years at Catholic schools in the State. Mr Melton referred to the applicant's employment as Deputy Principal (Pastoral Care) at Seton Catholic College from 2010 where Mr Melton worked as the applicant's principal for five years. Mr Melton said he worked closely with the applicant and mentioned the applicant's sound educational beliefs based upon respecting the worth and integrity of everyone. He said that the applicant commanded the respect of students and staff and had a strong sense of social justice.
- 113 In 2015 on Mr Melton's encouragement the applicant moved to the position of Deputy Principal (Curriculum) as he considered the applicant to be "Principal material" but needed to broaden his experience. Besides his schoolwork, Mr Melton referred to the applicant's involvement in school camps and retreats including student trips to schools in Thailand. Mr Melton said these trips were always highly sought after and regarded by students and were designed to encourage attitudes of volunteering and to heighten an awareness of world poverty.
- 114 Mr Melton said that he placed trust in the applicant often and has only encountered honesty and commitment. He described the applicant as very much a family man who treats his teaching as a vocation and one who sets himself the highest of standards.

Ms Parnell

- 115 As I have said earlier in these reasons, it was a central plank of the applicant's case that the investigation by CEWA was flawed. Part of the attack on the investigation came from the applicant. Some came from evidence given by the applicant's wife, whose evidence was admitted over the objection of the respondent. Ms Parnell is a solicitor with some expertise in sexual abuse cases.

Although plainly not a disinterested witness, on this basis I was prepared to receive the evidence on a limited footing, subject to some of Ms Parnell's witness statement being struck out on other grounds.

- 116 Ms Parnell gave some general character evidence on behalf of the applicant, to whom she has been married since December 2009. Ms Parnell and the applicant separated in January 2019. Ms Parnell gave evidence of the applicant's commitment to his work as a teacher and his contribution to school communities where he worked.
- 117 Ms Parnell works as a researcher at the University of Western Australia Law School. She has worked in private practice as a solicitor dealing with Redress WA claims and criminal injuries compensation claims and between January 2010 and January 2011, as a legal officer for the Department of Communities Redress Scheme. In this position, Ms Parnell assessed redress scheme applications; reviewing evidence; historical and criminal records; medical records; and accounts of sexual abuse survivors from overseas including studying literature in relation to sexual abuse offending, especially that committed in an institutional or residential care setting.
- 118 Having reviewed the Final Investigation Report, Ms Parnell was critical of it in relation to several matters, including a lack of basic fact checking. These criticisms included obtaining relevant documentary evidence such as A's death certificate; any coroner's report following his death; his medical records especially psychiatric treatment history; relevant records from the counselling service that A attended in 2017; and copies of his academic records at school in relation to his school performance both before and after the Indonesian tour.
- 119 Criticism was also made by Ms Parnell of the failure by the Investigators to speak to any persons as to the applicant's character and that the Investigators' observations as to the applicant's honesty were without foundation. Ms Parnell criticised the Investigators' reliance on statements from Ms Hunter, who was described in the Final Investigation Report as erratic and not coherent, along with placing any weight on statements by A's close friend, Mr Bardowski, with a history of drug abuse and who was also described by the Investigators in the Final Investigation Report as "somewhat erratic... and admitted his memory was poor" (exhibit R5 p 11). And Ms Parnell observed that the expert retained by CEWA to advise on A's Statements was not appropriately qualified in forensic psychology skills nor relevant expertise in assessing the impact of drug-induced psychosis or delusional or historic thinking. Ms Parnell was also highly critical of the Investigators' apparent disregard of Dr Chamarette's opinion as to the lack of substantiation of the allegations, based on the material she had been provided by the Investigators.

Mr Glasson

- 120 Mr Glasson was the Principal at MacKillop College at the time of the trip to Indonesia. He was the Principal from August 1993 until December 1998. He referred to Ms Hunter who initiated the trip, as being then inexperienced and was pleased that the applicant also went, as a senior male staff member. Mr Glasson said that he would not have approved of a teacher sharing accommodation with a student and was not asked to give such approval on the Indonesian trip. He said he did not receive any reports of problems with the applicant's behaviour while on the trip.
- 121 Mr Glasson also recalled speaking to A's father at a school reunion at the end of 2018. He mentioned to Mr Glasson that A's life had "spiralled out of control" and he subsequently died. A's father referred to "an incident" but did not elaborate and Mr Glasson did not ask about it. Mr Glasson said he did not recall A's parents bringing to his attention a decline in A's school performance. Mr Glasson also testified he had been shocked when heard of the allegations against the applicant but had not spoken to him at all and described him as a highly respected staff member. Mr Glasson also said that whilst on the trip, if a student was caught smoking this could be regarded as a disciplinary matter, and if there was consistent behaviour like that, he would expect a teacher to report it to him.

Ms Hunter

- 122 Ms Hunter was the school Indonesian teacher at Mackillop Catholic College in Busselton. She was the sole organiser of the 1997 school trip to Indonesia which involved five students, with A being the only male student. As he was the only male student on the trip, a male teacher had to travel with the group. Ms Hunter recalled A as one of her Indonesian students. She said as far as her recollection goes, at the time of the trip in 1997 she described him as a "capable, hard-working student who had good results in his Indonesian studies with me".
- 123 Ms Hunter said that the Indonesian trip went well until the last day. The flight home to Perth had been overbooked by the airline and the group had to stay an extra night at a hotel in Bali. She said that she protested with the airline that the students had to get back to Perth as parents were travelling to meet them at the airport. Ms Hunter described the Sempati airline person as a western woman named "Roxanne". She told the Investigators she "lost the battle" with the airline and the group had to stay an extra night. Ms Hunter recalled the hotel being the Kartika Plaza. As it was the school holidays, this was the only accommodation available. The hotel was close to the airport.

- 124 Ms Hunter testified that when the group arrived at the hotel, she initially stayed in her room to telephone parents to let them know of the delay. She testified that while she was busy contacting parents, the applicant took the students out to the Hard Rock Café. Although later in cross-examination she was unsure whether this took place on the first or second night. She informed the Investigators she had been told by one student when they got back to Perth, she thought S, that the applicant had bought the students drinks at the café. Ms Hunter said that the Kartika Plaza accommodation which the airline had arranged, presented a problem given the number of rooms allocated. Ms Hunter said that it was Sempati Air that had arranged the group's accommodation. Each ticket holder got accommodation and not separate rooms.
- 125 She testified that it was the provision of a bed for the night for each ticket holder which meant she had to make an executive decision about who was going into what room in the three-bedroom villa. The applicant offered to share a room with A because they were the two males. She stayed in a room with other girls and she thought two of the other girls stayed in the third room. Ms Hunter said she could not share a room with the applicant and nor could he with the girl students on the trip. Her evidence was this problem was solved when the applicant said that he would share a room with A. Ms Hunter said once the room allocation was sorted out the others went out for the evening. When cross-examined about this, Ms Hunter said that either the airline or she got the group a three-bedroom villa. The airline paid for a bed for each person on the trip. She had to work out room allocations and it was her decision to put the applicant and A in the same room. It was Ms Hunter's evidence this was not planned or approved by the School Principal, as the change of arrangements forced this situation on the group. Ms Hunter was emphatic this was the arrangement and took umbrage when it was suggested to her that she was wrong, and that the applicant had said this did not occur.
- 126 Ms Hunter testified that later that evening she spoke to the girl students watching a movie in their hotel villa lounge. Neither the applicant nor A were present. She was told by the girls they had gone to bed. She recalled that one student asked her to knock on the door where the applicant and A were staying, but she did not do so and did not ask why. She said that her decision resulted in the applicant and A sharing a room in the villa. Ms Hunter was cross-examined about A's Statements. She said that she had not seen or read them before her interview with the Investigators but had known the Statements had been made. She said that she had seen the Statements only about two weeks before the hearing. Her evidence was that when she read the Statements, and how detailed they were about what the group had done on the tour, while she may have had doubts before, having read the Statements, it gave her no doubt about the allegations made by A.

- 127 As to the return trip to Perth, Ms Hunter testified there were strong words spoken between the applicant and A. She said she could not hear what was said as she was sitting in a window seat on the plane not close to where A was sitting. She testified that she felt manipulated by the applicant as he had arranged for the return flight seating so she could not be close to A and speak with him. Whilst she said that she could not hear what was said between the two, she said it did not look comfortable. Ms Hunter said that she did ask what was going on between the two during the flight but received no response and the matter did not seem to go any further. Ms Hunter was emphatic this altercation did occur on the return flight however she did not tell the Principal, Mr Glasson, about it. She also said that the other students had also seen it. When it was put to her in cross-examination why she had not mentioned this to the Investigators, she said they did not question her about it.
- 128 Finally, Ms Hunter testified that after the return from the Indonesian tour, she noticed a significant change in A's behavior. He started not handing in work and socially and academically he deteriorated. He started to not go to his classes. Ms Hunter did speak to him about this and she said she did not get an answer. She reported this to the Principal. She knew A left the College soon after but did not know why.

A's mother

- 129 A's mother gave evidence. She described him in late 1997 as a good student. She said that he was receiving "A" marks in science and history and wanted to go to university to study science. She referred to the Indonesian tour in 1997 and that all seemed to go well.
- 130 However, she testified that she saw a change in A's behaviour on his return after the end of the tour. She described him as becoming more withdrawn and spent time in his room at home. She said that she spoke with her husband about this and they also received notes from school, that A was not completing assignments. Both she and her husband thought this was just normal adolescent behaviour.
- 131 By Term 1 1998, A's mother said his behaviour had become worse. He told them he wanted to leave the College. Both she and her husband discussed this with A. The applicant was A's English teacher in the first term of 1998. A left the College and went straight to Busselton Senior High School. However, A stayed only for a few weeks at his new school and did not complete Year 12. She said that he started a short TAFE course, but she was not sure if he finished it.
- 132 After A left school, his mother described his psychological problems with depression, anxiety, and insomnia. He also experienced alcohol and substance

abuse. A's mother described A's drug and alcohol as causing strain in his relationship with his family.

