ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter of	The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes and Ms Danielle Kelly for the Royal Commission
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	30 September 2020

TRANSCRIPT OF PROCEEDINGS

Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei

(10.03 am)

REGISTRAR: This sitting of the Royal Commission is now in session.

CHAIR: Ata marie ki a koutou katoa, nau mai haere mai tēnā koutou, tēnā koutou, tēnā ra koutou katoa. Good morning Ms Janes.

MS JANES: Good morning Commissioners, tēnā koutou katoa, we will continue with the evidence of Sonja Cooper and Amanda Hill this morning.

CHAIR: You remain on your affirmations that you took yesterday, thank you.

QUESTIONING BY MS JANES CONTINUED: Thank you. Yesterday we were discussing access to justice through civil claims in courts. In terms of the principles that you discussed, would you describe it as being a level playing field for the claimants that you represent?

MS COOPER: No is the short answer. To explain some of that, first of all, records are a big issue. I think accessing them is difficult even if we're in a court context, as we will explain, they often come in in a very segmented way and we had the experience in trial of getting them through trial and after trial.

Funding is a big, I think a big issue in terms of making the playing field not even. And you've already heard some of the constraints on that. But I think having to constantly ask the State for funding, you've heard how that's played out in real people's lives. So that, whereas the State, the Crown has whatever resources it needs and it can contract in, it can hire other people to help, it can utilise what other resources it needs. So that's definitely an issue.

I think then there are the, I suppose I would call them the tactics (and that's something we can talk about a bit more and we will talk about more in our evidence), that the Crown can employ to hold things up or to make it difficult for claimants and witnesses. And just brief examples and again things we've already seen in the evidence, you know, very late in the piece deciding to refer the matter to police, which can obviously have a catastrophic effect on a trial that's set down if the police become involved. Even things like using private investigators to track down witnesses, including whānau of plaintiffs, and your own witnesses, that's quite intimidatory and again it's a resource that the Crown has that is not available.

MS HILL: So some of those, the things that Sonja's talking about create a power imbalance that is very difficult to address. So when Sonja talks about things like funding and Legal Aid, it's not just to ensure that you have a lawyer. Legal Aid also acts as a shield for a plaintiff in

court proceedings. That's really important to recognise, that a plaintiff, even if you've got a lawyer working for you for free, you are exposed to costs, you've got to pay court costs. So the costs of actually going to court, some people think you should just go to court and it just happens. You have to pay tens of thousands of dollars to use a courtroom and have a judge there. And those are things that you don't have to pay if you are in receipt of Legal Aid. And so, a person without Legal Aid who is poor is in a really financially scary place, because you could end up with an enormous debt at the end, even if you win, your court costs and the cost of things like getting a psychiatrist to do an assessment, those sorts of things. So Legal Aid isn't just funding things, it protects a plaintiff from costs awards and things like that. And that's why it's also really important to have in place.

MS COOPER: If I can just add to that too, it actually allows these vulnerable people to access the courts in the first place. Amanda's talked about the court hearing fees. I think daily to use the court it's around about $1,200 a half day. And I remember with the *White* case, the hearing fees alone were over $100,000 because we had eight weeks scheduled.

Now nobody could afford that, and that's an upfront cost. So most of this client group, I would have thought 99.9%, I mean only a, you know, a commercial client could afford that sort of level of hearing fee. No-one else could. So Legal Aid provides that very basic right of access to the courts, because without that nobody could even get to court. You couldn't even do a half day hearing, most of our clients.

MS JANES: And we'll return to Legal Aid, but before we just – in terms of the impact on the claimant, what I'm hearing you saying is that while Legal Aid is a shield, there is still a potential chilling effect on a plaintiff or claimant. Could you just expand on how your clients feel about that discussion about accepting Legal Aid versus the potential debt to them.

MS COOPER: Well, I think, you know, this is the importance of Legal Aid really, is that knowing it is there, and you heard about – you've heard about that from some of the witnesses, knowing it is there to help your lawyers continue on with the work that they need to do so you can get your rights is absolutely fundamental. And it's very disempowering. And again, we heard direct evidence about that, it's very disempowering, and disheartening when you're told that your funding is being withdrawn or it's, you know, you've got to step through all these hurdles for your lawyers to get the next bundle. And it creates that sense of real vulnerability and disempowerment, which also is, you know, it's kind of that feeling am I actually ever going to get justice. And I think you heard

quite, you know, poignantly in some of that evidence, it's that sense of if the funding's not there it's like well, you know, this is just about wanting me to go away. And that's the impact, it very much makes people give up. And again, you've heard that in the evidence where the funding issues have literally forced people to give up.

MS JANES: And before we move on, because we will be returning to some of these issues, was there anything else that you wanted to talk about in that level playing field?

MS HILL: Yes, one of the biggest things in my mind that reflects that power imbalance I'm talking about is the ability to legislate or introduce policies that are advantageous to the Crown but not advantageous to claimants. And there's lots of examples that we'll talk about in the next couple of days.

So after the *S v Attorney-General* case the Government of the day changed the ACC [Accident Compensation] law to cut off cover that had been exposed in that case. A lot of the Government policies around claims and payments of compensation have a built-in Crown discretion. So it's always at the Crown's choice about, you know, the Attorney-General has a discretion as to whether to pay compensation under the United Nations Convention Against Torture. And as I'll come on to shortly, there's the Crown Proceedings Act 1950 which is a legislated advantage and a shield for the Crown against liability.

So the legislative scheme sets out that imbalance in a really formal way. And one thing I wanted to address before we moved on, was how that reflects in my – some of my first comments I made yesterday around the Treaty of Waitangi. Because when you legislate a power imbalance and you act in a way which reflects that power imbalance, we need to think really carefully about can that reflect the partnership obligations of Te Tiriti when one party holds so much power and the ability to create more power through the law.

And to my mind you cannot be a good Treaty partner when you're holding all the cards. And so even with the best will in the world, from the people involved, I think there is a serious breach of the Treaty of Waitangi there when we look at that imbalance to my mind. And in our international obligations there's the United Nations Convention on the Rights of Indigenous People which we recently signed up to which imposes similar obligations around fair processes and redress for loss and, you know, improving health and well-being statistics for Maori which in Aotearoa are awful.

So stepping back from the intricacies of that power imbalance we need to look at how we're fulfilling the obligations that Te Tiriti imposes and, in my view, I think that of just about anything, that imbalance means I don't think it ever can.

MS JANES: And I won't jump you to the very end of your evidence, but you have given some thought about proposals that may address that. Do you want to very briefly talk about the point of how you could address that imbalance?

MS HILL: The key thing that we think will address that, and we'll come back to this quite a lot in the few days, is an independent Tribunal or fact finder, or something that takes all of these processes out of the Crown and places them in an independent position. And that independent body should hold all the information, it should be the repository for all of the records that we talk about, so individual's records from their time in Child Welfare or in schools, it should be the place where people are able to go, understand the process to have someone help them work out what happened to them because that's important, and to make decisions about what does redress look like for them. It should be a place where they can go to for help in their, I think Chassy Duncan called it, 'real world problems'. And that has to come out of the Crown.

One thing I always think about, we have tribunals like this to deal with things like leaky homes, but we don't have tribunals to deal with the harm that we've done to children in care and I think there's a real imbalance there. If we can have a Tribunal for buildings that leak, why can't we have one for these claims. It seems so unbalanced to me that we prioritise something like leaky buildings over our children.

MS JANES: Thank you. You did mention the Crown Proceedings Act, so we will go back to that, and that's at paragraphs 31 to 42 of your evidence. So in December 2015 the Law Commission issued a report reviewing the Crown Proceedings Act, which in simple terms outlines how the Crown can sue and be sued. What changes did they recommend and how were they relevant to claimants seeking redress?

MS HILL: So the Crown Proceedings Act is an incredibly dry and painful document to begin with. It's also incredibly confusing, it's far out of date. So that was one thing that the Law Commission focused on. It's not fit for purpose, it was written in 1950, our governance structures have moved on.

And one of the things that it addressed was the central purpose of the Crown Proceedings Act is to allow the Crown to sue and be sued in the same way as any other company or person, except for one important point which I'll come on to and the Commission said well that probably shouldn't be the situation anymore. And the Commission provided a draft replacement bill for the Crown Proceedings Act which made it readable and it responded to what our Government actually looks like.

And so the report set out the problems with the Crown Proceedings Act and

proposed a solution which was a replacement Act. The one point that I mentioned before, and it's a critical one, is that the Crown Proceedings Act protects the Crown from being sued in direct negligence. So when Sonja was talking yesterday about the different types of causes of action that we use in court, we talked about vicarious liability and negligence, and direct negligence is something that a person can use when they sue anybody except the Crown. But the Crown Proceedings Act says you can't sue the Crown in direct negligence, you have to sue it in vicarious liability.

So a claimant coming to a court has to point to a Crown servant or a Crown employee, they have to find a person to hang their hat on and say the Crown is liable for that person's actions. So they have to sort of divert to a person to get to the Crown. And that's really hard for a claimant to do. A lot of times people who have been in care won't know who was making decisions about them, they may not remember the names of staff members or the staff members' managers, because back in the day in Social Welfare there's many, many layers of management and decision-makers at that point.

And so how do you make out that claim if you don't know who your State employee is, there's no-one to hang your hat on. And if it was any other entity, you'd just be able to say direct negligence is the way to go, but we can't with the current Crown Proceedings Act.

MS COOPER: Sorry, I was just going to also interpolate there, often what we're talking about in these cases are policies and systems and actually having to attribute that to an individual, and that's one of the things that the report highlighted, is actually impossible, because it's, you know, it's part of a group of people who've made a decision and sometimes you won't actually know where that decision has come from. I mean, for example, if you are relying on the policy documents, the manuals, you won't know who's authored that, because you can't actually sue directly, that can create really significant limits on liability.

MS JANES: And taking you to paragraph 34 and 35 of your evidence, there are a couple of quotes there that are probably good summaries if you would like to just read those.

MS HILL: Certainly. So the Law Commission noted that currently someone who wants to sue the Crown in tort must fit the case into one of the categories prescribed in section 3 of the Crown Proceedings Act. And the Law Commission explained it in this way:

"The Crown Proceedings Act effectively establishes a bar against suing the Crown directly in tort with the exception of the very limited classes of claims available under sections 6(1)(b), 6(1)(c) and 6(2)". This bar is felt most sharply in the cases of negligence claims but applies equally to other torts. The Crown can only be held vicariously liable in

tort for the acts and omissions of Crown employees. Consequently, in order to sue the Crown in negligence, a potential claimant must identify a particular Crown employee and allege that he or she has committed a tort.

