

Mr George Brouwer  
Ombudsman  
Your Ref: C/11/14492

28 June 2012

Dear Mr Brouwer

**Investigation under the Whistleblowers Protection Act 2001**

Thank you for the opportunity to respond to the draft report. I have provided my comments below.

**Paragraph 20**

The quantum of the settlement is subject to a confidentiality agreement and should not be disclosed. There should be careful consideration of the potential adverse consequences of publication. The following matters should be considered;

- The expectation by the plaintiff that this matter would remain confidential.
- The expectation by other litigants that confidentiality agreements with the State of Victoria would be maintained.
- The adverse impact on expectations of other potential litigants and increased litigation against the State of Victoria. This is an exceptional monetary quantum due to the prior earning capacity and the age of the plaintiff.

**Para 41**

I had little 'first hand' knowledge of the security arrangements. This was my impression. Hence this reference may be unfair to those providing the security.

**Para 60**

I am not comfortable that the quote "Reel everything back to subsistence" is accurate. I cannot remember the words the DPP used and doubt that he said "subsistence". The reference to subsistence is a reference to the case of *R v Moti* [2009] QSC 407 decided at first instance. This decision was later overturned on appeal. In essence, we agreed that reasonable financial support should be provided to ensure the witness was able to attend Court to give evidence and nothing more. At the time the witness had approached Victoria Police regarding further financial claims.



**Para 91**

My understanding is that the past medicals were included in miscellaneous items. My notes also record that, the options took into account the medical claims at the highest in scenario 2b and 3b that both contemplated the witness never working again. These options were not endorsed.

Barrister, Michael Rush prepared the quantum assessment table and can be requested to provide further explanation if required.

**Para 92**

I consider that after the liability issue advice was obtained the model litigant principles required that the state seek to resolve this matter expeditiously and prior to enormous potential cost of discovery. The settlement at mediation was appropriate and based on the advice of two senior counsel.

By way of background, I provide the following comments.

The conference on 27 July 2010 was a very robust discussion between myself, Superintendent Lardner, VGSO lawyers, junior and senior Counsel. My notes record that senior counsel assessed likelihood of success for the plaintiff as "very high" due to a representation that the witness would be "no worse off financially". It was agreed that the liability advice left the State with little option but to seek an early settlement on model litigant grounds.

In regard to the early settlement, I noted the following model litigant considerations favouring early settlement;

- To attempt to settle on the basis of a high probability of the loss of the case if defended.
- Compromise to avoid significant inconvenience...discovery, PII claims and members time.
- Overall cost to the state for a contest and interlocutory discovery.
- Legal costs of "\$100's of thousands" for discovery alone.

The discussion then turned to settlement strategies and assessment of damages. It was considered that the appointment of a very senior mediator would assist in working through assessment scenarios. Retired High Court Justice, Ian Callinan was the appointed mediator.

David Ryan, Acting Assistant Government Solicitor provided written advice (dated 28 July 2010) addressing liability, including, five scenarios for calculation of quantum and providing the factors supporting a settlement of the claim. On 28 July 2010. I briefed the then Chief Commissioner and others on the five calculation methods set out in the written advice and the recommended strategy and quantum.



On 5 August 2010, the then VGSO and I briefed the Director of OPI, including a copy of the writ, defence and the written VGSO advice.

After discussion with the VGSO, it was decided to obtain a second opinion from another senior counsel to inform the Minister and to ensure that the level of recommended quantum was reasonable. Victoria Police was not involved in the engagement of Peter Hanks to provide that advice. The settlement options, written advice and briefings from Victoria Police and, independent advice from senior counsel provided a responsible and appropriate strategy for early resolution of the case.

**Para 99**

My answer in regard to Mr Hanks reasoning was speculative, may be misleading and should be deleted. I was not involved in requesting this advice and did not speak to Mr Hanks. It would be better to speak to the person from VGSO who engaged Mr Hanks. Our primary concern was the safety of Ms Gobbo.

**Para 101**

I submit that it is against the public interest to disclose the quantum of a confidential settlement. How can litigants be confident that future settlements will remain confidential if they are later published? Many litigants prefer to maintain privacy and not be subject to media reporting.

**Para 105**

I would argue that reference to the witness protection program should not be included. Ms Gobbo never entered the program.

**Para 108**

I submit that it is against the public interest to disclose the quantum of a confidential settlement. How can litigants be confident that future settlements will remain confidential if they are later published by oversight agencies? Many litigants prefer to maintain privacy and not be subject to media reporting.

**Para 119**

The issues in relation to the loss of earnings related to the loss of the access of the plaintiff to work in the legal profession and her ability to work in like employment. The medical issues were a factor that would have potentially contributed to a much higher settlement figure if the plaintiff was no longer able to work at all. Please refer to my response to paragraph 91.



**Para 145**

Please refer to the response in paragraph 91. Junior Counsel will be available to provide further advice on this aspect if required.

**Allegation 8 on page 40**

The writ was settlement because senior counsel advice indicated a high probability of a finding for the plaintiff on the estoppel issue.

Embarrassment was not a factor for consideration, other than liability issues, we were concerned about her safety.

**Para 153**

The formal record of the meeting is contained in the five page summary of David Ryan dated 28 July 2012. I also took notes of the meeting with counsel that are on the file. Please refer to my response in paragraph 92. VGSO also obtained a second advice from independent senior counsel.

**Para 226**

I have no knowledge of any invitations received by the then Chief Commissioner and the Chief Commissioner was not involved in the selection of panel firms.

**Para 227**

My understanding was that the law firm had not received work because of a lack of suitable claims received by Victoria Police. The delay in responding to the lawyer occurred because I was on leave during the period and forgot to respond until the second request was received. It is quite proper and normal for the Partner of a Law firm to contact the Director of Legal Services to discuss workload issues.

Yours sincerely



Findlay McRae  
Director, Legal Services  
Victoria Police