- 133 Moving forward to March 2017, specifically 17 March, A's mother said that he telephoned his parents in an agitated state. She said that he told them of the assault on him by the applicant. She described visiting A at his house the next day on 18 March. Over regular subsequent visits A's mother said that he described to them the details of the sexual assault. She said that when he had described to them the detail of the sexual assault, he told them he did not want to take the matter up with the authorities and she said that as an adult they had to respect his wishes. However, when A died in October 2018, they felt the need to pursue the matter to honour their son. A's mother said that of course had they known at the time of the incident they would have pursued it. She described the relationship between A and his family as improving after he had told them about the sexual assault.
- 134 After A's death, she said that they found the typewritten notes with A's handwriting on it amongst his things. She assumed this was done by the counselling service, as it was not something that he would have done alone.

A's father

- 135 A's father also gave evidence. He also described A as a good student before the Indonesian trip. However, once he had returned, he noticed a change in A's demeanour and he became more withdrawn and would not tell him or his wife why. Both he and his wife spoke to A. They knew there was a problem but he would not give them any reasons. In cross-examination A's father said that he did not raise these issues with the School. He said that he did notice that A's performance in assignments had slipped. A's father said that subsequently, A experienced psychological problems, and began self-medicating.
- 136 A's father described the contact A made with himself and his wife in March 2017. He described the telephone call where A rang in a distressed state. This was set out in the letter from A's parents to CEWA dated 6 February 2019, raising the complaint which led to the subsequent investigation. The letter, signed by both of A's parents, sets out in their words their story and formal parts omitted, it is:

I have chosen to place in writing the allegations, made by our son A, we wish to discuss with you at our meeting, not to replace official minutes of the meeting, but more so we can take our time to ensure we provide you with the full extent of the information we have on this issue.

Our son, A, was a student at McKillop[sic] Catholic College in Busselton in 1997 when his Indonesian language class was offered the opportunity to accompany their Indonesian

language teacher, Chrissy Hunter, on a class excursion to Indonesia during the break between third and fourth term. We were happy that we were in the position to allow our son this wonderful opportunity to consolidate a subject that he obviously enjoyed.

A was the only male student in the group of five students to accompany Miss Hunter on that trip. We were later informed that Catholic Education policy dictated that a male teacher would have to and ultimately did, accompany the group due to A's presence as the sole male student in the group.

Throughout the stay in Indonesia, the students stayed in host family homes, and the feedback we had from A was all positive.

The itinerary of the trip included a flight to Bali to catch a flight from Denpasar to Perth. The flight to Perth on Merpati Airlines was cancelled, and the Airlines arranged overnight hotel accommodation for the group in Kuta, Bali, that saw two of the girls in a room by themselves, we cannot confirm, but we think the other two girls were in a room with Miss Hunter, but may have been in a separate room, and A in a room with the accompanying male teacher, Don Parnell.

The group arrived in Perth twenty-four hours later than initially expected.

Within the first week of A being home, [my wife] discussed with me her observation that something was wrong with A, she had noticed he was quieter and tended to withdraw to his room. This needs to be taken in the context of prior to this, A had been a very happy, jovial and mischievous young man. After discussing this with me, she approached A in his room and asked him if he was okay, was there anything troubling him. Despite A's response in the negative, we knew something was wrong, something had changed.

It is both noticeable and significant that this was the clear starting point in the deterioration in A's behaviour and attitude, initially at an insidious pace, but later at a rather rapid pace.

[My wife] and I saw our "A" grade student lose interest in schooling to the point he left McKillop and transferred to the local high school mid first term of his year 12, ultimately leaving the high school by the end of first term.

In later contact with Chrissy Hunter, she informed us she too had noticed the marked deterioration in A's behaviour and attitude following their return from Indonesia.

A's risk taking and self-destructive behaviours, self-medicating, insomnia, evidence of a poor self-esteem, restlessness and generally erratic behaviour became increasingly evident and it is an understatement that it had a massively detrimental impact on his life.

Approximately eighteen months prior to his death, A rang us in an agitated and distressed state, and revealed he had been experiencing the return of memories he had suppressed for the past twenty years. Over the course of the next two to three weeks, A's recall became more detailed, revealing intricate details of the event. He described to me reacting to the event as it was occurring by removing himself from his own body and what was happening to it at the time, and closely studying the painting on the wall of the hotel room, a

phenomenon that is known in Psychiatric terminology as Disassociation. A described that painting to me in minute detail.

The Perpetrator of that alleged anal rape of our son was the male teacher accompanying the group, Don Parnell, who I believe currently holds the position of Deputy Principal, (Learning and Teaching), at Lumen Christi College in Martin.

With our encouragement, A sought and received counselling from the (name omitted), and as one of the therapeutic interventions employed, A was encouraged to write out his memories of that event. By now you will have read that personal account.

As A was thirty-six years of age when he revealed his allegation to both himself and us, his parents, we informed him that due to his age he had to be the driver of how he responded to this issue, he had to make the ultimate decision as to how he was going to deal with this issue, did he wish to pursue legal avenues etc, but whatever he chose to do, he would have our full support. A chose not to pursue this issue through legal avenues, stating clearly that he didn't consider that he had the strength to withstand the inevitable grilling/cross examination the legal process would entail, and he definitely did not wish to have to re-live the events in the public forum of a courthouse. He stated he did not wish to experience the scenario of "Yes you did", "No I didn't", "Yes you did", etc.

There are several specific issues that A refers to in his writings on the alleged event, or that he had discussed with us, that in our opinion add weight and credibility to his allegation, and that we have already discussed with detectives who have interviewed us recently. We feel these specific points also need to be drawn to your attention.

Firstly, at the time we phoned Chrissy Hunter to inform her of A's death, she was in tears as she stated to us she was recollecting that on the night of the alleged rape of A, two of the girls approaching her expressing concern about the noise they were hearing emanating from the room where A and Don Parnell were staying, and asking her to go to that room, knock on the door and find out what was happening. She did not do this.

Secondly, A described to us that following the alleged rape, he was "Crying like a baby", and how Don Parnell had responded to that in a very disparaging manner. In the same phone conversation with Chrissy Hunter referred to above, Chrissy Hunter also revealed recollecting the two girls who may have been sharing the room with her, but definitely the same two girls who had approached her the evening before requesting she investigate the noises referred to above, speaking to A and Don Parnell the next morning, and her overhearing the girls asking A and Don Parnell, "What was that noise coming from your room last night, at one stage it sounded like a baby crying?" You will have noted that A refers to this same conversation in his writing therapy for (name omitted).

Thirdly, you will have noted A's reference to the thinly veiled threats he alleges Don Parnell levelled against him, "I know where you live ", etc. We have subsequently, since A's death, discovered that Don Parnell had lived just around the corner from us in Busselton when he first moved to Busselton to teach. I can recall A elaborating on this point and claiming that Don Parnell had told him, at the time of the alleged incident, that he used to ride his bike past our house on his way to school and had seen us, A's parents, at the

front of our house, and that is how he knew where we lived. I reiterate that no-one in our family knew this information prior to A recalling it twenty years after being informed of this fact, and this information was not confirmed until after A's death.

Fourthly, in another separate conversation with me concerning his allegations, A stated to me that Don Parnell had informed him at the time of the alleged incident, that his older brother had sexually molested him when they were younger, and that was a significant reason why he now sexually assaulted younger boys. A also stated Don Parnell had clearly stated, "I've done this before". Again, the information that Don Parnell had an older brother, was recalled by A twenty years after having been informed of it, and it was only investigated and confirmed subsequent to A's death.

Following the revelation of his allegations to both himself and us, (A's mother) and I and others close to A, can categorically attest to the fact that A's behaviour and attitude began to improve, his relationship with us significantly improved, he was more settled within himself, he wanted and began to play a bigger part in his sister's and nephew's lives, he re-invigorated his passion for music and his guitar playing, he had joined a band as the lead guitarist and was rehearsing twice weekly with resultant gigs at local eateries and wineries occurring.

This somewhat dramatic change and improvement in behaviour is a well-documented response to the revelation of, and dealing with, the emergence of suppressed memories such as sexual assault. In our opinion this is a further example of the non-specific type of evidence which has led us to give credence to the allegations A has levelled against Don Parnell.

¹³⁷ A's father also described finding the typewritten Statements in A's things after he died. These Statements, running to some five typewritten pages, were headed "Part 2 of my soul: start" and a second, "Part 4 of my soul: The Next Step". A copy of the Statements, which also contained some handwritten annotations identified by A's parents as his handwriting, were annexed to the witness statement of Ms Jones, the Employment Relations Team Leader at CEWA. As these are the only words expressed by A in relation to the incident in evidence, and as much other evidence has been given in these proceedings as to their content, I propose to set out the passages of these Statements. Whilst they may be distressing to some readers, they provide some insight into A's description given around the time that the disclosures were made. In the copy in evidence, there are letters missing at the beginning of many of these sentences on the first page, due it seems to the margin being cut off on the original document. The documents read:

rt 2 of my soul:
tart

is all very raw.
ave remembered so much, too much.

ave had to put myself together again.
 nd by no means am I together .
 t here goes.

was 16 years old
 was in Indonesia.
 chool trip for a cultural Indonesian class.
 group of 7 people.
 here were 4 girls - were all in the same year.
 y Indonesian teacher (female).
 nd me. I was the only guy in my class to go.
 he group was also accompanied by my English teacher (male) - who wasn't part of the Indo
 class but there to
 ervice, basically.
 e did more than supervise.
 or ease of getting this on paper let's just call him "Elephant".
 fter two weeks of a great holiday in Indo we finished up in Bali for our flight home.
 pon trying to board, check-in informed us the flight had been overbooked.
 We would have to wait until a flight the next day. The airline covered our accommodation
 expenses and we
 ettled into a hotel close to the airport.
 My indo teacher shared a triple with 2 girls, the other 2 shared a twin and I shared a twin
 room with Elephant.
 We all had dinner at the Hard Rock Cafe that evening.
 fter dinner, whilst the .girls were downstairs dancing, the Elephant bought me a few beers
 and shots like B52s. He shouldn't have done this but ... he said it was the end of the trip, I'll
 buy you a few drinks. Innocent enough.