However, if no particular Crown employee has committed a tort, or it is alleged that the Government department as a whole has failed, or its claimed that a number of Government departments have collectively failed, a person harmed in circumstances where there would otherwise be legal redress may be left without any redress against the Crown.

And the Commission went on to make another really important point:

"Immunity for the Crown may not be justified where it leaves a person who has been harmed no remedy in tort".

And just dealing with immunity for a second, the State Services Commission Act, or its precursor legislation, almost as boring as the Crown Proceedings Act, immunised a lot of public servants against these kinds of claims. And when I had to explain this to someone in a simple way the immunity is catching. If the employee has the immunity, then the Crown gets it too. And so if your employee – and this is a very simplified version – if your employee has immunity then the Crown is protected as well.

So it's another form of shield there through the State Services Commission Act.

MS JANES: Then there's also an issue with exemplary damages.

MS HILL: Yes, so we haven't talked a lot about the type of damages, some people find it interesting. For the purposes of today there's two types of damages that we talk about, compensatory damages which put you back in the place you would have been had you not been hurt. Now the ACC scheme says you're not allowed those damages if we're talking about a personal injury after 1974. It's much more complicated than that but we don't have that kind of time.

Exemplary damages are damages designed to punish. They are on top of compensatory damages. You can still get those, even if compensatory damages have been barred by ACC. Now the Crown Proceedings Act says you can't sue in direct negligence, you've only got vicarious liability. But the Supreme Court has said if you sue in vicarious liability we're not sure you'll be able to get exemplary damages.

So not only does the Crown Proceedings Act cut off that avenue of direct negligence where you can also get exemplaries, but it forces you down this route of vicarious liability and the law in New Zealand, it's not entirely clear, but the Supreme Court were not very enthusiastic about exemplary damages for vicarious liability. So you're cut off there again.

So it's like you're going through a little funnel and it gets tighter and tighter for a claimant and it's because the Crown Proceedings Act is just – is cutting that off and protecting the Crown.

MS JANES: So where is this currently, the Law Commission's suggestions for change?

MS HILL: Well, the Law Commission proposed change in 2015 and the Government rejected the proposed changes, in particular it rejected the suggestion that the Crown should be able to be sued in negligence. So it expressly said we don't want that, and since that time it's gone nowhere, it's just sitting there. The Bill's still perfectly good, but the Government has decided not to implement any of those recommendations.

MS JANES: And you've probably explained it, but if there's anything else you want to say about why that has an impact on claimants seeking redress for abuse.

MS HILL: It's a cleaner, like direct negligence is a cleaner and more honest way to approach it. And why should the Crown be different to any other entity in New Zealand? It's one of those built in unfair things that places claimants at a disadvantage. If a claimant had been in say Catholic church care, they could sue the Catholic church in direct negligence but because they've been in the care of the State they can't. To me that seems terribly unfair.

MS COOPER: Particularly I should add too given that most children and vulnerable people in New Zealand will have been in State care rather than in private care.

MS HILL: It's not a big concession is the last thing. A claimant still has to get through all of the other barriers. They've still got to address ACC, they've still got to make out their claim, they've still got to get through the Limitation Act, they've still got to do all of the other things. So it's not an enormous concession, it's just a levelling of the playing field.

MS JANES: And at paragraph 42, if you can just look at paragraph 42 and then you propose a solution at paragraph 43. And while you're finding that in your brief, at this point I'll also ask you to then go to paragraph 30 which provides a wrap-up solution for your yesterday's evidence.

MS HILL: So at paragraph 42 we'd talked about how many of our clients are the victims of systemic negligence. This idea of wholesale failure at levels of Government and they can't identify specific individuals, or where lots of people have contributed to wrongdoing and you think about Chassy Duncan, for example, all those different people in his life.

Where if you claim in direct negligence, it sets out the claim more clearly and more honestly than the sort of artificial way of dealing with it in terms of vicarious liability. So a solution is really, really simple, it's to implement the draft bill that the Law Commission wrote for the Government five years ago to amend the Crown Proceedings Act to remove

that protection for the Crown.

And we can go to paragraph 30, unless you have any other questions for me on that.

MS JANES: No.

MS COOPER: So this is stepping back to some of the other barriers that we were talking about yesterday and we have proposed that there is a purpose-built statute and I think that's something we'll talk about quite a bit in our evidence to deal with claims of this nature. And that's something obviously there's already the Australian model that this Commission can look at, but we would ask that it address, first of all imposing a duty of care on the State and at least those contracted to the State to provide services to make sure that there is a strict liability, and we're not – I mean I think the Commission will need to decide whether that's non-delegable or vicarious.

I think secondly what we would say this statute should do is reverse the burden of proof, which is typically on the plaintiff, reverse that to the defendant when we're looking at whether there has been any breach of a duty that's owing. And also finally in establishing causation, so that line between abuse and its harm, that again the burden should be on the defendant to show that the abusive conduct did not cause the damage. So reversing again that burden. And that, again, will be factors which obviously are almost insurmountable problems now, will just put that burden back where we say it should properly lie given all those other difficulties.

MS JANES: Can I just tease that very gently and very quickly. Reversing the onus of proof or establishing a very strict balance of probabilities, because you talked yesterday about there were disparate burdens of proof. In your view would one equate to the other or is one preferable for any particular reason?

MS COOPER: I think actually the preferable way is to have the reverse burden. I think just recognising that the starting point for this claimant group particularly, taking into account their own personal vulnerabilities and then all those other issues that they confront like records missing, lost, unavailable, witnesses potentially unavailable, and if we look at all those other barriers that there are standards of the day arguments.

I mean just if we look at the practicalities of the burden of being able to prove the case, I think what we would say is if you've reached that burden, which you already start from a difficult point of view as a claimant in this area, then it should be up to the Crown to show that actually there's been no breach, or that actually the harm that you've suffered hasn't been caused by that acknowledged breach. And again, I just think that that levels the playing field, it's already, from my recall, it's something that the Australians legislated as a

consequence of their Royal Commission and I think, you know, that's again kind of recognising the realities of how difficult litigation is.

I should emphasise that this is just for these kinds of claims and not saying that that should be universal, but I think, as I say, it's specifically about this particular claimant group. So we're talking about obviously children who are in care and vulnerable adults, so those who have been in psychiatric hospitals and psychopaedic, so vulnerable people is really where the focus of this is.

MS JANES: And we now move on to the indivisible Crown. Amanda, would you like to tell us what it means and what impact it has for claimants.

MS HILL: Certainly. I should explain the term "indivisible Crown" is a nickname we gave to this issue in the kindest possible way because it was just the way it came about.

So the nature and the history of the claims has meant that at times different issues have presented themselves and we've had to try and find ways to address it. And one issue that came up was caused by some clients having two claims, one against the Ministry of Social Development and one against MOE [Ministry of Education], education. And sometimes they've been started at different times, so often a claim about a residential school had been either filed in the court or raised later than the MSD [Ministry of Social Development] claim. And so that created issues in terms of different, potentially different Limitation Act periods and the clock that Sonja was talking about the ticking stopping at a different time. That's a reasonably small group of people in the scheme of the claimant group.

The second issue that is the background to this was the establishment of Oranga Tamariki which initially was going to deal with historic claims where people were in care after January 2008. That's since changed but that was the situation for a while.

And so with that date we said well, Oranga Tamariki needs to be a defendant for some of our younger clients, because sadly we have clients who were in care coming to us after 2008. And we said we'll start to name Oranga Tamariki as a defendant. I won't get into how you name different defendants in court proceedings, that's not necessary, but the prospect of a third Government Department being named in court proceedings was the issue.

And the Crown responded with a view that we should name the defendants in proceedings differently, that instead of doing the Attorney-General in respect of the Ministry of Education and so on, it would just be the Crown as a single entity. Because all parts of the Government are really just part of the Crown.

And quickly we just started calling it the indivisible Crown argument and that's why it –

MS COOPER: Or the one Crown to rule them all.

MS HILL: We try not to use that. And the point was that Crown Law came to us and said just name the Attorney-General on behalf of the Crown and we'll decide which parts of the claim relate to which parts of the State and we'll decide what discovery to give you and we'll just decide about that on the basis of what's in the claim document.

That was a bit challenging for us because part of the power of putting, you know, filing claims in court is obtaining discovery and knowing who you're getting discovery against. So this idea of one large Crown, this amorphous thing and they decide who gets the information, that didn't sit well with us.

While I acknowledge that it was a proposed solution to deal with the issue of claims, it would have helped a small group of people, but been detrimental to the wider group. We viewed it as a way for things to become less transparent. And also we didn't think it accorded with the law as it sat at that time. The Court of Appeal had been presented with a similar argument in the Dotcom, one of the many, many cases about Kim Dotcom, and the Court of Appeal had said no, that's not appropriate, you need to name the part of the Government that you are dealing with.

And it came up as something that the Crown wished to address and really it came down to what name do we put on the front of court proceedings. And Justice Rebecca Ellis at that point said how does this resolve the claims, what does this do to resolve the claims? And my conclusion at that point was not much. It was something that was going to take us more time than needed to deal with and it had no real effect.

But one of the things that became clear is that we were not willing to deal with a single Crown because in reality the Crown doesn't act like a single entity. We've got processes with the Ministry of Social Development, with Health, with Education, they're all different. So this reasonably academic idea of the indivisible Crown in practice for our clients didn't work.

So it was something that, it's still sitting there as an issue, but in reality we saw no practical use in it and we've since found a way through for the joint claims. It was another thing we had to respond to and put time into, it took us away from the substantive claims. But until the Crown starts acting as a single entity, we weren't prepared to treat it as one.

MS COOPER: I should also add to that that each of the Crown entities has their own lawyers as well. And whenever we've been involved in litigation, the different lawyers from the

different departments are involved as well. So that adds to that sense of it all being divided amongst itself anyway.

MS JANES: In terms of consistency approach as between Government Departments and how they deal with claims, was there a concern of potential impact, you've talked about the transparency issue.

MS COOPER: I think it was -- we were particularly concerned about documents to be honest. And also too, so that's the discovery if the Crown was deciding which parts of it were potentially liable, it also got to decide what documents we might get. And, you know, our ability in court proceedings to get all of the relevant documents is absolutely critical. I mean documents are just critical for this client group in terms of proving their claims and has become more so.

