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25 October 2012

Mr Derek Smith  
Acting Director, Legal Services  
Community Services, Department of Family & Community Services  
DX 21212 ASHFIELD

**Attention: Joanna Mitchell by e-mail Joanna.Mitchell@facs.nsw.gov.au**

Dear Mr Smith

**State of New South Wales ats AIL & Ors**

I have been asked to advise in these matters generally. Having regard to the amount of material in relation to this multi-claim matter that task is taking longer than anticipated.

I have been asked in the interim to advise on an offer of compromise served on behalf of Kathleen Biles on 2 October in the sum of \$170,000 which expires on 29 October 2012.

1. Ms Biles (DOB REDACT 1971) was declared a neglected child under the *Child Welfare Act 1939* on 2 May 1974. On 23 October 1974 she was committed to the care of the Minister to be dealt with as a ward admitted to state control and taken to Bidura.
2. Her mother appealed the decision, however then admitted she could not care for her children and requested that the Court commit the children to the care of the Gordons at Bethcar.
3. On 10 December 1974 the Court dismissed the appeal and varied the order to commit the children to the care of the Gordons at Bethcar for a minimum period of 5 years.
4. Payments in respect of Ms Biles ceased when she turned 16. She ran away from Bethcar at about this time.
5. Ms Biles alleges the following:
  - i) While at Bethcar she was threatened and physically abused.
  - ii) She was flogged by Edith Gordon.
  - iii) Another female at Bethcar did things to her and her sister and made her brother do sexual things to her.
  - iv) When she was 4 or 5 she was touched by Bert Gordon and was flogged by Edith Gordon when she complained.

- v) When she was 13 Bert Gordon offered her \$20 for sexual act. Next morning he kissed and groped her and gave her \$20. The following weekend he made a further comment in relation to \$20.
  - vi) At about the same age Bert Gordon rubbed her leg whilst they were in a car together.
  - vii) When she was 14 there was an incident in the bathroom where she was kissed, groped and rubbed by Bert Gordon
6. AIL [REDACTED] alleged that on one occasion Bert Gordon took AIL [REDACTED] and her sister (presumably Kathleen) back to Brewarrina and stopped a number of times on the way to have intercourse with them.
7. The statement of claim alleges the plaintiffs were:
- i) (a) removed from their parents and families by the Defendant and committed to the care of the relevant Minister to be dealt with as a Ward admitted to State control, or
  - (b) placed in foster or fulltime live in care by their families.
  - ii) The Defendant caused and/or allowed the Plaintiffs to be placed in the care and under the control of Bert and Edith Gordon at the Bethcar Children's Home at Brewarrina and/or Orange.
  - iii) The Gordons were agents of the defendant
  - iv) The defendant is vicariously liable for the acts of the Gordons and Colin Gibson.
8. The following matters are pertinent:
- i) Ms Biles was not (other than for a brief period for which no complaints are made) committed to the care of the Minister.
  - ii) The State did not owe a non-delegable duty to Ms Biles in those circumstances.
  - iii) Arguably neither the Gordons nor Gibson were agents of the defendant and the defendant is not vicariously liable for them.
  - iv) Bethcar received State and Commonwealth funding.
  - v) Bethcar was inspected regularly and there was no complaint by the children, the local school and there was nothing to arouse suspicion as to the care of the children. Ms Biles presented as healthy and happy over this period. One record in 1984 noted that she identified very strongly with the Gordons and referred to them as mum and dad.
  - vi) She had at least some contact with her mother and appeared to make no complaints.
  - vii) In 1980 there was a police investigation into Colin Gibson which did not result in a prosecution. Gibson left for a period and returned. Allowing the children greater access to their natural family was one measure taken to protect the

children, although it is also reported that this was due to complaints by the children that they did not see their families as often as they would like.

- viii) There was no relevant complaint about either Bert or Edith Gordon over this period.

9. Ms Biles faces some substantial hurdles in this litigation:

- i) The claim is statute barred,
- ii) Establishing that a duty of care was owed by the State in circumstances where she was not a State ward,
- iii) Establishing an agency relationship between the State and the Gordons and Gibson;
- iv) Establishing that the State would be liable for the acts of the Gordons and Gibson in circumstances where it was unaware that the acts were being committed, and where it had a system of inspection.
- v) There are some causation issues in that Ms Biles was approximately 3 years old at the time of placement and may have suffered injury as a result of the neglectful treatment prior to placement. Ms Biles has also had difficult relationships since leaving Bethcar, which again may have contributed to her current disabilities, although a court may well consider her current disabilities are primarily due to her time at Bethcar.

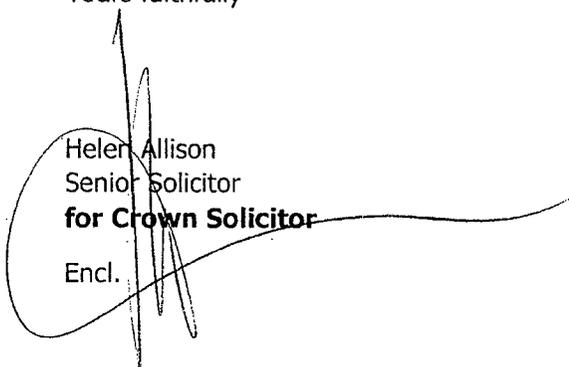
10. Ms Biles claims damages including 20 hours per week domestic assistance since age 18 and continuing and future treatment. She makes no claim for economic loss. While there is no evidentiary basis for a domestic assistance claim the offer itself of \$170,000 is equivalent to about 32% of a most extreme case plus future treatment and the plaintiff, if successful, may receive such an award.

11. On balance I would not recommend accepting the offer of compromise on the following bases:

- i) The limitation and liability issues faced by the plaintiff,
- ii) If this offer is accepted the balance of the plaintiffs will assume that their claims will also settle,
- iii) Not settling at this stage will not preclude settling this or any other matter at a later stage.

If this is insufficient for your present purposes kindly advise.

Yours faithfully



Helen Allison  
Senior Solicitor  
**for Crown Solicitor**

Encl.