At one stage he looked across at me and says you know you look cute in this light?
 Uncomfortable! Had I heard correctly? Loud music blared.
 asked him what did you just say?
 He didn't answer me and I asked him again.
 o which he turned and said you heard me.
 The answer that I didn't want to hear and immediately responded with what do you mean
 by that? Thinking he was joking.
 He turned it back on me and became confrontational slyly saying to me I knew exactly
 what he was talking about.
 thought fuck this dude. I walked off. I had a really bad feeling.
 He yelled after me, ah yeah leave me all by myself.
 sat on my own just needing to have my own space. I didn't know what to do and all sorts of
 things were going **[Handwritten notes]** *I wasn't about to run up to the chicks + start into a
 conversation about something that could have just been the booze talking.*

We left in a group back to the hotel and I put it out of my mind. I ignored what had
 happened because I wanted to be just part of the group again.
 Our group went to the pool and I remember just wanting to be together with everyone else.
 We swam around for an hour and everything was cool because it was back to normal and I
 totally dismissed what had happened putting it down to me misunderstanding. A teenager

just wanting inclusion and safety in the group activities. It was a wicked pool, it had been a great holiday, I was focusing on ending everything on a good note.

Once up in our twin room I remember drying myself and Elephant telling me that he wanted the bed closest to the door. He reckoned he wanted to sleep in his jocks and he wanted to face away towards the door.

I was putting pants on and he commented you're not wearing pants are you? It's boiling in here you're sweating like a pig. The air con had been off the whole evening and it was indeed stifling. He reassured me he was facing towards the door and made me feel almost silly then added in a joking way I'm not queer You didn't take me seriously at the bar did ya? **[Handwritten note]** *I was On edge.*

He knew I was apprehensive. Nonetheless he made me feel that there was no big deal and I was silly. I relaxed and let my guard down thinking I am a fucking idiot he was joking. **[Handwritten note]** *I had a gut feeling at the bar.*

Not sure how long I had been dozing *off* or sleeping before startled awake by a noise. It sounded like he was taking his jocks off ... and then he was doing other things that my brain was struggling to compute or believe. I didn't want to face him or tum around or move at all. My head was swirling.

Without warning he had suddenly crossed over to my bed and was right up against me spooning me. I totally froze. I was petrified. I remember being frightened was my initial reaction. The next was trying to calculate what to do. I tried to get off the side of the bed away from him. I could not escape and he forced himself on top of me, forcing my face into the pillow aggressively pinning me down with all his body weight.

I am making a noise but hardly any sound is coming out. I am struggling to breath. Chocking in terror. He takes this opportunity to tell me what is going to happen to me.

Listen, I am going to hold you down until you pass out he says into my ear. I am not gay. I am a rapist and an opportunist. I fuck men that are queer (or I reckon are queer). I am going to hold you down until you pass out is the last thing I can remember and a whole lot of red. I felt like I was suddenly out of my body. Blacking out. Hyperventilating. Blocking it. Coming to. Blanking out again ...

When I became conscious again, reality hit. I lost consciousness again. I didn't know what the fuck was happening, I was in pain, I felt like I couldn't breathe. There was nothing that I could do. I couldn't fight back. I was shaking like a leaf. Someone could have thrown a *live* grenade next to me and I would not have been able to do anything about it.

He went to shower and returned whistling. Like he was a stud.

Out he came and dragged me out of bed saying get in there.

Pushing me into the shower telling me to clean myself up. You're not coming out until you have cleaned yourself up. I was hunched in the comer with him looking at me from the open shower door, tears streaming down my face. **[Handwritten note]** *Crying but no Sound. Screaming but no sound.*

The thing that terrified me - the worst part - was the blood.

Blood everywhere.

The shower floor filled with red. I thought I was going to die. I thought my insides were coming out and all I could see was red red.]. **[Handwritten note]** *I was pissing blood in terror screaming but no sound.*

He instructed coolly clean all that up. Piss all of that out. Make sure you do it properly. He showed panic suddenly - he said he had never seen this much blood when he'd done it before. He asked me if I was okay. Was I going to be alright?

He was clearly worried and said I needed to pull myself together. If I needed medical help he would be the one to deal with it and he made this very clear. He changed tactics. He said I can help you if you need me to. Softer voice. Completely setting up the next step - my exiting the shower and being told to get changed.

He did something unpredictable again - walked over to the flyscreen gap above the toilet window - and yelled out loudly something to the effect of
Well A I hope you learnt your lesson!
You have a few drinks and take a swipe at me ...
Well I had to teach you a lesson!
His words echoed down the hallway.

Then more softly ... further talking to me. Try and escape or make any noise I will knock you out and do it to you again. **[Handwritten note]** *I managed to scream Fuck You! He attacked me again + said Sorry I did that to you A, you're a good kid, I just can't escape what I*

The following morning before leaving to the airport he reminded me again where I stood. He spoke softly If you say anything about this no one will believe you. I know where you live. I swear to god if you say anything I will kill you. And I will kill your parents. Followed with "do you want me to do it to you again?"
I was exhausted and shut down **[Handwritten note]** *Went into shock again.*
He carried on like this. .

Prior to boarding our plane I recall someone (my Indonesian teacher?) commenting that they had heard a racket. They thought they could hear someone crying.
He stepped in and said A was being smart with me. Can you believe he took a swing at me? He was thinking he was a hero at the bar. Had to teach him a lesson.
Shocked she looked at me and asked with absolute concern are you okay?! To him she asked concerned, did you hit him?
I couldn't look up. Couldn't talk. **[Handwritten note]** *Went into shock again.*
Elephant stepped in between and downplayed the whole thing. We've sorted it out. he made it to be no big deal. **[Handwritten note]** *On the bus to the airport, she says He's still snakey about it. Look (indistinct) got the time to talk about it.*

On the plane he made an issue. He didn't want everyone getting up and swapping seats. He wanted to sleep. From across the aisle I was watching him fall asleep wondering what to

do. I was waiting to be sure he was asleep because I felt so much rage I wanted to attack him or somehow get my Indonesian teacher's attention and tell her what had happened. But she was in the window seat right next to him. That's why he had not wanted the swapping of seats - to avoid any chance of her sitting near me or visa versa. He opened his eyes and stared straight at me watching every move.

I was struggling to think about what I could do. I was thinking more clearly than before and watching him constantly for any change in behaviour. It was blocked out at the same time. Nothing was there. Nothing had happened. It couldn't have happened. Staring at him trying to make sense of it all.

then he broke out, "what are you fucking looking at me like that for?"
 artling the other teacher. She questioned him what was going on. Don't talk to him like that! What is with you boys?
 h look he is being a smartass! He is really pissing me off now.
 hen to me again Get out of my face.

he girls on my side was flabbergasted I can't believe the way he spoke to you! Are you okay?
 ot a peep from me. Paralytic with fear.
 hocked, closed my eyes trying to escape and rocking myself until the plane landed.

otal helplessness. Couldn't tell anyone what had happened. My biggest fears had been confirmed. What had
 appened had happened. So angry. So confused.

Everyone was thinking what I had done to piss him off so much and there I was thinking I hadn't done anything wrong at all. Why was this happening to me. I went into shut down mode. Why was this happening to me. I
 hink that I slept through exhaustion .

anding in Perth, how I got home, the events after that are like little pieces that I cannot clearly remember. Autopilot. Block. Still this feeling but do not want to go there. Trapped. Now there is my parents ... Block. Just want to get to the car and away and starting to remember bits and blocking bits and remembering bits ...barely functioning.

watched him go around to all the parents and make light small talk about the trip as if nothing had happened. He didn't speak with my parents though. He waited until they were distracted by my other teacher to say, look do you mind getting a lift home now with A and his parents. [**Handwritten note**] *Knew they'd be distracted with my Indo teacher all the way home.*

The original plan was that the teachers had arrived together and were going to leave together but it had changed. His girlfriend had arrived, apparently double parked, and they had to quickly get out the door. She headed out first with the .luggage, he said he was following in a minute and just going to say goodbye to me and my parents. But my parents were talking to my excited Indo teacher still about the trip. Leaving me by myself. In that airport.

Hey A remember what we talked about?
Then after a pause and punctuation with his head Yeahhhh you remember don't you?
Everything surging back again. Head pounding. Tasting puke. Reality.
He turned on his heel and took off.
And that was that

Part 4 of my soul:
The Next Step

What do I Dream of?

Transcendence.
Deeper level of understanding of where everything fits.

Actions

Good support network (good friends, keeping communication channels open)
Chat with a (name omitted) - taking comfort from professional therapeutic intervention, counselling and support
Realising the importance of this chapter!
It is a growing list of constructive things I can add to.
Reflecting back on past chapters and recognising/ celebrating how far I have come

Closure and understanding

Sitting down with The Elephant in the room with my parents
Hearing it from him. Not just from me.
old hard facts.
Evidence
But so what?
My parents now more able to accept it?

Putting a stop to it.

The Elephant gaining atonement.
What closure will this give me?
Exposing him and the truth.
Dealing with the conflict of anger.
Finding a path of forgiveness.
Showing courage to do what feels right and just.
Not putting undue pressure on self.
This so called Deputy Principal-Pastoral Care, Deputy Principal-Curriculum, Head of House, Head of English -cunt for want of a better word - will be judged and served. One way or another there is justice.
I will be happy.

- 138 A's father testified that after A's revelations to them he contacted Ms Hunter. He could not recall how that contact was made. Suggesting nothing to her specifically, he said that he asked her how the trip to Indonesia went and could she recall anything about it. He said that he did not tell Ms Hunter of the

allegations made by A against the applicant. It was his evidence he did not think that at any stage he had told Ms Hunter about these matters. However, sometime later, A's father testified that he did give Ms Hunter a copy of the Statements about one month before this hearing commenced. He also said that he gave a copy of the notes to A's sister.