So that was a concern for us. There was another thought that flashed into my head but has flashed out, but it may come back to me and I'll think about that again.

MS JANES: You just subconsciously process that. We are going to be talking about the *N v Attorney-General* case, but it does seem at this point it would be quite a useful diversion because you've been talking about the reason for filing claims is access to records. Just a very thumbnail sketch, can you outline why that case was important and what it means in terms of filed and unfiled records?

MS HILL: So *N v Attorney-General* came about because the records we were receiving for clients were heavily redacted. Some were so badly redacted, blacked out, that you couldn't make sense of it. And this was for people who had received court-ordered discovery as well.

There's different rules that apply. Obviously for information received under the Privacy Act or information received under discovery. So there's different rules there.

But we applied for particular discovery because we said that the redactions weren't in accordance with the rules. MSD was making decisions, and this is about MSD rather than MOE or Health, MSD was making decisions about what was relevant to our client's claims and saying well, if you have any concerns about what we've blacked out, just let us know. But if you can't see it you can't tell them you're concerned about it. So that was an unusual challenge to try and guess what was under the redactions.

And what we discovered, because sometimes we act for people who are related, or we have – so we had some brothers, or sometimes the person redacting just isn't very good at it and forgot to redact some parts. So what we could see is the clearly relevant material was being redacted by MSD, even though under court-ordered discovery you shouldn't really be redacting for relevance at all.

So we took that to the High Court and the result was the decision in *N v Attorney-General*, which I think is certainly in the materials provided to the Commission.

MS JANES: Yes.

MS HILL: And Ellis J, who manages the, what we call the DSW [Department of Social Welfare] group, issued a decision saying that clearly relevant material had been redacted, that we couldn't be expected to identify what was important because we couldn't see it, and that she directed that we received two versions of the documents, counsel-only version, so we call it the clean copy that only the lawyers can see, and then a redacted copy which we could release to our clients without breaching anyone else's privacy. In terms of court-ordered discovery that's been the way we've operated since then and it's been very helpful to be able to see what's under the redactions.

We've got other issues coming out of that. The redaction of all court documents, because there's issue around who owns those documents, MSD says it does not own them, so they have to redact them. We're taking issue with that and we're seeking –

CHAIR: What do you mean by "court documents"?

MS HILL: So say –

MS COOPER: Social work reports, psychological reports, so it's particularly those documents, so documents particularly under the Children Young Persons and their Families Act, now the Oranga Tamariki Act.

CHAIR: These are documents ordered by the court?

MS COOPER: Yes.

MS HILL: Yes. Owned by the court.

MS COOPER: So they're produced for the court as part of Family Court and Youth Court processes. There were similar reports under the Children and Young Persons Act 1974. They are critical documents for us, because they tell us about the family, more importantly they tell us what State knew about the family, what it's done so far, what its intentions are moving forward, what, if any, court orders there are, because often all of that court stuff is now redacted so we don't know what status a client has at all. And trying to pin liability when you can't actually figure out what's happened, what status is is really, you know, again it's another really significant barrier.

And I think our point is that except for the psychological reports which are clearly court-ordered, and there will be often very good reasons and those of us in this room who are youth advocates and Family Court lawyers will understand even now there may be good

reasons why a court should think about whether they should be released.

But social work reports, there is actually a presumption in the legislation that they are released, but they are still being withheld from us. And this is after we went around this circle in 2016, at that stage it was a reliance on the Family Court rules, legislation, and we said yes, but a lot of the documents we want actually are from the Youth Court. And most of them are.

And so we started to get them all again for a while and then it's only been, I think probably, certainly since the Royal Commission has been underway, that's been reviewed again, because we asked for all those documents that had been redacted to be re-released to us and that process is underway, but they've all been redacted again. So that's just -- it's a real impediment to us and survivors understanding what their history is, what the State knew, which at the end of the day is the most important part of this, what interventions they were supposed to do, and also too, as I say, status.

MS JANES: It's probably useful because we're so deep in this subject, let's actually go to number 37, the *N v Attorney-General* decision. We'll have a look at some of the paragraphs, because Ellis J made some fairly firm findings in this judgment. And then as we do that I'll also then ask you what has happened subsequently.

So this is the *N v Attorney-General* decision, Ellis J on 4 February 2016. And if we can first go to paragraph 1 and 4. The only issue I want to make in paragraph 1 and just have you confirm is that this was really a representative.

MS HILL: Absolutely.

MS JANES: So it was not confined to these three plaintiffs?

MS HILL: No.

MS COOPER: No, it was right across the client group but we use these to illustrate the general difficulties we were having.

MS JANES: Thank you. Then we'll go to paragraph 4. Thank you. That just confirms what you've been saying that up until the end of 2013 the Ministry was providing Cooper Legal with the full personal and family files of the claimants without redaction.

MS COOPER: Correct.

MS JANES: Then if we go to paragraphs 7 and 8. Perhaps if I get you to, one of you to read the next paragraphs as I call them out.

MS HILL: You want me to read these ones?

MS JANES: Yes.

MS HILL: "But it appears that in the context of addressing the discovery applications and in light

of the 2012 amendments to the High Court Rules dealing with discovery, in late 2013 the Ministry reviewed its disclosure processes. This resulted in the Ministry taking a narrower approach to relevance which, it considered, was in keeping with those new rules. So, a letter from Crown Law to Cooper Legal dated 12 December 2013 advised:

'You therefore may notice more redactions in the documents that you will receive in discoveries. Of course if those redactions raise any concerns with you that there may be information that you consider to be relevant that has been redacted, then please let me know. The Ministry is happy to consider any explanation you may have as to why that further information may be relevant in terms of the test in Rule 8.7'.

There is perhaps something of a catch 22 aspect to the suggestion that plaintiffs' counsel should explain to the Ministry why they regarded information they had not seen as relevant.

MS JANES: Then if we can go to paragraph 11 and 12.

MS HILL: I also –

CHAIR: Can we also, for the record, note this is the judge speaking.

MS HILL: Yes.

MS JANES: Yes, paragraph 8 was the judge speaking.

MS HILL: "I also record at this point that my own comparison of a sample of the redacted documents with the original of those documents (an exercise helpfully facilitated by the provision of a bundle of such documents by counsel for the Ministry) gives me some concern that some of the material redacted is plainly relevant to the claim of the particular plaintiff concerned. Again, that is not meant as a criticism of the effort or bona fides of those charged with the disclosure, but rather as an indicator that the redaction of parts of otherwise relevant documents can be fraught with difficulty. There is also the point that the content of the documents in question by and large constitutes personal information related to the particular plaintiffs themselves. Absent some clearly articulated and contestable claim for third party confidentiality, it is difficult to see how the redactions could be warranted.

The court is therefore faced with a situation where not only is there no sworn affidavit of documents and accordingly no presumption in favour of the validity of the redactions, but one in which there is an actual basis for doubt in that regard".

MS JANES: And then finally we'll go to paragraphs 16 and 17.

MS HILL: "Although I urged counsel to reach agreement about some form of pragmatic solution, that did not prove to be possible". Do you want the whole paragraph?

MS JANES: No, just the highlighted ones thank you.

MS HILL: "In the end I consider that the most just, expeditious and inexpensive way forward is for the Ministry to provide a set of documents to counsel for the plaintiffs which contains both a redacted version and a clean copy of each of the disputed documents. The clean copies are to be provided strictly on a counsel to counsel basis only".

MS JANES: Can you then talk about what took place after this judgment was received and up to the present day? Because I understand it is an on-going discussion.

MS HILL: It is, and so for some time after the decision was issued, whenever we received discovery for an individual claimant, as I said, we've received these two different versions, in the last year or two we've had an increase again in the amount of redactions. So Sonja has explained the issue around court documents, and there was also – sorry, I've lost my thought, train of thought, there was something else that was redacted that shouldn't have been redacted.

MS COOPER: I think we gave an example of a recent file. Yes, so we're back to redacting for relevance again. And what we're seeing is when we finally do get the clean copies of the documents that yet again, clearly relevant material is being redacted.

CHAIR: Sorry, you're saying that you're still receiving the clean copy on a counsel-only basis?

MS COOPER: That's only when we push.

CHAIR: So you're not getting that as a matter of course?

MS COOPER: No, even – and I mean we specifically are filing some claims to get the clean copies, and we're getting pushback.

MS HILL: The other thing too is that this is – the *N v Attorney-General* only applies to discovery, we still have most of our clients who don't have their claims filed in court and we still have the issue of Privacy Act, which is enormously redacted, and I think –

CHAIR: You don't have the same principles applying to that because it's not related to the court?

MS HILL: Yes, it's not under discovery orders.

CHAIR: Yes, I see.

MS HILL: So we get very, very heavily redacted records under the Privacy Act, so there's quite a disparity between the clients who are filed in the court, and discovery also is time-consuming and expensive, so there is that impact on the time and resource to do that versus the Privacy Act requests heavily redacted, and due to the Ministry's change of position we're now going through this second cut, if you like, where they review and unredact some parts. So we go through the documents twice sometimes.

MS COOPER: And it takes years for this to happen, it's another significant delay. At the moment they are giving us back documents that we say they wrongly redacted back in 2016 and 17, and it will take, you know, three or four years to get those documents sent back to us again. We now know that the court documents are being re-redacted so we have to go around that circle again.

CHAIR: Have you suggested to the Crown that they treat the privacy documents in the same manner as the court, as – and what was the response to that? You both nodded, for the record. And what was the response to that?

MS HILL: The Ministry declined. Their view was that that was not consistent with the Privacy Act, although –

CHAIR: We won't take anymore time on this, I think we've got the point that you're making thank you.

MS JANES: So really just for clarity, you have the filed claims that come under the discovery order supposedly governed by *N v Attorney-General*, and then you have the unfiled claims, and just quickly summarise better, worse, what would you like to see done differently?

MS HILL: We'd like to see much cleaner copies of the Privacy Act information. We still see relevant material redacted. If you want an example of that, in our evidence in reply we talk about a claimant called MN and there's an example in our reply brief about the type of redactions you will see in a Privacy Act release. That might be helpful to illustrate the point.

MS JANES: And just quickly, you may be able to say yes or no, but the Commissioners have seen an example of redactions in the Sammons evidence and that would have been an unfiled claim?

MS COOPER: No, I think they were – one was filed and one wasn't, so Georgina was filed, you'll remember we had a judicial settlement conference for her, Tanya not, from recall, because she would have – she came to us later and is caught by the stop the clock agreement, so we didn't need to file her.