A's sister

139 A's sister also gave evidence in these proceedings. She said that on or about 18 March 2017 she received a text message from her brother. It said that he had been "raped by Don Parnell". As she read the message she was alarmed and said that she telephoned A straight away. In that telephone call, A informed her that the applicant raped him whilst they shared a hotel room in Bali on the final night of the Year 11 school trip to Indonesia. She said that he explained to her that their return flight to Perth had been delayed. This meant they had to stay an extra night in Bali and last-minute arrangements had to be made for overnight accommodation, which meant that he and the applicant had to share a twin room in a hotel. He informed her this was the only time on the trip they had shared a room. Earlier in the evening the applicant and the students went to a bar and he told his sister that the applicant bought him alcoholic drinks including "B52 shots" particularly. She testified that she particularly remembered him telling her that. While they were in the bar, he told her that the applicant commented "You look cute in this light" which made A feel very uneasy. When he asked the applicant what he meant by this, the applicant replied, "You know what I mean". He told her he then went downstairs and joined the other students, as he felt uncomfortable.

140 A's sister then said he began to recount what happened after being in the bar later that evening. She testified that he told her that both he and the applicant went to the hotel room to sleep. He told her it was hot inside the room and the applicant questioned him why he would wear pants to bed and that he should take them off, which he did. A described to her that shortly after getting into their beds he heard a noise. He was unsure what it was but reflecting on it later he realised that it was the sound of the applicant opening a condom packet. A then told his sister how the applicant then got out of his own bed and quickly slid into his bed and "spooned" him. At that point A told his sister he was too frightened to move. A told her that the applicant said to him at that point "I am an opportunist and a rapist" and that he would hold him down until he passed out. A's sister testified that A described how the applicant had climbed on top of his back and held him down by his neck while pushing his face into the pillow and then began to rape him. A said that he felt terrible pain and was terrified at that moment. He told

her that the applicant was pushing his face so hard into the pillow he was struggling to breathe and felt like he was falling in and out of consciousness.

- 141 She then recounted how he told her that when he had finished, the applicant went to the bathroom and had a shower. A told her that the applicant was whistling in the shower and thought he was a "stud". When he returned to the room the applicant then told A to shower and clean himself up as he was bleeding. A told his sister that at that point he was "crying like a baby" and got into the shower and was horrified as the shower floor turned bright red with his own blood. A's sister said that at this point in the telephone conversation she had a distinct memory of A telling her that the applicant, who watched him have a shower, was ridiculing him for crying and is alleged to have said "I've never seen so much blood when I've done it before".
- 142 The conversation continued and she testified that A then said, once out of the shower, the applicant told him he had flushed his used condom down the toilet so it could not be used as evidence. She also said that A told her that the applicant told A he regularly rode past his house and "said he knew where I lived", which A took as a threat to keep his silence. And his sister said she recalled A telling her that the applicant then yelled at him, out of a window, to make it sound as if they were having an argument lest any passers-by may have heard any noise.
- 143 A told her that once they had returned to their beds he had been told by the applicant that "You're a good kid" and that the applicant had allegedly confessed to him it wasn't the first time he had done this and that he had been raped by his own brother.
- 144 Next in the conversation, she said that A told her that the next morning he was approached by either some of the other students or the Indonesian teacher, who said they had heard some noise coming from his and the applicant's room the night before. They thought they could hear some crying and wanted to knock on the door. A told her that the applicant had then said that he (A) had tried to hit him. Further, she said that A described the trip home on the plane and that the applicant was in an angry mood and snapped at him about the students swapping seats on the plane. He felt that the applicant had seated himself next to Ms Hunter, which A thought was to prevent his access to her on the flight back.
- 145 When they arrived back in Perth, she said that A told her that the applicant had, before leaving the airport, said to him "Remember what we talked about?" She testified that he then started to hypothetically talk about telling their parents and how distressing that would be for them and Ms Hunter and that he did not want to upset them with such shocking news.
- 146 A's sister said that she had known her brother for 35 years and she knew he was telling the truth. She testified that when speaking to him in this telephone call he

was rational and calm, although he had an upset undertone in his voice. It was his sister's evidence also that once A had told her and her parents what had happened, that A and his family had a better relationship and he also played music again.

- ¹⁴⁷ A's sister was cross-examined about his drug use after he left school and she confirmed that he had issues with drugs and alcohol and that he told her at one point that he had also used heroin. In relation to the Statements found in A's things after he died, his sister testified that she had not seen these notes until she was at her parents' house but did not get a copy. She just read them and confirmed she had seen them before her interview with the Investigators.

Attempts to get counselling records

Sexual assault communications privilege

- ¹⁴⁸ The Investigators contacted the counselling service that A attended in 2017 after his disclosures to his family. The Investigators requested information about his attendance and sought the release of documents. Due to confidentiality reasons, this material could not be provided. Once these proceedings had been commenced and for the hearing, the respondent's counsel issued a summons to the Chief Executive Officer of the counselling service for production of documents, that being the organisation's counselling file in relation to A's attendance at the service. Those documents were produced under cover of a letter dated 28 January 2020, which were tendered as a restricted confidential exhibit R9. The representatives of the parties were given access to the file to inspect it. Consistent with my ruling earlier in the proceedings, the identity of the counselling service was not to be disclosed. The respondent also called as a witness the counsellor who provided counselling services to A in 2017. The counsellor's identity was also the subject of my confidentiality order made during an earlier part of the proceedings.
- ¹⁴⁹ Before the counsellor was called as a witness, I raised with both parties the issue of counsellor-client confidentiality in sexual assault cases, which is referred to as the "sexual assault communications privilege" in the evidence statutes of several State jurisdictions including in Western Australia. However, those statutory provisions only apply in circumstances where there have been criminal proceedings in relation to a sexual assault. That is not the case here. The purpose in my raising this issue with the parties was whether the principles underlying those statutory provisions ought guide the Commission's exercise of discretion in hearing from the counsellor as a witness, as plainly, this would involve the giving

of evidence in relation to confidential communications between a counsellor and a victim of sexual assault.

- 150 The respondent submitted that the evidence of the counsellor should be admitted as the substance of the disclosures have already been the subject of evidence through other witnesses including A's sister and his parents. Thus, in effect, any confidentiality between the counsellor and A in relation to the alleged sexual assault had already been lost. It would therefore not be appropriate for the Commission to decline to receive the evidence from the counsellor. When I raised with counsel for the respondent the assertion that A's Statements may have been produced in a therapeutic context, at least that being the assumption by Dr Chamarette in her expert report on the Statements, counsel submitted that there was no clear evidence to establish that the Statements were in fact made in that context, and it would be a "stretch too far" to reach that conclusion.
- 151 The applicant opposed the counsellor being called to give evidence. It was submitted by the applicant's agent that whilst the Commission is not bound by the rules of evidence, ss 19A to 19M of the *Evidence Act 1906* (WA) should guide the Commission as to whether to receive the evidence or not, acknowledging that the Commission proceedings are civil in nature and that no criminal proceedings have taken place. Mr Mullally identified the underlying principles why such communications should remain confidential. These included dangers associated with disclosure and the unrestricted use of information that is communicated by a victim of a sexual assault, in the context of a therapeutic relationship. Secondly, is the general infringement of privacy and confidentiality.
- 152 Thirdly, is the issue of a threat to the recovery process and psychological harm. Fourthly, is the issue of retribution and safety. Finally, is the potential conflict between the seeking of counselling and the reporting of or proceeding with a case. Within those broad principles, Mr Mullally contended that when it comes to the underlying principles set out in ss 19A to 19M of the *Evidence Act*, there is a prohibition on the disclosure of a protected communication in criminal proceedings, except with the leave of the court. It was submitted that the communications in this case clearly fall within the meaning of a protected communication in s 19A. In his submissions, Mr Mullally contended that the principles underlying s 19E, requiring a legitimate forensic purpose for disclosure of a protected communication and s 19G, setting out requirements for a public interest test to be met, have not been adequately addressed.
- 153 In response, Mr Curlewis submitted that the evidence of the counsellor could have great probative value which may either confirm the respondent's case or support the applicant's case. Additionally, Mr Curlewis submitted that the consent provision of the *Evidence Act* in s 19H is relevant. This provides that if the complainant consents to disclosure of a protected provision, then the exclusions

do not apply. As in this case the complainant is deceased, he submitted that on his instructions, the parents of A consent to the disclosure and moreover, have given their evidence, as has A's sister, in open court willingly and for the matters in issue to be placed in the public domain. In these circumstances, Mr Curlewis submitted that it would be completely at odds with their approach to participating in these proceedings, for the evidence of the counsellor and the counselling file to not be admitted.

154 After an adjournment over the lunch interval, I returned and delivered my reasons to the effect that the counselling file should be admitted into evidence and that evidence should be received from the counsellor. My oral reasons from the transcript of the proceedings at 202-203T were as follows:

I've considered the submissions that have been made in relation to the documents produced under summons issued by the respondent and under cover of a letter of 28 January 2020 from the Counselling Service and the proposal by the respondent to call a counsellor from that service for the purposes of these proceedings and it seems to be common ground that [A] did attend a particular service and that doesn't seem to be in dispute.

The Commission has already ruled that the identification of the service and the counsellor not be published in any way and that remains, of course, the view of the Commission. The respondent now proposes to call evidence from the counsellor. The Commission of its own motion raised with the parties before the lunch adjournment today whether the principles underlying the sexual assault communications privilege as set out in the Evidence Act 1906 in this State has some application to these proceedings and I should note that a similar regime exists in all other states across Australia and in part in the Commonwealth.

It's accepted that, and in my view, there can be no doubt that the particular communications in this particular case on the evidence thus far would meet the definition of a protected communication for the purposes of that legislation and there can be no doubt about that in my opinion. It's also accepted that such protected communications cannot be disclosed in criminal proceedings without the leave of the court. An exception to this is if the court considers there is a legitimate forensic purpose and it's in the public interest for there to be disclosure and that is set out in a number of prescribed grounds.