MS JANES: And we did see Georgina, so 45 out of 90 were under a court discovery process. We're now going to go back to where we were previously and we're going to talk about Crown use of defences in civil litigation. Just quickly foreshadowing where we will go with that evidence, firstly we will look at the ACC, then the Limitation Act, then very briefly the immunities mental health legislation. And an issue that arose in the Earl White evidence was contributory negligence, so I will also ask you to briefly talk about that.

But firstly, with the ACC, before looking at, as we go through each of the State redress schemes, ACC is a possible avenue for redress both monetary and non-monetary since 1 April 1974, particularly in relation to sensitive claims of sexual abuse.

But what would you say in terms of historical abuse in care and the relevance of ACC as a process?

MS HILL: I would say that ACC – it is an enormous block on people obtaining redress and the whole idea of ACC being able to replace what you get in a court or what you could get in a court, that's not the reality of what a person receives through the ACC scheme. So it blocks your ability to receive compensation, but it does not deliver what you should be getting in response, which was the whole point of the scheme.

MS JANES: And we will hear from the Crown, Linda Hrstich-Meyer, at 3.9 of her evidence talks about ACC and redress schemes being entirely separate processes.

MS HILL: Yes.

MS JANES: Would you have any comment about your experience, if that is the case or not?

MS HILL: Certainly as we work through the documents that deal with particularly MSD settlement processes, and ACC is often referred to as a reason not to grant compensation, but currently, ACC has been there so long it has deflated compensation across the board anyway.

But the entitlements under ACC, yes, they're separate to redress, but they're really just so inadequate. So you used to be able to get lump sum payments. Very few people qualify for them anymore. Most people who can access ACC entitlements do so through what's called independence allowance, which requires you to go through a fairly brutal assessment with an ACC assessor who will tell you your percentage of disability and so you're broken down to a percentage and you have to be, I think, more than 10% to get any financial assistance at all. And that's usually given over time, it's not a lump sum. And certainly those percentages will be thresholds that ACC use. They favour physical trauma over mental trauma, so there's a higher percentage allocated for physical trauma over mental trauma.

I think Chassy Duncan touched on this the other day when he gave evidence, the counselling that is available when you lodge a sensitive claim, that's only for sexual abuse. There's no counselling available for victims of physical abuse or witnessing trauma or solitary confinement. Even though some of the – a lot of those things are covered by ACC, so you can't get compensatory damages for them, there's nothing available under the ACC

scheme for you.

MS JANES: Just going back to your point about what used to be available by way of lump sum, we actually have an article from The Dominion in 25 April 1996. Could you just read the highlighted part and then I want to contrast that with Earl White's findings.

MS HILL: "A woman who was coerced by her psychologist into having sex with him 17 times will get up to $170,000 in ACC compensation after a landmark decision by the Accident Compensation Appeal Authority. The Appeal Authority, Peter Cartwright, has allowed her appeal against an ACC decision that all of the sexual abuse was a single act, entitling her to a maximum $10,000 lump sum pay out".

MS JANES: So coming back to Earl White, the findings in the High Court were that there were 13 incidences of sexual abuse, and a 17% impairment for the purposes of ACC. So what comment would you say about what you have seen through your involvement with claimants and what happens with ACC entitlements, recognising that this is a difficult topic and there will be a whole round-table on it.

MS COOPER: Well, I think it's exactly as you've said. Now, you know, once upon a time each separate assault was treated as such, and you received compensation for each individual injury. Now it's all lumped together as one injury and you have to meet this threshold before you're entitled to ACC at all. It's only sexual abuse, as Amanda's pointed out, not all of the other abuse that will have impacted on you. And then you get the small amount I think quarterly or annually, but that has to be reassessed every three to five years to see whether you're still sufficiently damaged to continue to get this small lump sum payment.

So it's really not what ACC was meant to do, it was meant to replace the damages, the compensatory system that was available in the courts but it hasn't done that at all. And there were deliberate policy documents. Again, it's one of those things that this, you know, a political decision as so much of this area is, it was a political decision to specifically make it more difficult for victims of sexual abuse to get lump sums for a start, and also to make it harder for them to get big lump sums.

MS JANES: So in terms of claimants coming to you with degrees across physical, sexual abuse, neglect, what would you say about the inequities that may or may not exist relative to the ACC system and redress processes?

MS HILL: It's enormously inequitable. I think if you go back to the whole reason for ACC in the first place was so that people didn't have to go to court to get a remedy for personal injury. But then you see what has replaced it and it's just a pittance.

And then there's all these things that aren't covered by ACC and I'll come on to the

decision in *Taylor v Roper*. So things like solitary confinement, that's not covered by ACC at all, but still have to go to court for that part. It's immensely complicated as well, it's inaccessible, it's unworkable.

MS COOPER: And the redress processes are built on this basis that there is a functioning ACC system that actually, you know, will give you that proper compensation. So they're also lower level compensation and they also compartmentalise and minimise and lump together assaults, you know, so, you know, repeated sexual assaults will just be sexual abuse and repeated physical assaults will be, you know, just all lumped together and deflated and minimised and then represented in small amounts of compensation or ex gratia payments that are offered under the redress processes, and that's again built on this premise that we have this functioning ACC system that we don't.

MS JANES: So you've talked about the difficulties and inequities of access to ACC entitlements, and then we go back to the ACC bar that then applies in civil claims. So just talk us through that part of the process.

MS COOPER: Well, yeah, I mean we saw that graphically illustrated I think in *White* where – I mean we had, you know, these were two claimants who'd actually never had treatment, but as a result of the win in *S v Attorney-General* the legislation had been, you know, passed to apply retrospectively and we were saying yes, but they've never had any treatment so how can it actually apply?

But it was deemed to have applied and then because they would have had cover when they were in care, at least post-1974, for all of their other abuse, so because the 1972 and 1982 acts were very expansive and covered everything, they covered, you know, physical, sexual, psychological abuse. So in effect their whole claims were covered by ACC.

But, of course, you can't retrospectively apply for ACC if you've missed out, if you've missed out because you didn't actually know you had a right to apply for ACC. The only thing that you can retrospectively apply for is in respect of sexual abuse, but every other aspect of abuse you've suffered it's still covered by the ACC bar, but you can't actually claim ACC for it anyway because the provisions say that if you don't make your claim in time you don't get it. So there's a double whammy there.

CHAIR: There's a limitation in the ACC legislation as well.

MS COOPER: Yes.

CHAIR: What is that limitation time?

MS COOPER: What it says is that if you had cover, say, under the 1972 Act, you had to make

your claim within the timeframe of that legislation.

CHAIR: I see, so if the law changed you lost your entitlement?

MS COOPER: That's right, yes, so they had effectively lost their entitlement once the 1982 legislation came in. And I was arguing, we were arguing then well, look it should be treated like the Limitation Act. If you don't actually know that you had a right to claim ACC, surely your legal rights should start to run from when you actually realised that you've got an entitlement, not from when you should have made the claim that you didn't know you could have.

And I mean the Court of Appeal, while they understood that was a fair argument, they actually said we can't do that because the legislation is really clear. So it's –

CHAIR: A policy decision, yeah.

MS COOPER: It has to be legislated.

CHAIR: Legislative.

MS JANES: And that was really the next question, is that as we go on to the Limitation Act we know that's discretionary, but the ACC bar is not discretionary, the courts apply it, as you've said, if it comes within the particular legislation that applied at the time.

MS COOPER: That's correct.

MS JANES: It can't be waived by any party.

MS COOPER: No.

MS JANES: Just a very quick point, are you aware in Australia of any – you've talked about you can't seek entitlement if you don't know it exists. Is there an Australian case that you're aware of where there was a duty to advise of entitlements?

MS COOPER: Yes, that's *Bennett v The Commonwealth.* That's actually a High Court of Australia case. We actually now have a cause of action relying on that case. So that was a State ward who, while he was a State ward, had an injury and cut off part of his hand or something like that. Anyway, he was not given any legal advice at the time that he could bring a claim, and then when he did come to get advice still within the limitation period he was given incorrect legal advice and told that he was only entitled to work his compensation and he couldn't sue the state in respect of that abuse. He then got some advice later again down the track which was that he did have a common law cause of action, so he could sue the state for negligence, but by then, of course, it was time barred.

So it went all the way to the High Court of Australia and they said well, if he'd been given – first of all they said because he was a State ward the State had obligations to him to

ensure that he got legal advice, and on top of that – and that obligation was on-going, even once the wardship was concluded.

And the High Court also said was that that obligation was to give correct legal advice, not incorrect legal advice. And so because he'd got incorrect legal advice, essentially that obligation continued. And so his claim was found to be not limitation barred because he'd got this incorrect advice and that obligation was on-going, and so he was able to get damages from the Commonwealth for this injury.

And we actually have that in every one of our claims that we file in court in reliant on that *Bennett* case.

MS JANES: And in terms of a lot of claimants having already suffered deficiencies in terms of education and cognition and knowing where to go to find out where their rights are, not all of them will seek legal advice. If there was a responsibility for information about entitlements, where would you say that should arise?

MS COOPER: Well, I think with, it arises with the State. You know, I mean that *Bennett* case was very clear about that. Again, it might depend a bit on status, so but certainly if you're a State ward or you're in the State's custody, I would have thought there is a clear obligation then. And that's also to get, you know, to ensure you get ACC when you are entitled to it.

MS HILL: I have a slightly different view to Sonja on this. So this independent Tribunal that I mentioned earlier, that should also have an advocacy role for people who have been in State care. There is a long history of Crown entities not telling people what they're entitled to, there is a lot of media around MSD not advising people of their benefit entitlements, ACC not advising people about, I think, loss of potential earnings and things like that.

So if the Crown is going to do that, I think I have concerns about that. And so part of the independent Tribunal that I envisage that I would love to see would have that holistic approach to helping people access what they're entitled to as a result of being in care.

A final point, Hanne – I know you want to move on – the practical realities of ACC, even if you're entitled to counselling, there aren't enough counsellors, you can't get them in prison. And like Chassy Duncan, he had an assessment in prison two weeks before he was released and there was no follow-up. Often we see people transferred away from counsellors that they're using. The practical realities of the counselling regime under the sensitive claims, it's immensely inadequate, particularly in our prison system where it's needed the most.

MS COOPER: And also too, of course, when you're a prison inmate, while you may be entitled

to counselling, all other entitlements are halted.

MS JANES: And you have some possible solutions that you outline at perhaps 139 to 142 of your brief. If you would just like to summarise those.

MS COOPER: Well, we have a number of potential solutions. One is to amend the legislation specifically for this group to allow them to claim for compensation, and to balance that any Accident Compensation they have received can be offset against any compensation that a court might award. So that prevents a double-dip and that was effectively what happened in *S v Attorney-General*. He had to account back to ACC for the money he'd received from ACC and back from his compensation.

If the legislation is to continue, then I think there needs to be serious consideration to extending cover, so that it covers all of the impacts of abuse in care and that's physical assaults and the mental health aspects of that and psychological abuse and trauma.

I think we're very clear that lump sums should be re-introduced specifically for this claimant group. And it's interesting, we know when we get reports from actuaries, and I just want to bring this in now, when we get reports from actuaries about the economic loss suffered by this client group because of the impact of their abuse on their ability to work to actually have, you know, productive sustained lives, we are talking in the hundreds of thousands. I've not seen a report from an actuary that has been lower than about $400,000. And some of the figures are considerably higher.

So the economic impact of abuse on this client group is profound and ripples through the generations because of, you know, the poverty that then carries through the generations. I think that's a point worth noting. When you quantify their loss, it's hundreds of thousands of dollars.

MS JANES: Just before we finish –

MS COOPER: Sorry, the last – so the last suggestion we had was that to get rid of the amendment that was made to retrospectively cover for sexual abuse. So if we are going to have legislation that starts from 1 April 1974, that should be the starting point and if you're pre that it should all be out, not some in and some out.

MS JANES: We're going to move on to the Limitation Act, so this is probably a good time to –

CHAIR: Good time to take the break. We'll take the morning break at this stage.

Adjournment from 11.23 am to 11.45 am

CHAIR: Thank you Ms Janes.

MS JANES: Thank you. Ms Cooper and Ms Hill, we're turning to paragraphs 66 to 78 of your

evidence, the Limitation Act. Recognising that it is a very complex piece of legislation, can you briefly, in lay person's terms, talk about what it is, how it affects claimants who are seeking redress.

MS COOPER: So the main purpose of any Limitation Act is to stop stale claims being brought. And that's so that defendants have some surety about the timeframe within which they might have to face claims, and that affects insurance and all sorts of things. So it sets up a timeframe in statute by which you have to have brought a legal claim, that means filing a claim in court.

It's important for this claimant group because, as we've explained, the research from Australia shows that on average it takes 22 years for somebody to realise that they have a claim, or to be able to talk about what's happened to them. And the way that the law works is that's going to mean that it's already way out of time.

So the law has been specifically developed to address claims of this kind. I should say before that that the Limitation Act is a choice for a defendant. And that's actually really important, and I think particularly when it's the Crown that's on the other side. So a defendant can choose whether to raise the Limitation Act as a defence or not. So it could just say no, we're not going to rely on that. And so what the Limitation Act does is it bars any remedy, so you can still bring a claim and you can still have findings made about your rights, but you just don't get any remedy as we saw in the *White* case.

So as I say, the law has developed to accommodate these special kinds of claims, and just stepping back a bit, this is really a new area of law. It wasn't even until the late 1980s that psychologists and psychiatrists realised that Post Traumatic Stress Disorder applied to this claimant group. So when you think about it, that's actually not very long ago. Because that was specifically developed for war veterans, so they recognised that people coming back from the war obviously had trauma.

So as I say, it wasn't really until the mid to late 1980s that it was applied to victims of child abuse and that started only with sexual abuse. So these claims really only started in the 1990s. And, of course, limitation acts are typically older. Ours is 1950, so these kinds of claims weren't even in contemplation, of course.

So there are two ways that an abuse victim might get through the Limitation Act. The first is what we call reasonable discoverability. So that's when you reasonably discover that you have a claim. That actually developed from the hidden cracks cases. So these were the cases where people had defects in their houses that you couldn't find. So there might have already been a defect for 20 years, but it wasn't until the cracks started to

show that you realised that you had a defect in your house.

And so they applied that thinking, so in other words an abuse victim hadn't realised that they had suffered some harm or that the person who had caused them harm was the defendant and so that was how reasonable discoverability developed. So, as I say, that was only from the mid-1990s was the first time that was being considered in the Commonwealth and New Zealand. I think the first time I argued it was 1995 or 1996.

The other way that you can potentially get through the Limitation Act is if you are under disability. So the law automatically says that until you are 20, so as a minor you're automatically under a disability, so in fact the Limitation Act doesn't start kicking in until you turn 20. Now of course with the new Limitation Act that's down to 18, because the age of majority now is 18 instead of 20.

So what disability means is that because you've had, and that has to be a recognised psychological or psychological condition, that has meant you have been unable to instruct a lawyer. So it's around your ability, because of recognised illness or mental health conditions, that you've been unable to instruct a lawyer.

I think one of the real issues with disability and it's something that we touched on yesterday, that can fluctuate. And so somebody might be okay, and this is the thing about Post Traumatic Stress Disorder; one of the symptoms of that is that you avoid thinking about the trauma, and so you might actually not be diagnosed with Post Traumatic Stress Disorder until you actually see an expert. And so you may, to all intents and purposes, be actually carrying on with your life sort of okay because you're not actually having to think about, you're avoiding thinking about the trauma.

But the thing with disability is once it's deemed to have stopped, your time starts to run. So if you have a period of wellness and you're functioning, the time starts to run and it doesn't stop again. So I mean we've had clients who where you might say that the disability has stopped for a bit and then maybe six months down the track they've been in a car accident and suffered a significant brain trauma but the time doesn't stop, it doesn't re-stop. So that person, because of their brain trauma could never instruct because of that, but the disability doesn't kick in again, it keeps running from the time that you're no longer under disability.

New Zealand, we have an additional, under the 1950 Act, which covers most people, we also have – so for most claims of six years you have to bring it from the age of 20, but if it's personal injury and most of these claims are personal injury, so that's all of the abuse claims really physical and sexual abuse, you actually only have two years to bring a

claim. And then you've got another four years on top of that that the court has a discretion to allow that additional four years if there's been no unreasonable delay. So that's just another hook that has been used in New Zealand to kick claims out.

MS JANES: Can I just take you to, you talked about the 1950 Act.

MS COOPER: Yes.

MS JANES: No contemplation of these types of claims?

MS COOPER: No.

MS JANES: But there was a 2010 amendment.

MS COOPER: Yes.

MS JANES: Can you talk about what the changes were and are they better or worse for claimants.

MS COOPER: So the amendment only applies to reasonable discoverability. And to be honest it's a very, very confusing set of amendments. So it applies a long stop. So one long stop provision was within five years of that amendment, so up until 2015, and the other long stop period was 15 years from the time of the cause of action. So I mean if we say a 20 year old that would potentially extend it to 35, and then there is a discretion, but I'm not – I think this is the confusing part, is, you know, is that it, is that the long stop. Because there is also a discretion in the case of sexual abuse to take into account all the reasons for delay to extend that. And in physical abuse, if that's by something called a close associate, and that has been a term taken from former Victoria and New South Wales legislation, so which, of course, has been found to be outdated and already overtaken by legislation which gets rid of the limitation period. So we don't really know how those amendments to the 1950 legislation really work yet.

MS JANES: So in practical terms, how is that impacting on claimants who come to you both historical and contemporary claimants in terms of what you can advise them about application of the Limitation Act to their cases?

MS COOPER: Well, for our older clients it's a significant barrier and that's really around the way that the courts have interpreted those provisions since *White*. I mean one of the things in *White* was that it restricted reasonable discoverability to sexual abuse only, whereas I think I explained in *S v Attorney-General* he'd been the victim of both physical and sexual abuse and the Court of Appeal applied it across the board.

Disability, as I say, has just got lots of fish hooks in it. And the way that the courts interpreted that, I mean a couple of more recent cases, which Amanda will talk to, maybe shine some light on that and there's been a little bit more, I suppose, kinder I would have said to claimants. But even still, there are lots of barriers there.

So I think for our older clients we just say the Limitation Act is almost now insurmountable and to get through it, I think Amanda explained, you have to be damaged enough to get through the Act which requires a very kind of high level of damage, but then you've also got to be functioning enough to give a coherent account of what happened to you. I mean that's almost a perfect storm plaintiff.

Which is the reason, as I said yesterday, that's the reason why we file all claims where we can beat the Limitation Act, we file them.

MS JANES: In April 2010 you wrote, so if we can bring up number -- document number 9, witness 94 ending in 398 and we see that's a letter from Cooper Legal to Garth Young at the Ministry of Social Development dated 28 April 2010, and you raised some issues about suspension of the Limitation Act. If we can call out the three, four actually highlighted paragraphs, if you could just go through the yellow highlighted parts for us please.

MS COOPER: So, "Further while we accept that there have been potential Limitation Act and/or ACC defences in some of the claims MSD has resolved with clients of this firm, MSD has always relied on those defences in terms of the limits on its offers made with regards to settlement.

While MSD continues to rely on its rights vis-a-vis the Limitation Act, clients have no option but to file their claims in court in order to protect their positions in the event that any less formal processes may prove to be unsuccessful. This is particularly given the extraordinary delays in MSD being able to complete the care, claims and resolution process for most clients. It is observed that delay is a very real concern, given your own information that 20% of claims dealt with by the Ministry do not settle.

We also note that in a number of cases you have been unprepared to proceed with the care, claims and resolution process until we have submitted a document in the nature of a statement of claim".

MS JANES: And moving over the page if we can, calling out those highlighted paragraphs, and again if you could just read the highlighted parts.

MS COOPER: "As we have stated, if we are required to provide that level of detail and legal definition of a claim and the client is forced to incur the legal cost of doing so, then there is little to be gained by holding off filing pleadings in a court context.

We note that Chief Justice Elias in hearing the Crown's appeal in the psychiatric hospital cases questioned why the Crown was taking the limitation point in relation to the mental health legislation. Chief Justice Elias challenged the Crown in those cases to let the High Court determine the cases on their merits. The same sentiment applies here. Clearly

the option of relying on the limitation defence applies whether or not a claim is filed in a court. Further, our own experience is that MSD relies on its technical defences at all stages. The limitation defence is clearly taken into account in terms of any settlement reached".

MS JANES: And again, over the page, calling out the highlighted passages.

MS COOPER: "Many of the churches and other organisations such as IHC with whom we deal agree to suspend the limitation period in the manner we have suggested. It is interesting, particularly as MSD is supposed to be a model litigant, that it takes a completely different position in these cases, which are, after all, involving allegations of abuse by State officials or while under the care of the State.