In New South Wales, but not apparently in this state, there is also privilege in the evidence legislation that if there is - if such material, rather, is found to be privileged in criminal proceedings, then it is also subject to the same privilege in civil proceedings. In this case, of course, there are no criminal proceedings on foot or have occurred, but however, by their nature, the communications that I've (indistinct)2.59.05 between the former student [A] and The Counsellor and the Counselling Services would be highly personal in nature and generally confidential.

Therefore, on my view, it's a matter of discretion for the Commission and the Commission should have regard to these circumstances when considering whether (a) the materials, that is, the documents produced under summons should be admitted into evidence or (b) evidence should be led from the particular counsellor concerned, having regard to section 26(1) of the Act.

In this respect, I am guided by, but of course not bound by, the tests set out in section 19G of the Evidence Act and also the provisions of the Act in relation to legitimate forensic purpose, in other words, whether the material is relevant and will either advance or be adverse to a case of one party or the other. And that seems to me to be a common sense test in any event.

Having regard to those principles, in my view, on balance in particular having regard to the evidence given thus far, evidence of the counsellor from the Counselling Service would serve a legitimate forensic purpose at least in relation to the impact on the evidence of disclosures made thus far in these proceedings.

In relation to the question of public interest, as I've said, I'm guided by the provisions of section 19G(2) in that regard in relation to the making of a full defence that really is obviously tailored towards criminal proceedings and doesn't apply in this case.

In relation to whether the communications may have a substantial probative value, given that the complainant, as he was at the time, is now deceased, of course, sadly and the other evidence is mostly hearsay, then in my view this material may have probative value but I do not know the answer completely for that issue, of course, until the evidence is given.

Further, in relation to the likelihood that evidence of the disclosures and protected communication may have an impact on the outcome of the proceedings, it may well do and therefore, in my view, that sort of criterion would be satisfied. I'm mindful, of course, also of evidence being given in relation to disclosures and confidential communications persuading complainants in other cases from seeking counselling or diminishing the effectiveness of that counselling.

But in my opinion, that factor is outweighed by the two I've just referred to but also the directions I made in relation to the protection of the identity of the counsellor and of the particular service. I don't think there is any issue in relation to ensuring in the public interest adequate records are kept. Finally, sadly, there's no impact on the complainant in this case for the reasons I've already indicated and for those fairly short reasons, the evidence in my view ought be led.

The counselling file

155 I do not propose to consider the detail of the content of the counselling file. Suffice to say that its content is consistent with much of the evidence given on behalf of the respondent in these proceedings in relation to the incident occurring; A's mental health problems; his drug and alcohol abuse; and his naming of the perpetrator as the applicant. It paints the picture of A as a deeply troubled individual. Reference is also made to two later incidents of sexual assault against A, which were also disclosed during counselling. There is also reference to a report by the counsellor to the police, in relation to A's assault. The note also records a conversation between the counsellor and a Detective in Bunbury, to the effect that A filed a complaint with the Police in relation to the assault, however, as the incident was alleged to have occurred overseas, it was beyond the jurisdiction of the West Australia Police to investigate.

The counsellor's evidence

- 156 The counsellor has qualifications in trauma, sexual assault, and domestic assault counselling. The counsellor testified that A attended six to seven counselling sessions in 2017. During the counselling sessions he disclosed the sexual abuse. The counsellor said that A had described how he had run into a person in the local area who had sexually assaulted him on another, later occasion. This had set off panic attacks and triggered memories, which led to A disclosing to the counsellor what occurred on the Indonesian trip. The counsellor described that whilst on the school trip when he was 16, a male teacher was sent on the tour as his chaperone, as A was the only male student on the trip, and something had happened between them. The teacher slid into his bed and A told the counsellor he was scared and fearful and the teacher told him to stop yelling and calling out. His head was forced into the pillow, he was struggling, and he was told he had to keep quiet. A told the counsellor he felt like he was suffocating and then he was raped.
- 157 The counsellor testified that during the sessions with A, they got to know each other somewhat and the counsellor commented on his authenticity and his fluid, calm and detailed account of what had occurred. The counsellor said that A felt relieved to have been able to have said what he did. When asked about A's use of drugs and alcohol, the counsellor said that at no stage did he present under the influence and was always well groomed, paid attention to himself and other staff members, was well mannered and polite. The counsellor said that A had been threatened that the perpetrator knew his parents and family and where he lived and that he would get him and kill them which made him very fearful and despairing, as it was described. He also told the counsellor that after the teacher concerned was working at another college, that A had telephoned him several times at work to aggravate him to see if he was at all remorseful and whether he had done the same thing to anyone else.
- 158 The counsellor said that A wrote down the name of the teacher on a piece of paper which appears in the counselling file and the teacher's name was the applicant. A told the counsellor that the teacher had informed him he only f...d guys that were gay and that A was trying to tell him he was not gay and that it was important for people to know that and that he liked someone at school. The counsellor testified that A had disclosed that he had been sexually assaulted sometime later when older, one evening after being out at a hotel in his local area. He had been attacked and raped on the way home. When asked whether there was any prospect that in the counsellor's opinion, A could have confused these incidents, the counsellor referred to A's description as to what state he was in after the assault in the hotel room in Bali and the triggers he described arising

from that incident when he was 16 being “smell and condoms and pain and blood, and like, he was very descriptive and detailed about it. So no, it was nothing like it at all”: 208T.

159 In cross-examination the counsellor was asked about the last session with A in July of 2017 where it was recorded that A did not present too well and the counsellor observed that he had been asked to see another psychiatrist and he did not want to repeat all of his prior trauma. In relation to any subsequent assault, the counsellor referred to at least one, possibly two, further occasions when A had been sexually assaulted, making possibly three in total.

Ms Jones

160 Evidence was also given by the three Investigators from CEWA. Ms Jones is the Employment Relations Team Leader. She confirmed that herself, Ms Taylor, an Employment Relations Consultant, and Mr Wong, the Coordinator Child Safe Team, were assigned to investigate the allegations set out in the letter from A's parents. The investigation took place over the period from February to August 2019.

161 Consistent with the case as put by the applicant, Ms Jones was subject to criticisms that the Investigators were not sufficiently qualified or experienced to investigate allegations of this kind. Ms Jones said that once the allegations had been made by A's parents, contact was made with the police, however, they were told that as the alleged assault took place overseas, that the police could not investigate the matter. Whilst Ms Jones said that CEWA had conducted several investigations into similar complaints, including rape allegations, consideration may well have been given to engaging external assistance.

162 Ms Jones accepted for the investigation, that a lot of the evidence gathered was hearsay. Whilst the Investigators did not tell the applicant that A had died in October 2018, she said they did not deliberately withhold such information from him. Ms Jones also said that she understood at the time that A's death was common knowledge in his local community. In relation to the Investigator's interview with Ms Hunter in March 2019, Ms Jones accepted, as noted in the Final Investigation Report on p 9, that Ms Hunter lacked clarity and appeared somewhat erratic in some of her responses to questions. It was also acknowledged in the Final Investigation Report that Ms Hunter had informed the Investigators she had been contacted by the applicant's father and had discussed issues with him.

163 The Investigators took these matters into account in assessing the credibility of Ms Hunter as a witness. However, despite this, Ms Jones said that the Investigators still found Ms Hunter a reliable witness and one with a good

recollection of events on the trip, in particular the identification of the hotel, the airline, accommodation arrangements and what occurred on the last night before returning to Perth. Ms Jones said that it was clear during the interview with Ms Hunter that many things she said were from her own recollection, such as the detail of the trip etc, and not from anything that she may have been told by someone else.

164 Similarly, in relation to A's friend, Mr Bardowski, the Investigators also accepted, as acknowledged in the Final Investigation Report at p 11, that he too appeared to be somewhat erratic and had a poor memory. These matters were also considered and taken into account.

165 In relation to A's Statements, it was accepted these were not formal signed complaints and were seemingly made in a therapeutic context. However, Ms Jones said that the Statements were not taken in isolation, but also in the context of what A had also told others as to the assault. Ms Jones also commented that the applicant appeared to change his responses when questioned on whether he shared a room with A on the final night of the trip.

166 In relation to the expert report prepared by Dr Chamarette, Ms Jones accepted that at the time of seeking her opinion on the material given to her, the Investigators had not at that point been able to conclude that the allegations were substantiated or not. Once the Investigators had received Dr Chamarette's report, they considered the material collectively and reached the conclusions that they did. As to whether the applicant had an older brother or whether he lived close to the applicant's house Ms Jones said that the Investigators did not focus on these matters, rather the focus was on the specific allegations themselves. In relation to the applicant's criticism of the investigation that no attempt was made to interview character witnesses on behalf of the applicant, Ms Jones testified that the applicant's good character was assumed for their investigation.

Mr Wong

167 Mr Wong was asked to join the investigation team. He is a registered psychologist. He accepted that the Investigators should probably have spoken to the Principal of the College, Mr Glasson, but they did not. He agreed that the Final Investigation Report's reference to a "handwritten statement" of A was inaccurate, as it was a typewritten statement with A's handwriting on it. As to the Statements themselves, Mr Wong testified that for the investigation the Investigators took them as a statement of fact and that the Investigators believed them. They were taken at face value, despite their therapeutic context. However, Mr Wong clarified this evidence and said that the assessment of A's Statements

were also taken in the context of the corroboration of others, who were spoken to by the Investigators.