Your letter then asks this firm to provide quite a lot of other information about the complaints and concerns our clients have. This includes a record of where and when they were placed in care. With respect, MSD holds all of our clients' records. It has the resources to obtain this information itself. We have no funding from the Legal Services Agency to enable us to do substantive work on our clients' files. Unrepresented clients would not be required to provide the information you are now requesting from this firm on behalf of a very large number of clients".

MS JANES: And do you recall a response?

MS COOPER: Well, nothing changed immediately. I think we had some discussions around filing what we were then calling a mini SOC [Statement of Claim], so a mini statement of claim, to just stop the clock. But those discussions then devolved into agreeing to the stop the clock agreement with the Ministry of Social Development, which we finally agreed and signed up in May 2011. So yes, it was another year later.

MS JANES: And you covered the limitation agreement with the Ministry of Social Development in your contextual hearing evidence, but can you just summarise the agreement and what the purpose and effect of that stop the clock agreement was?

MS COOPER: So essentially what it means is that from the point that MSD accepts that a claim has been made, and that's a point that we're now back in debate about, but anyway we'll come back to that. So essentially that was when we notified the Ministry of Social Development that we were requesting records because a client had instructed us that they'd been abused in care. Time stopped from that point in terms of the Limitation Act running to enable us to work through the historic claims process to see if we could resolve the claim. And time would only start running again under the Limitation Act, I think from recall two months after a client might have rejected any offer from the Crown, from MSD.

So that has been a big help obviously, it's meant that the vast majority of claims we no longer file in court, and that's significant because there is a lot of work that we need to do to actually get a claim to the point that we can file it. As I say, we still do it for all our younger clients, but it is very hard work, it is reliant on going through as many documents as we can, and with our younger clients where records may run to 3 to 8,000 pages that we've got to try and absorb in a very short time to do that, we still do it though, but that just has meant we don't have to do that with everybody. Obviously there are some disadvantages of that in terms of what we get in terms of the records, but as I say, at least, you know, we don't have to file every claim.

CHAIR: I don't want to open a can of worms so keep the lid on quite firmly, but if you're not filing in the High Court, what's the Legal Aid situation?

MS COOPER: So that was very vexed for a long time, but –

CHAIR: The short question is –

MS COOPER: We get funding for that, yes.

CHAIR: – can you get Legal Aid to bring a claim that is not filed in the court?

MS COOPER: Yes, yes because the legislation specifically provides for engaging in alternative dispute resolution processes, so yes.

CHAIR: Thank you.

MS JANES: And we will actually come to a document where that was not entirely clear but –

MS COOPER: Yes, that's where we got to.

MS JANES: So we will go to that document shortly. Just going back to discoverability and disability, it would probably – we don't need to spend a lot of time for it, because, Commissioners, we are relying on the contextual hearing evidence which did go into that in quite a lot of detail, as does this brief. But it would be useful just to highlight it with some cases where you can outline how and why it applies and when and why it doesn't, so you've got the *W v AG* case.

MS COOPER: Yes, so that was – I guess it also demonstrates kind of the way in which the court's view of these claims changed as well. So *W v Attorney-General* was one of the very first cases that I took. This went to the Court of Appeal in 1999, so the argument was about reasonable discoverability, particularly this was a client who had instructed us in the, as I say, 1996. By the time she came to us she had tried to apply for ACC, she'd written a short narrative of what had happened to her in care, it was a handwritten account, she'd spoken to a nun about some of her experiences and had had some counselling.

But the court there found that these kind of preliminary steps were not enough to trigger the reasonable discoverability and it wasn't actually until she had – I'm trying to remember, I think it was proper therapy and somebody actually diagnosed her with a disorder that she actually was found to have reasonably discovered the link. So, you know, it required some better understanding. Then of course we had *S v Attorney-General*, which was also High Court and then Court of Appeal. So that was in 2003 the Court of Appeal decided that. That was both reasonable discoverability and disability.

So again, you know, from all outward looks a reasonably functioning person, I mean he'd gone to university, he'd had an on-going alcohol abuse problem but was working, married, you know, so to all outward looks kind of seemed to be functioning okay, but the court there found that in terms of reasonable discoverability, again it was really – so he had a massive kind of breakdown when his foster mother, who had abused him, died, and that kind of unlocked all these memories really, and that was the step that enabled him to get counselling. So again, it kind of ran from there.

But also too what was important in that case in terms of reasonable discoverability was actually accessing his departmental files, because he hadn't known then what role the Department had had to play and what decisions the Department had made or not made. So actually accessing his files and understanding the liability of the department was critical. In terms of disability, you know, so as I say, we had these kind of outward looks as though he was –

MS JANES: Can I just pause you there.

MS COOPER: Sure.

MS JANES: Just to make a point before we move away from *W* and *S*. In terms of the redress that they were able to achieve in their cases.

MS COOPER: Yeah.

MS JANES: As I recall from your contextual evidence around 150,000 each, where, in terms of subsequent compensation payments, would you characterise that as sitting?

MS COOPER: Well above anything, there's never been – in the context of these claims, there's never been anyone who's received – I think the next highest would be 90,000. And that's for a breach of Bill of Rights Act claim too, that's somebody who had no limitation problems and it was BORA [Bill of Rights Act]. So, yeah, most claimants, I think the average for a Ministry of Social Development is like 18,000, I think that's what the statistics would say. But, yeah, we'll talk about that later, but yeah, very, very big disparity.

So with those two, they got a big lump sum payment, I think actually *S* was – *S* kept 140 in his hand and he had to pay 160 to Legal Aid. And I would have thought *W* was about the same, I wasn't acting for *W* at that stage, Judith Ablett-Kerr was.

MS JANES: Just to confirm, the 140, 150 was in the hand.

MS COOPER: Yes.

MS JANES: And legal costs were –

MS COOPER: On top of that.

MS JANES: On top of that. Thank you, I stopped you there.

MS COOPER: That's all right.

MS JANES: But we'll carry on with your disability.

MS COOPER: Yeah, so the critical thing there was the, there was a commonly accepted diagnosis of Post Traumatic Stress Disorder, and it was accepted that that disorder had one, stopped him, he'd avoided thinking about the trauma, but also two, it had been a, you know, it had stopped him from being able to instruct a lawyer. So his claims were in time.

And then we kind of then, *White* and, you know, you know what happened there, which was really interesting because in terms of the functioning of both Earl and Paul, they were much less functioning plaintiffs, much, much less functioning plaintiffs than certainly *S*. And I have to say I remain devastated to this day that – of the outcome of that in terms of both reasonable discoverability and disability, because it seemed to me in terms of reasonable discoverability not only was it restricted to sexual abuse, but you just needed to have a small kind of, I use that word scintilla, a small tiny little understanding, and that was enough. Whereas the earlier Court of Appeal cases had made it clear it didn't need to be a sophisticated understanding, but it needed to be a sufficient understanding before your legal rights kicked in. And yeah.

K I just wanted to refer to again. I did refer to it in the contextual hearing, but again it was another unusual decision, decided about the same time as *White*. So this was a man who by the time the hearing came to be dealt with was already under the Intellectual Disability Act and that Act only applies if you've been – if you've had a low IQ from birth, so below 70, and yet the judge held well, he wasn't, you know, he wasn't actually detained under that legislation until after he'd taken this litigation. And also that he was somehow sufficiently not disabled to instruct a lawyer and yet he was detained under legislation that said his IQ was at a low enough level that he had to be, you know, especially detained and had particular rights because of his low IQ.

So that didn't make sense to me. And then with *J*, which was again in this kind of triumvirate of cases which had the catastrophic effect on Legal Aid. Here it was – she was found to not be under disability because here the court found that she was undoubtedly aware of her distress, emotional upset and anxiety. Well, again the test was around understanding a psychological condition. I mean these are kind of just normal features really. And also too, in terms of making the link, because she'd gone to ACC, as had *W*, that again was said to have been when she made the link.

So you see these cases, you know, you see *W* and *S* from 2003 and then only four years later kind of a very big turnaround. So yeah, they were, I think surprising is one word. And obviously catastrophic really in terms of what that meant for this group of claimants.

MS JANES: And just to orient the Commissioners, this can all be found at your evidence pretty much from paragraph 49 to 108 if further information is of value. Then we go over to the case of *LSA v W*.

MS COOPER: So these were then after the withdrawal of Legal Aid process kicked in which we'll talk more about. We were then fighting for four years, I think, three or four years to actually retain Legal Aid for this client group. And the reason why we put these cases in is because they put further glosses on the limitation tests. And we've referred to the *LSA v W* case because here's the High Court expressly rejected the findings of the Court of Appeal, so this is a High Court expressly rejecting the findings of the Court of Appeal, a five-court bench Court of Appeal, in *S v Attorney-General* on the basis that they somehow had developed a better understanding.

So I mean, yeah, so that was interesting. And then we had other cases which we've referred to, so *LSA v LAE* and *LSA v L*. So this was about the quality of expert evidence that had to be provided, and what that meant was that experts now had to read every single document that was relevant to a claimant's life. So right from whoa to go collecting educational records where they were available, criminal justice records, medical records, ACC records, every single record. And that all had to be taken into account by the experts, and if that was not taken into account, then their reports were rejected as not being robust enough.

MS JANES: What were the practical implications of that change of requirement?

MS COOPER: Well, I think – I mean we already had a very limited number of experts that we could access to do these reports. That actually limited the pool even further, because the

amount of documentation that needed to be reviewed was, you know, like literally boxes for some clients. And that just meant, you know, because typically most psychiatrists doing this work do work in the public system and then, you know, have one tenth or two tenths to work in the private system and they just couldn't do it. And it also meant that the reports became very expensive. They went from being $1,500 to $2,500 up to $8,000 to $10,000.

And, you know, that's another thing that makes Legal Aid pause clearly, because if you're going to spend that money and then get a report that's either ambivalent or actually says your plaintiff doesn't get through under these new tests, Legal Aid's going to think very carefully about whether it's going to fund them. And so that was just again another constraint because we had far fewer people that we could legitimately recommend to get assessed for these reports.

MS JANES: So as well as the unavailability of psychiatrists and the enormous cost, given that you've – and correct me if I've misinterpreted – that these are document reviews.

MS COOPER: Yes.

MS JANES: And we've already heard that a lot of these matters that would substantiate a claim are unlikely to be found in the records, what would you say about additional barriers that were created?

MS COOPER: Well, yeah, so it was an additional barrier, but also too of course, what became another issue, particularly for our prison client group, was that they never reported their abuse and that became another hurdle for them, because the way that the courts interpreted that failure to report was they weren't under disability.

So it was a double whammy. So a vulnerable group that on average takes all this length of time to report anyway, it was counted against them that they hadn't reported because that meant that their time was, you know, they weren't under disability. So yeah, it just all became quite vexed and Amanda can probably add to that.

MS HILL: I guess from a practical perspective as well, so as well as reading all of the documents about an individual claimant, they always interview the individual claimant, so you have to be able to find a forensic psychiatrist who was willing to travel.

MS COOPER: Yeah.

MS HILL: And also potentially go into a prison so that limits your numbers again. And often when claimants meet someone new they're another person who's there to assess them they've got to tell their story again. Sometimes that's just too hard for them, and so you get to that point and there's just another stranger that they have to talk to. And that hasn't

always gone very well, because sometimes people clam up or don't want to talk or are too distressed to talk. So you get to that point and then things can go astray at that point too.

MS JANES: And Amanda, you were going to tell us about the *Taylor v Roper* and the *J v J*.

MS HILL: Yes, just briefly because they're illustrative of the way more recent cases have been dealt with. I'll deal with *J v J* first because it's the earlier case. That was a 2015 case of a woman who sued a relative for sexual assault when she was a child. So this was a direct claim against a perpetrator but still a civil claim. And she, and I won't go through all the evidence, but the court said that she met the disability requirement, so her claim was not barred by the Limitation Act and her – the factual situation was much more like the one you saw in *W v Attorney-General* where there'd been some counselling, she'd, I think, been in the Family Court, there'd been instances of her talking about the abuse, even ringing the perpetrator and saying - "You've done this to me". And the court found that she met the disability extension.

So wildly different from the *White* decision. And in the end she received damages of $75,000 because not only was the abuse found to have happened, but the court said actually he's quite a wealthy defendant and so in order to punish because these are exemplary damages we're going to up them to reflect the fact that you have money and that would be an adequate punishment.

MS JANES: And just to put that in a timeframe, this was a 2015 decision versus 2007?

MS HILL: Yes. In the second decision, *Taylor v Roper,* which has received some publicity in the last few months or the last year or so. Ms Taylor took civil proceedings against Robert Roper, an individual, and the second defendant in there was the New Zealand Air Force. And recently the Court of Appeal issued their decision because Ms Roper had, I think, been found to be barred at the High Court level. Court of Appeal, in a split decision, the majority found that Ms Taylor had been under a disability for 26 years until she learned of Mr Roper's convictions, and that this news released her in a similar sort of mental development breakdown, there's lots of different words you could use, that had happened in *S v Attorney-General* and there'd been this release. Again, really different from *White*.

And another interesting aspect that *Taylor v Roper*, again, only majority of the Court of Appeal found, is that a number of her causes of action were subject to the ACC bar, but aspects of her claims about false imprisonment of being contained in a cage were not covered by ACC because there was no physical injury or personal injury or assault that went with detaining her and consistent with a case called *Willis v Attorney-General* that's not covered by ACC. So the Court of Appeal has sent that back to the High Court for a

damages assessment.

The reason I wanted to talk about these two cases is it reflects the swing back. But I'm concerned that that swing wouldn't be seen for our claimants. We are talking about individual claims, specific circumstances, not involving the State and also we're talking about people who don't necessarily look or present like our claimants. Our claimants are primarily Maori, they are prisoners, they don't always present in ways that people find comfortable, whereas the plaintiffs in *Taylor* and in *J v J* do, and I do wonder if unconscious bias plays a role there. We know that the floodgates policy, the sheer number of State claims was a factor in that hardening and I don't know if that swing back would be in favour of our claimants now. So it's been interesting to watch the courts shift like that, but I worry that that shift wouldn't be for everybody.

MS COOPER: It's probably also worth noting that the Crown has sought leave to the Supreme Court to appeal the finding that she's entitled to compensatory damages in respect of the false imprisonment. I think the argument that the Crown is raising there is that because there was some physical force to get her into the cage, that means it's a, yeah, personal injury.

CHAIR: Does the appeal also cover the disability point –

MS COOPER: No.

CHAIR: – or is that accepted by the Crown?

MS COOPER: Yeah, that's not been appealed.

CHAIR: Thank you.

MS JANES: So moving to paragraph 109 of your evidence, following the *White* case the courts also dismissed claims on grounds of delay despite earlier Court of Appeal decisions that applications under section 4(7) of the Limitation Act should be decided without prejudice to limitation issues, unless intended was undoubtedly – the claim was undoubtedly statute barred. Did this introduce further barriers to claimants and are there cases you would use to demonstrate that?

MS COOPER: Yes, again, these were cases I think we referred to in the contextual hearing. So I'll just briefly say, so New Zealand is the only country that has this two years and then this additional four. And yes, I mean these were cases where one there were issues about the psychiatric evidence, the quality of the evidence, but here the delays were, I think one was six months and the other was 18 months in an overall delay of 25 years, and the courts relied on those reasonably small delays to – as a factor in not exercising the discretion in

favour of those plaintiffs, so their claims were struck out. So that just became another way in which the claims for this group could be completely struck out.

MS JANES: And you've talked about the enlightenment in terms of understanding the psychology, the neuroscience. Have you any thoughts about what may make a difference in terms of knowledge of lawyers and judges dealing with these cases?

MS COOPER: Look I think this is clearly a very specialist area. To understand this you actually need to understand about the way in which abuse impacts on memory, on the ability to disclose, on the ability even to understand that you have a claim. I think – so that's all highly specialist understanding and knowledge. And, you know, just that kind of 22 years is something that I think resonates quite easily.

And I think what this says is that to actually work properly in this area, both lawyers, judges and those doing expert reports, all have to have expertise specifically in trauma, because I don't think that this claimant group can actually receive justice unless you have experts, at least people who've got specific training and understanding of these areas making decisions.

MS HILL: Can I add to that. There also needs to be an understanding of what's been called counterfactual evidence, understanding why people don't complain at the time, why they may act in a way that appears to be conceding or agreeing to something, or not fighting back, and we hear a lot about this in terms of sexual violence cases in the criminal courts, understanding why victims behave the way they do, and not reverting to what we think that means. The other thing that I think is very important is on-going training around understanding unconscious bias, understanding that when a claimant presents with a long list of criminal convictions or maybe doing sentences for some extraordinarily bad things, that that doesn't mean they're not a worthy claimant, they're not worthy of redress.

And so putting aside those things, and we'll talk about the high tariff offenders later, putting aside those things and understanding that this was a person in State care, and I think people who saw the photo of Chassy Duncan that was taken when he was at Waimokoia School, they were children and remembering that, the last thing is probably understanding, particularly for our Maori claimants, that there is that additional trauma of colonisation and the impact of that upon culture and having that connection to Te Ao Maori.

MS COOPER: Yeah, so the loss of mana and wairua, that's just an additional component. So actually that's something else we should say we need appropriately trained culturally as well, that it has to be an aspect of this.

MS JANES: And just going back to the issue of the counterfactual because that was raised in the

White trial as well and you talked yesterday about if you are at the point of having to be uplifted from your home in any event. So can you just marry the problems of a court applying a counterfactual scenario to this type of claim.

MS HILL: I vividly remember this. I vividly remember Miller J going what's the counterfactual, what's the alternative? And you're asked to envisage this alternative plan for this child. Where the reality is, there's not an alternative plan, it's have a better system. Actually do the things that you should be doing right. There isn't alternative universes here, you have a system and a job and you need to do that well. I remember sitting there thinking, just have a good system is probably the counterfactual that I would suggest. But Sonja has different views on that I think.

MS COOPER: No, I think you know that was the impossibility of the situation we were in, because actually the counterfactuals were just as abusive as any alternative. So it's like well, you're put in an impossible situation because, as Amanda says, if the State had been doing its job properly, I mean you are supposed to remove children to make their lives better, not to either keep it at the same level or make it worse. And, you know, the whole of their lives, everything just made it worse.

So I mean, how could we present a counterfactual because the system wasn't working. There wasn't – I mean, you know, that's exactly what the system is supposed to do and that's the complaints still about the system, is that actually it causes more harm to actually remove children. So you set up an impossible – we were set up in an impossible situation, because there wasn't a counterfactual that actually – well, there might have been, foster care, because actually for the sisters, for the sisters, you know, some of the sisters at least, foster care actually was a good counterfactual and they did well and they thrived. And that had been a possibility. But for Earl and Paul, they got fostered for a short time and then they're whipped into the boys homes where it was catastrophic.

So as I say, it was like the whole issue of being able to provide a counterfactual was just impossible in these situations because for many of our clients there isn't a good option, and actually probably I'd like to think now that the best option would be working with whānau, however, you know, difficult that may be, but I think for most tamariki we would say that actually working with the whānau, providing resources to the whānau and that can be a broader concept of that, is actually going to produce the best long-term outcomes.

Yes, there will still be children who need to be removed, but – and I think, you know, just longitudinally working in this area that's where we've got to. That actually the

ones who've suffered the least long-term harm have typically remained with their families, or at least, you know, had some connection, or been placed in really good foster care. But again, we know foster care has been damaging, we heard the Sammons.

MS JANES: So returning to the Limitation Act and you've talked about the transitional timeframe between MSD and Oranga Tamariki, what are you able to do to try and protect the claimants who will cross, because you have the Limitation Act agreement with MSD, you don't have one with the Ministry of Education and you don't have one with Oranga Tamariki. So what can be done to protect and preserve the rights to redress going forward?

MS HILL: Those people who will come into the Oranga Tamariki timeframe are in a really difficult position. I don't know whether you want me to go into the limitation, proposed limitation agreement?

MS JANES: Yes.

MS HILL: Okay, so there is no current stop the clock with Oranga Tamariki, is the first thing. And the second thing is that Oranga Tamariki appears to still be developing its complaint and claim process. And it's not clear how long that may take. And so in the absence of either of those things, then the only step that we have available to us currently for a person who is in the care of Oranga Tamariki and suffered abuse which is after 1 April 2017, is to file their claim in the court to stop time.

We've been seeking a stop the clock agreement for all Crown entities that deal with historic claims for quite a long time, since about 2014. In particular the Ministry of Education, because since about 2014 the number of claims against the Ministry of Education has grown, but we've never been able to negotiate a stop the clock agreement with education.

There's a number of reasons for that. We want as broad cover as possible for obvious reasons. Whereas often the Ministry would seek to limit the coverage of any proposed agreement. There's the sticking point of the Education Act 1989, which placed the governance of schools with boards of trustees and created a shift there.