- 168 In relation to observations of Ms Hunter in her interview with the Investigators in March 2020, to the effect she spoke with A's father before the interview, Mr Wong accepted this may have somewhat tainted her views, but he had to consider this when assessing her credibility. Mr Wong agreed with the proposition when put to him, that he approached this case as influenced by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Ms Taylor

- 169 Ms Taylor has been a legal practitioner for about eight years. She was the author of the Final Investigation Report and the other two members of the investigation team endorsed it. Ms Taylor said she appreciated the seriousness of the allegations and the need for the Investigators to be sure in the conclusions they reached. Whilst she had not investigated a rape allegation previously, Ms Taylor said she has been involved in many other workplace investigations. She testified that she did discuss within the investigation the "Briginshaw" approach to the balance of probability standard of proof, and that given the seriousness of the allegations against the applicant, that the Investigators needed to be sure in the conclusions reached. Especially in relation to A's Statements, Ms Taylor said that she had to acknowledge that it may not necessarily have been a statement of fact, as it was made in a therapeutic context. Therefore, she testified that she had to look at other evidence through other witnesses, to place reliance upon them.
- 170 At the time of the referral of the draft report to the expert Dr Chamarette, Ms Taylor said that at that time no conclusions had been reached by the Investigators. Whilst some options were mentioned in the brief to Dr Chamarette, her expert opinion was sought on A's Statements and the statements made by the applicant in his responses, in the context of Dr Chamarette's expertise. The veracity of the applicant's Statements was important to the investigation. Ms Taylor agreed that Dr Chamarette concluded that given the therapeutic context of A's Statements, it may not strictly speaking be a statement of fact, but it was credible. Whilst Dr Chamarette did express views on the options set out in her brief, in relation to whether the allegations were substantiated or not, Ms Taylor observed that Dr Chamarette's conclusions involved some "fence sitting" but in any event, expressing those views went beyond the brief given to Dr Chamarette for her expert opinion.
- 171 As to the conclusions reached by the Investigators, Ms Taylor observed that the investigation would not have been satisfied if only a borderline decision was

available. She said that at the end of the investigation, the conclusion reached was reached with a "level of conviction":190T.

Ms Prendergast

Ms Prendergast is the Principal at Lumen Christi College. She said that she met with the applicant informally three times during the investigation. Ms Prendergast said the applicant expressed his frustration and anger towards CEWA, due to the time the investigation was taking. As the employer of the applicant, she said that based on the findings of the Final Investigation Report of 8 August 2019 and the applicant's responses, she concluded that the applicant had to be dismissed for serious misconduct. Additionally, Ms Prendergast said she had lost confidence in the applicant as a member of her executive leadership team at the College.

Consideration

¹⁷² It is undoubtedly the case that because of the historical nature of the allegations against the applicant, that he was at a forensic disadvantage. In criminal proceedings involving historical sexual assault cases, a trial judge will inform the jury of the delay in commencing a prosecution; the possibility of human recollection being distorted; the age of a complainant; whether the prosecution case is confined to the evidence of a complainant; and any other unusual features. The principles relevant to delay and the danger of conviction on the uncorroborated evidence of a complainant were established in the decision of the High Court in *Longman v The Queen* (1989) 168 CLR 79 as discussed and applied in *Crampton v The Queen* (2000) 206 CLR 161 at par 45 per Gaudron, Gummow and Callinan JJ.

¹⁷³ This necessitates an acknowledgement of the forensic disadvantage suffered by an accused in cases of lengthy delay in a complaint. This involves testing a complaint; the opportunity to locate other witnesses; and not having available "the forensic weapons that reasonable contemporaneity provides constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions": *Crampton* at par 45. While the investigation and these proceedings arise from a workplace incident, and are to be approached with the principles discussed earlier in these reasons in mind, it is still necessary to have regard to the lengthy delay in the complaint being made and to take this into consideration. This is particularly so as the complainant is now deceased.

174 I am satisfied that the Investigators were cognisant of the substantial lapse of time involved from the alleged assault and the time that A disclosed the events to his family, his close friend, and to the counsellor. In her evidence, Ms Jones referred to the long delay involved. Importantly, in the Final Investigation Report in section "(e) Credibility of Witnesses" the report states at p 11:

In considering the evidence of each of the witnesses, the investigators have taken into account:

1. The lapse of time since the alleged assault and the impact this has had on the ability of the witnesses to recall the incident or any other relevant surrounding circumstances;...

175 All the witnesses called, including A's sister and parents and Ms Hunter, were cross-examined by the applicant at some length and the opportunity was given to test their evidence. The applicant was also tested on his evidence and statements he gave to the Investigators.

176 Second, I am satisfied that the Investigators knew of the fact that a considerable amount of the material gathered by them was technically hearsay. This was acknowledged by the Investigators called to give evidence in these proceedings and was specifically noted in the Final Investigation Report under the section dealing with the credibility of witnesses. Much evidence was also circumstantial in nature. Whilst that was so, it was incumbent on the Investigators to weigh up all of the material, including that which was of a hearsay nature, and form a view whether the misconduct occurred on balance, having regard to the gravity of the allegations.

177 In these proceedings, whilst the Commission is not bound by the rules of evidence, the accepted approach over many years is that hearsay evidence is not inadmissible, but is to be accorded the appropriate weight, depending on the totality of evidence before the Commission. This includes circumstantial evidence, which, depending on the nature of the case, may be most important. It is the evidence in its totality that must be considered: *Baron v George Weston Foods Ltd* (1984) 64 WAIG 590; *Australian Workers' Union WA Branch v Hamersley Iron Pty Ltd* (1986) 66 WAIG 322. Where, as in s 26(1)(b) of the Act, the rules of evidence do not apply, facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from "spinning a coin" and bases its conclusions on material that has probative value, with the weight to be given to such material, being a matter for the tribunal (and in this case the Investigators): *Reg v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488 per Diplock LJ.

178 Third, I am satisfied that the Investigators did have regard to the appropriate principles in approaching the workplace investigation. It was stated in the Final Investigation Report that the investigation proceeded under the CEWA policy

"Unsatisfactory Performance and Misconduct Policy". A copy of this policy was attached to the applicant's witness statement at annexure W. The policy refers to various definitions on p 1. There can be no question, that an allegation of sexual assault during the employment would constitute misconduct of the most serious kind.

179 Under the heading "Principles" on p 2 of the policy, is recognition of the principles of procedural fairness. There is also expressed in the policy the need for "sound evidence" and the duty of a Principal, no doubt based on duty of care considerations, to take formal action which may lead to dismissal in the case of established misconduct. In relation to misconduct/serious misconduct the process is set out on pp 4 - 6 of the policy. Here the allegations were put to the applicant and he had an opportunity to respond to them. The allegations were vigorously denied. The investigation then commenced. I am otherwise satisfied that the respondent complied with the policy. I am also satisfied that the Investigators were independent. It was not, and it would not be appropriate, to conduct such an investigation at the school level. None of the Investigators were associated with the matter the subject of the investigation.

180 As to the composition of the investigation, it comprised three persons; a legal practitioner; a psychologist; and the team leader for the employee relations department of CEWA. Despite criticism by the applicant of the level of experience of the Investigators, in not having investigated an allegation of this present kind, I do not consider this to be a fair criticism. They had undertaken many workplace investigations, some including allegations of a sexual nature. Given the circumstances confronting the respondent, that first, the conduct occurred overseas and outside of the jurisdiction and second, the complainant was deceased, this placed the respondent in a very difficult position. The circumstances were unique. As a provider of education in Western Australia, the respondent had to investigate allegations consistent with its duty of care, especially as the allegations concerned a senior educator still working in the system. It is important to return to the earlier discussion above, in relation to the standard to be achieved in workplace investigations not expected to be that of the police. Here, the police could not investigate. The context of the investigation was to enquire into whether the applicant had engaged in serious misconduct in breach of his contract of employment, not whether the applicant had committed the offence of sexual assault under the criminal law. The standards and approaches to enquiries in both contexts are different.

181 Despite this however, I am satisfied that the Investigators were aware of the seriousness of the allegations. Whilst a reference is made to the balance of probabilities test in the "Investigation Principles" section of the Final Investigation Report, I am satisfied in particular, on the evidence of Ms Taylor,

that the investigation knew the need for an "actual persuasion" to the affirmative case, that serious misconduct had occurred, consistent with the principles in *Briginshaw*. In this context too, I am not persuaded that the Investigators commenced with a "presumption of guilt" as put by the applicant. The fact that they sought expert opinion from Dr Chamarette, and the context in which that opinion was sought, is inconsistent with such a presumption.

182 Having considered these general issues, I now turn to some of the more particular criticisms of the investigation advanced by the applicant. I will then turn to consider the evidence, and whether, based on that material, it was open for the respondent, after as full and extensive an investigation as required in the circumstances, to hold an honest and genuine belief, based on reasonable grounds, that the misconduct took place.

183 I acknowledge some criticisms made by Ms Parnell of the investigation process. It is the case that the Investigators did not obtain a death certificate or copy of the coroner's report into A's death. However, I do not consider the possession of such would have had any material impact on the outcome of the investigation. It was not clear, but it appears on the evidence available, that A's death was because of an overdose of prescription medication. It was also not controversial that A did engage in substance abuse, involving alcohol and drugs. That much is clear from the evidence of A's family and his friend, Mr Bardowski. The Investigators knew of this. The question of alcohol and substance abuse was specifically referred to in the Investigators' brief to Dr Chamarette as set out on p 1 of her expert opinion of 24 July 2019, annexed to the Final Investigation Report at annexure UV. Dr Chamarette did not consider that A's drug use meant that his recall and writings were delusional, or drug induced.

184 As to records from the counselling service, as I have mentioned earlier in these reasons, attempts were made by the Investigators to obtain information from the counselling service, however, for confidentiality reasons, that material could not be obtained. As for school records, the evidence was that the school did not keep all reports, however A's parents had some, but both gave evidence of how their son's school performance did decline and how they responded to this. Any school reports in the possession of A's parents, and his mother said they had some at home, were able to be obtained by summons in these proceedings but the applicant did not do this. It was open for the Investigators to have due regard to A's parents' evidence. Similarly, too, was the important evidence of Ms Hunter, A's Indonesian teacher who plainly said that his schoolwork deteriorated on his return from the Indonesian trip. Despite the criticisms of Ms Hunter's interview with the Investigators, and aspects of her evidence in these proceedings, which I will come to later in these reasons, it was open for the Investigators to conclude

on this material, that something was amiss in A's school performance from this time.

185 As to the applicant's character, I refer to the evidence of Ms Jones, who said for the investigation, the applicant's good character was assumed. Nor was the applicant's service record with the respondent in issue. As to the referral of some matters to Dr Chamarette for her expert opinion, I do not accept that Dr Chamarette was not an appropriate person to consult on such matters. Dr Chamarette's background, experience, and qualifications in dealing with adult victims of child sexual abuse are set out in an appendix to her expert opinion, as attachment UV to the Final Investigation Report. Dr Chamarette is highly qualified and experienced in this field. I consider she was well qualified to provide the opinion sought by the respondent. There was no objection by the applicant to the tender of Dr Chamarette's report, as part of the Final Investigation Report. It was open to the applicant to call Dr Chamarette and to cross-examine her on the opinion she expressed in her expert report, but this course was not taken.

186 As to the assertion that the respondent ignored Dr Chamarette's comments on the "options" as to substantiation etc, I do not consider this to be a fair criticism. A balanced reading of Dr Chamarette's conclusions reflect some ambivalence and she did not express a clear view either way. Her qualification of A's Statements, as not having the force of, for example, an affidavit, is understandable. However, importantly, the Investigators said that they considered Dr Chamarette's views as part of all the material they had before them, and just not what was referred to Dr Chamarette for her opinion. I therefore do not think it fair to say that Dr Chamarette's opinion was disregarded in this context. I note the evidence of both Ms Jones and Ms Taylor, that at the point that Dr Chamarette's opinion was sought, they had not reached any firm conclusions about the outcome of the investigation. Overall, the Investigators approached their task thoroughly in the context of a workplace investigation. The chronology of the investigation is set out at pp 2 - 5 of the Final Investigation Report. The Investigators interviewed those persons most directly involved in the allegations. Two were deceased, being A and another student who also went on the Indonesian tour, "J". Repeated attempts were made to contact the fifth student on the tour, "T", but this failed, and the Investigators could not speak with her.

187 There was also criticism that the Investigators did not interview Mr Glasson, the former Principal at MacKillop College. Whilst he gave evidence in these proceedings, it is not clear how he could have assisted the Investigators. He said that he would not have approved a teacher sharing a room with a student and he was not informed of this afterwards when the group returned to Perth. He also said that in relation to students caught smoking on the trip, he would have

expected this to be reported to him as it would be regarded as a serious matter. The applicant's evidence was this was not reported to Mr Glasson. These matters, whilst they may now be considered in hindsight, would not have materially impacted on the outcome of the investigation in my view.

188 The interviews with the witnesses, as set out in the Final Investigation Report, were conducted fairly and properly. An open-ended questioning technique was used. The interviews were comprehensive. Although the interviews themselves did not seem to be audio recorded, detailed interview notes were taken, and no suggestion was advanced by the applicant that anything of substance was left out. He accepted that his statement was accurate in correspondence to the Investigators dated 28 March 2019 (see annexure Q exhibit A2).

189 I turn first to consider the evidence of the disclosure. I observe at this point that despite the views expressed by Dr Chamarette and the Investigators, there is no firm evidence that both of A's Statements were made in his therapy with the counselling service. This was an assumption. It was not the subject of comment in the evidence of the counsellor because, importantly, as to both the veracity of the disclosures by A to the counsellor and the counsellor's evidence generally, there was no evidence that the counsellor was aware of the Statements. Nor is specific reference made to such Statements in the counselling file in exhibit R9. The evidence before the Investigators, and before the Commission, is that the Statements were found in A's things after he died. They are undated. A copy of them is not on the file in exhibit R9. However, for the second document "Part 4 of my soul: The Next Step" under the heading "Actions" is reference to the counselling service and "therapeutic intervention, counselling and support".

190 As the Statements refer to "Part 2" and "Part 4", it may be open to assume there may have been other writings produced by A, not located. Given the reference to the counselling service in the Statement headed "Part 4", it appears the assumption of the therapeutic context of the writing, at least in relation to this document, may be sound, but only as to the second document and not the first. Importantly, it is the first Statement, "Part 2", which is the document setting out the detail of the trip to Indonesia and the detailed allegations as to the assault on A. It is this first document, that sets out A's description of the incident. There is no basis for a finding on the evidence in my view, that this first document was created in a therapeutic context.

191 However, even if this is not correct, and both Statements were made in a therapeutic context, it is important to recognise, as a matter of the sequence of the events, that the Statements were not the first step in A's disclosure. The first step in A's disclosure was to his sister and his parents in March 2017. It was only after his disclosures to his family members, that A was encouraged by his parents to seek professional help. The disclosure to A's sister was made because of

triggers from a chance meeting with a perpetrator of a subsequent assault, well after the Indonesian trip. As the outcome of A's sister's interview with the Investigators and her evidence in these proceedings reveals, A's disclosure to her was detailed, graphic and emphatic. I found A's sister a very credible witness. A also contacted his parents and disclosed to them, over separate visits, on the evidence of A's parents and their interview with the Investigators.

- 192 I find the essence of the Statements made by A compelling and credible, as did Dr Chamarette. They are detailed, although not as to all aspects of the trip, as suggested in the Final Investigation Report. They were also not handwritten but had handwriting on them, contrary to the description in the Final Investigation Report. I do not regard this error in the Report as being of any significance, however. The detail of the first Statement related to events once the tour group got to Bali and not before then. The Statement correctly identified the number of students and two teachers on the trip. However, the subsequent description, starting with the delay, the overbooked flight, the airline having to arrange hotel accommodation and that it was close to the airport, was very accurate and consistent with other evidence.
- 193 Whilst I accept that both in her interview with the Investigators and in her evidence in these proceedings, Ms Hunter did go off on tangents on occasions, her recollection of the trip, accounting for the long lapse of time, was detailed. For the reasons identified by the Investigators in the Final Investigation Report, when dealing with credibility issues, I paid close attention to Ms Hunter when she was giving her evidence. Ms Hunter, in both her interview with the Investigators and in her testimony, identified the interaction with the airline, Sempati Air, in detail. She recalled the name of the Sempati Air representative as "Roxanne".
- 194 Ms Hunter described the situation with accommodation generally throughout the trip and that they had their own rooms when staying in "losman" type accommodation. She said she had a "battle" with the airline representative, but she lost it. It is understandable that Ms Hunter may have had such a battle as she was the tour organiser. As she said in her evidence, she knew the parents of the students were travelling from Busselton to Perth to collect their children from the airport and urgent arrangements had to be made. Contact had to be made with the Principal of the School, Mr Glasson, to inform him of the last-minute changes.
- 195 Ms Hunter recalled the first hotel on the first night as the Adhi Dhama. All the tour group members had their own rooms. Ms Hunter narrated the steps she took to reconfirm the flight home and her contact with Mr Glasson. In relation to the Kartika Plaza Hotel, she said they had a three-bedroom villa.

- 196 But the applicant's recollection on the hotel accommodation was not clear. He told the Investigators he did not have a distinct memory of Bali. He could not recall whether the tour group stayed at the same hotel on the last two nights, but he leant towards it being the same. He thought there was the same setup in the types of room. It is highly unlikely that the group would have stayed at the same hotel. The first night in Bali was the planned last night of the school tour. This hotel would obviously have been booked in advance. The group were scheduled to leave the next day and fly back to Perth, but the delay became a major problem. The flight was overbooked, and the airline had to find somewhere for the group to stay another night. It was the end of the school holiday period. Ms Hunter said that because of this there was little choice in finding unplanned accommodation in Bali. This is an entirely logical conclusion. It also finds some support in the interview of student S with the Investigators, that the hotels were separate and different on each of the nights. Although I note that S in her statement to the Investigators, said that she thought there may have been more than one villa on the final night, but there was uncertainty in her recollections too.
- 197 Ms Hunter told the Investigators that either the airline or she obtained a three-bedroom villa at the Kartika Plaza Hotel. Her description of the villa as attached to the hotel and close to the road and the airport was detailed. She said to the Investigators that the applicant offered to share a room with A. Later when asked as to how she divided the rooms, she referred to her and the applicant not being in a room together, and nor could either of them share with the girls. The reference to there being "no other option" in her statement to the Investigators was plainly in the context there being no other option but for the applicant and A to share a room in the villa, as there was no other accommodation available.
- 198 In terms of her evidence in these proceedings, Ms Hunter was cross-examined extensively. She said the airline gave each ticket holder a bed, not separate rooms. It was her decision to work out the room allocation. This problem was resolved when she put the applicant and A in the same room. This meant no male had to share with a female, which would have been the least appropriate option. In terms of competing likelihoods, I am satisfied this would have been the most likely combination of accommodation arrangements, if the villa had only three bedrooms. I have already mentioned that I paid very close attention to Ms Hunter's evidence, in terms of not just its content but her demeanour when she was in the witness box. When it was put to her by Mr Mullally in cross-examination that she did not put the applicant and A in a room together, the following exchange took place at 148 - 149T:

You did not put Mr Parnell in a room with a student, did you?---That is completely untrue.

...

HUNTER, MS: Completely untrue.

...

HUNTER, MS: And he's perjuring himself by saying that.

KENNER SC: No, Ms Hunter, just - I think you might have misunderstood?---If he's saying - - -

The evidence you've given is that the airline provided accommodation for each individual ticket holder?---I understand that.

...

And therefore - - -?---Beds - beds.

- - - that means - does that - - -?---Beds.

- - - mean individual rooms?---No, it means beds. So therefore, I had to make decisions about who was going into what room with whom.

All right. So was - - -?---And there - - -

- - - that your - - -?--- - - was three bedrooms.

- - - decision?---Pardon?

Was that your decision?---No, it was because we were only given three bedrooms in the villa.

All right?---So I had to make an executive decision, um, and Don, um, offered to - as far as I remember, Don offered to stay in the room with [A], because they were the two males. I slept in a room with the, um, other girls and I think the, um, two other girls slept in another room.

MULLALLY, MR: So the end result was that you say you put them together in a room?---Yes.

199 Ms Hunter's reaction to the question put to her by Mr Mullally was telling on this point.

200 Whilst the applicant could not recall much of the Bali arrangements, he remained emphatic that he and A did not share a room. However, as identified by the Investigators in the Final Investigation Report, there was some change in the applicant's position. Initially, in his response to the allegations at attachment E to the Final Investigation Report, the applicant said that he said that "I strongly believe that I did not share a hotel room with A". When this was put to him in his interview, the applicant said that he was being cautious with his language in his response and said he was "100% sure that he did not do so."

201 I note too, that despite saying he had little recollection of the stay in Bali, or whether it was the same hotel or not on both nights in Bali, and saying he would

only recall exceptional matters given the passage of time, despite this, the applicant maintained that the accommodation was in three separate villas provided by the airline. Both he and Ms Hunter had one villa each and a separate three-bedroom villa was provided for the students. The applicant did not say how this was an exceptional matter, so he could recall it and for Ms Hunter to be so wrong, when he had little independent recollection of many other matters.

- 202 Also too, I note that a portion of the applicant's interview with the Investigators and also in his evidence in these proceedings, was devoted to criticism of Ms Hunter because she had not properly planned the trip; she lacked leadership; and that she spent a lot of time away from the group with her friends etc. None of these matters were at all relevant to the central allegations and it is open to infer, and I do infer, these matters were raised by the applicant to impugn Ms Hunter's credibility. This is despite Ms Hunter acknowledging at the outset, that when the Indonesian tour was undertaken, she was only a relatively junior teacher.
- 203 Whilst I have reservations as to aspects of what Ms Hunter told the Investigators, for example the assertions of the applicant "grooming" her not being in the sinister sense, rather mentoring her, and some confusion as to whether she had done "research" about historical sexual assault, and whether this was told to the Investigators and/or whether it was accurately recorded by them, in all other respects, and in particular on the core issue of the accommodation arrangements on the final night at the Kartika Plaza Hotel at Bali, I accept Ms Hunter's evidence. I regard her as a witness of truth. It was open for the Investigators on the same basis, to accept Ms Hunter's version of events.
- 204 It would, with passing time, be unusual for there not to be inconsistencies in recollections. The applicant and the students did go to the Hard Rock Café but on the first and not the second night it seems. As to the allegation of the drinking of alcohol on that evening, it would appear from the interview of at least student S, that when they did go to the Hard Rock Café she did think that they were consuming alcohol and referred to cocktails in large glasses. She also described the atmosphere as being dark and like a nightclub, which was consistent with at least in part, A's description in his Part 2 Statement, of the group having dinner at the Hard Rock Café. Also, whilst the counsellor referred to A being given alcohol in the room by the applicant on the last night immediately before the assault, this was not mentioned in A's Part 2 Statement.
- 205 Ms Hunter said that it was not until she returned to Perth that one of the students told her that the applicant took the group to the Hard Rock Café and bought them drinks. This was denied by the applicant. On this issue I have doubts whether the investigation could conclude on balance, that it was established that the applicant had purchased drinks for the students. There was no direct evidence to this effect.

In all other respects however, the general consistency in the essential narrative was striking.

- 206 Ms Hunter's evidence was also consistent with at least the interview of student S, that the students were watching a movie on the final night. I have no reason to doubt Ms Hunter's evidence that neither the applicant nor A were present and her being told by the students they had gone to bed some time earlier. Ms Hunter referred to student S asking her to knock on their door as noises were heard. I also accept Ms Hunter's evidence there was some form of altercation on the flight home involving the applicant and A, but Ms Hunter did not know what this was about.
- 207 As to the contention that Ms Hunter's evidence was entirely contaminated because she had spoken to A's father before her interview with the Investigators and had seen the Statements, I do not accept that is the case. Ms Hunter's evidence was that she had not seen the Statements until two weeks before the hearing in these proceedings. She agreed that she had spoken to A's father on two occasions, the first time briefly and on a second occasion in more detail. He told her about A's complaint.
- 208 Overall, I found the consistency between the disclosures made by A to his sister, to his parents, their evidence as to what A told them and the manner in which it was told, taken with A's Statements, to be compelling. There was also A's disclosure to his friend Mr Bardowski, to a similar effect.
- 209 As to the disclosure, I refer to the evidence of the counsellor. The counsellor was independent and had spoken to no one except A. I found the counsellor's evidence to be highly credible and compelling. Taken with the evidence of A's sister, his parents and the content of the Statements made by A, the evidence of the counsellor is strongly corroborative in relation to the events, even though it was given after the conclusion of the investigation.
- 210 There is, as I have said earlier in these reasons, a substantial body of circumstantial evidence. First, is the evidence given to the Investigators and in these proceedings as to A's decline in schoolwork standards and his behaviour. Evidence of this came from home through his parents and from his then Indonesian teacher, Ms Hunter. Second, A became increasingly withdrawn and his parents noticed a substantial change in him. Third, A left Mackillop College with no explanation. He then left school altogether after a brief period at another school. This is despite evidence of his family that A had been to that time, generally a diligent student before the Indonesian trip. Balanced against this is the evidence of both Mr Greaves and Mr Holt, called as character witnesses by the applicant, that as former teachers at Mackillop College they noticed no substantial change in A's behaviour and performance after the Indonesian tour.

However, they could not have been as close to A as A's parents, or Ms Hunter, as one of his teachers at the time.

- 211 Fourth, is A's descent into alcohol and drug abuse and his destructive behaviour generally. Fifth, is the uncontroversial evidence of his family and of the counsellor, that once A had disclosed the assault, he seemed to have a sense of relief.
- 212 Sixth, and importantly, is the series of “tweets” sent by A to the applicant in March and April 2017. I have set these out above. These were sent to the applicant at about the same time as A’s disclosures to his family and before he attended the counselling service in early May 2017. There can be no reasonable explanation, as a matter of logic, given the timing and content of some messages, other than something of significance had occurred between the applicant and A sometime in the past. It just makes no sense to see them in any other light. The applicant did nothing about the tweets and blocked them. He did not report them to anyone, if he had any concerns as to the welfare of A, as a former student at Mackillop College, given his pastoral care role. Such a failure to act on the tweets is also consistent with the applicant not wanting to call attention to A in his past, and to prompt the asking of questions.
- 213 Seventh, is the evidence in the counselling file in exhibit R9 of a report made by the counsellor of the assault of A on the Indonesian, tour to the police. The counsellor clearly felt seriously concerned enough to do so. The note records that the police could not deal with the matter because it took place outside of the jurisdiction. The note, as mentioned above, also records a conversation between the counsellor and a police Detective to the effect that A made a complaint to the Bunbury police in relation to the assault. However, as noted by Mr Mullally in his supplementary written submission mentioned above, no formal police record of that is in evidence. This does not alter the fact however, of the contact made by the counsellor with the police, nor that a file note was made on the counselling file to the effect that the counsellor was told something by a Detective. It cannot of course, stand as the truth of what is asserted in the file note.
- 214 Eighth, is the evidence of the counsellor that at some undisclosed time, A made telephone calls to the applicant at work when he was at another school. The notes made by the counsellor in the file suggest that A did so to see if the applicant had done to anyone else, what A said he had done to him. I note this appears to have been a consistent theme in A's narrative.
- 215 Ninth, is the complete lack of any possible ulterior motive for A to make a malicious complaint against the applicant of such seriousness. The applicant maintained that he had no contact with A after A left Mackillop College in early 1998. It is inconceivable that an occasion of being caught smoking on a school

trip, and nothing more, would cause such resentment, to lead to allegations of the present kind, twenty years later. If it was the case, as the Investigators observed in the Final Investigation Report at p 14, that A had a "personal vendetta" against the applicant for some unknown reason, it is highly improbable that A would wait so long to make such an allegation. If damage to the applicant's reputation and career was A's motivation for such a disclosure, then it is far more likely it would have surfaced long ago.

- 216 Tenth, is the disclosure made by A to his family and the counsellor of a subsequent sexual assault(s) and meeting one perpetrator, which triggered the revival of repressed memories of what occurred on the Indonesian tour. As discussed by Dr Chamarette in her report, "the literature on delayed recall and disclosure of sexual assault in childhood, supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997" (see Final Investigation Report annexure UV p 2).
- 217 In this context, I also refer to an academic article referred to by Mr Mullally in his closing submissions, titled *Cognitive Mechanisms Underlying Recovered-Memory Experiences of Childhood Sexual Abuse* Psychological Science, Volume 20, Number 1, pp 92-98. In this article, the authors engaged in various experiments in relation to repressed memory in childhood sexual assault cases. The upshot of the article being a suggestion from the research that recovered memories in relation to those made in a therapeutic context, are less reliable than those made spontaneously, where the individual encounters a reminder of the abuse episode. Whilst I do not place much weight upon the article, given my conclusions as to the context of the Statements, and the timing of the disclosures of A *prior* to therapy, and what A told his sister and his family how his memories were triggered, the conclusions reached in the article tend to support, rather than undermine, the reliability of A's allegations.
- 218 Eleventh, on my acceptance of Ms Hunter's evidence as to the tour group having a three-bedroom villa on the final night of the tour, and such an acceptance being well open to the Investigators, the logical consistency of A and the applicant sharing a room as the only two males on the trip, as opposed to either of them sharing a room with a female(s), is of itself, compelling. This is notwithstanding Ms Hunter's evidence, which I have said I accept, that she did put them both in the same room.
- 219 Twelfth, that A's attendance at the counselling service for some time between early May and late July 2017, shortly after the time of his disclosure to his family, is consistent with the legitimacy of A's grievance and the need for therapeutic assistance.

Conclusion

- 220 Having regard to all of these surrounding circumstances, in my view, looked at in the totality of what was before the Investigators and what is before the Commission, including the direct evidence of the applicant and Ms Hunter, it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred. These inferences, open on the material assessed as a whole, go beyond mere conjecture or surmise. I am not satisfied however, that it was reasonably open on the material before the Investigators, or in these proceedings, to sustain the allegation that the applicant purchased drinks for the students at the Hard Rock Café. However, this conclusion does not detract from the principal allegation. All the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction".
- 221 For the foregoing reasons, the dismissal of the applicant for misconduct was not harsh, oppressive, or unfair. The application must be dismissed.