But, and we say this quite strongly, the Ministry has such a strong role with special residential schools, even after 1989, that they're in a slightly different boat than your average State school run by a board of trustees, because the Ministry appoints half of the board of trustees for a special school, so gets quite complicated at that point.

So we've had a lot of correspondence over the years trying to find an agreement that will work for everyone. And there's always claims that don't quite fit and we've been trying as best we can to fit as many different types of claimants in under that agreement, because

obviously it's to their benefit that we fit as many in as we can and the ministries are seeking to keep that as narrow and compact as possible. So that's been a lot of correspondence over the years. So that conversation started in 2014 and carried on stopping and starting through to 2018 and we still did not have an agreement at that point. And since about 2015 we had been filing Ministry of Education claims in the court, rock and a hard place, no stop the clock agreement. If we didn't file their claims then effectively we're negligent at that point. What can you do?

So we get to 2018 and I don't even know how many iterations of a draft policy we had been through by then, and Crown Law wrote to us and said look all of the different proposals between, say, MSD, the current agreement, and what we're proposing for MOE, they're inconsistent, and we would really like to be consistent across the board. That sounded like a good prospect, we'd like to have the same agreement because we wanted it to be consistent with MSD's agreement as well.

And so the Crown said in 2018 we're going to work with Oranga Tamariki, MSD, MOE, and we'll bring you a proposal for an all of Government stop the clock agreement. And that sounded fantastic. And so that's great and that's in 2018. And then we didn't hear anything for the rest of 2018 and for all of 2019 and up until –

MS JANES: 24 August.

MS HILL: – 24 August 2020.

MS JANES: We'll bring up the document for 24 August.

MS HILL: Thank you. So this is a letter that we received from Crown Law and I have to acknowledge at this point, this is a very complicated issue and I have some sympathy for Crown Law in trying to conduct an exercise in what really is mustering cats and trying to get everything going in the same direction, so I have some sympathy here.

MS JANES: If we just call out the highlighted paragraphs, if you can go through those, that will just give the Commissioners a flavour of where the current status is at rather than you describing it.

MS HILL: That's good. "The draft policy applies to all claimants (both represented and unrepresented) and to both extant – so current – and future claims. It suspends time for the purposes of both the Limitation Act 1950 (1950 Act) and the Limitation Act 2010.

As you will recall the original intention was for the policy to apply across MSD, MOE and, Oranga Tamariki. Oranga Tamariki is in the process of developing the detail of its claims process and will consider the application of the policy to claims relating to events

from 1 April 2017 in that context. The draft policy currently applies to MSD and MOE claims".

MS JANES: And if we go over the page please, just call out paragraph 7.

MS HILL: "The preamble to the policy expressly refers to the Crown's discretion to take a more favourable approach for a claimant in the particular circumstances of a claim".

MS JANES: And paragraph 11.

MS HILL: "In summary, an extant claim is lodged on the earliest of the following dates".

MS JANES: And if we can then bring up the subparagraphs.

MS HILL: "The date the claimant told the relevant Ministry that they wanted to make a claim, their name and date of birth and any further information the Ministry asked them to provide so that they could confirm that the information constituted a claim (as defined) in paragraph T.1, or the date that the relevant Ministry has otherwise accepted that the claimant engaged with that Ministry's claims resolution process as advised to the claimant by that Ministry described in T1.2".

MS JANES: Before moving on to the rest of that letter, in terms of the dates, you alluded earlier to the issue about the Limitation Act and there were still some uncertainty about the date that that became operative. Can you just briefly go through where you're at with that now.

MS HILL: So initially, so the word "lodgement" is used here, in other documents we talk about "claim registration". And it's the date that the claim is notified is another word. There's no consistent term across the correspondence. The claim is notified to the Ministry and that's the date where the date stopped. So it's really important. And it's been a sticking point, because in previous iterations to the agreement Ministry of Education said well no, the date only stops when we get your letter of offer, whereas we might have requested their records several years, sometime before then. So what constitutes lodgement is different between the different departments. Sonja may have something to add around the claim registration issue.

MS COOPER: We also had some issue with MSD in relation to when the time started as well, and that became a really big issue in respect of a very large number of our clients. Once upon a time MSD, when we requested records, that would be the start of the time period, and in around 2014 for some reason it stopped. We didn't know that until 2018 when we got some correspondence for our clients and a very large number, over 500, were missing from MSD's list of our clients, and so their own record system of keeping notification of our clients requests for records had suddenly stopped, and they said they had no notice of these clients. So that was very problematic for us.

Since then MSD's introduced a registration process, so there's a form that every claimant has to complete and we do that on behalf of our clients, and that's the point at which the claim is registered sometimes the clock. But of course, and we had to retrospectively do this very large group of clients which took us again diverted us from actually working on their claims and I was concerned at some of the evidence around how MSD is dealing with that group, and that's something we'll have to go back to MSD about.

MS JANES: And in fact if we go back down to paragraph 13 they actually do refer to that particular category of claims.

MS COOPER: Yes, they do.

MS HILL: Did you want me to read that?

MS JANES: Yes.

MS HILL: "In the context of preparing the draft policy MSD has identified that a further modified approach will be required for some other claimants in order to ensure consistency and fairness as between the 559 specified claimants and other claimants".

MS JANES: And moving over the page please and looking at paragraph, if we can perhaps – if you can read it if I call out all three.

MS HILL: Should be able to. "MSD advises that on the basis of the policy as currently drafted, it intends to accept (for the purposes of paragraph T1.2 of the policy) that the above claimants engaged with its claims resolution process at the time of their records request.

In order to ensure fairness and consistency of treatment as between MSD and MOE claimants, on the basis of the policy as currently drafted, MOE intends to accept (for the purposes of paragraph T1.2) that claimants whose first engagement with MOE's claims resolution was an information request committed to MOE's claims -- was an information request received by MOE where objectively considered the information request was made for the purpose of commencing a claim.

For clarity, the ministries note that if any other claimants are in a materially similar situation to your clients (that is, they have made an information request that, objectively considered, was for the purpose of commencing a claim) the ministries will apply the same approach to them".

MS JANES: And over the page.

MS HILL: There's a section about long stop.

MS JANES: Yes, let's quickly look at the section on long stop.

MS HILL: "We have identified that the current position under the limitation agreement between your firm and MSD, with respect to the long stop period in section 23B of the 1950 Act

appears to be unclear".

MS JANES: And then over the page we carry on, just see if we can highlight 19 and 20. I'm not sure if you can fit 22 in.

MS HILL: "The addendum – so there was an extra part added to the 2011 agreement about the transitional provisions as they were known – the addendum appears to take a different approach to section 23B(1)(a) and (b)".

MS JANES: We probably don't need to touch on those, that's going into technicalities we don't need to.

MS HILL: Happy not to.

MS JANES: Just very quickly looking – so it goes on to talk about the long stop periods and how they apply and what the policies will look at, and then again over the page similarly. So really the short point, having received this correspondence, what is your sense of where you are in the journey towards a consistent Limitation Act?

MS HILL: So it's certainly a positive step. So attached to that letter was a draft policy by the way, and the policy is, and Crown Law were very clear, it's written to be understood by lawyers or non-lawyers. Anyone, even the lawyers in the firm struggled with the content and the way it has to be expressed, because it's a very complicated thing.

It's a positive step but there are problems. The first problem is it's not a whole of Government document. It's only MSD and MOE. Oranga Tamariki has had – it's been in – it's been alive for three years and it still hasn't got a claims process, so it's sitting outside of this at this point. It's a policy not an agreement. So the MSD current limitation agreement is a signed agreement between Cooper Legal and MSD. It's something that we can hold on to, something that we can try and enforce. The proposed change is a Crown policy, and the provisions of the policy say that the Crown can change it when it feels like it and that there's a reasonably short notification period of change.

So it's something that, again it's that discretion, it's that imbalance of power again. And there's a real nervousness there about it being a Crown policy rather than an agreement that potentially could be enforced.

There are issues around – on the one hand it's good that there's a provision in there that claimants who don't fit within the policy a more favourable approach can be taken. So we can come to agreement about people who might not fit, but it's the Crown retains the discretion, it's – so the Crown could say no, and again, it's reflective of that imbalance of power that I keep coming back to.

There are lots of intricate things that we are going to work through with Crown Law. I'm conscious that our response is in draft and Crown Law hasn't seen it yet, so this is sort of a preview situation for them. And so it's a really good step after waiting for two years for this to have received it this month. It's a good step and we've got work to do.

But if we were in a position of not having to file the Ministry of Education claims, that would be wonderful. It would take, like the resource and the court itself is increasingly becoming overwhelmed by the number of claims. Because they just sit there, they're not progressed until we request them to be taken out of the pool, if you like, and –

CHAIR: Is the Crown filing defences to those claims?

MS HILL: No, we have an agreement that the Crown doesn't. It's purely to stop time.

CHAIR: So just to stop the clock.

MS HILL: Unless, as I say, we request that something is progressed. So progress, but still something to work on. Did you have anything to add Sonja?

MS COOPER: Yeah, there's still some very narrow and constrained definitions, particularly around the Ministry of Education, what that covers. And again, I think that almost takes us back to the beginning of the discussion back in 2014 when we couldn't reach agreement because it's a very constrained agreement in terms of who it potentially covers. So yeah, that's – as I say, that almost takes us full circle, so that's a problem too. And it doesn't cover the Ministry of Health.

CHAIR: Yes, I was going to ask about that. Is that a deliberate omission?

MS COOPER: Well, the Ministry of Health, I've been thinking about this, Amanda, and I have been talking about it. Of interest, the Ministry of Health just seems to sit on its own like a little island. I don't know why it's never been part of the bigger discussions, particularly because many of the clients experience multiple placements, including psychiatric hospitals. And I don't know whether that's, you know, we settled 320 in 2012 and since then the number of claims has been a trickle. And I don't know whether that's because – I suspect this group still doesn't know about their rights a lot of them. That's my –

CHAIR: That area would cover a lot of the disability claims, wouldn't it?

MS COOPER: Yes, it would.

MS HILL: One of the interesting things, and I think it's an interesting challenge and you come back to the idea of the indivisible Crown, this is presented as a Crown policy, not an MSD, MOE policy, it presents itself as an all of Government, but currently doesn't apply to all of Government. So I think there is a disconnect there about how it's presented versus who it

actually covers.

MS COOPER: It states it's a Crown policy, but then it only covers two Government agencies. I mean, you know, really if it was going to be a Crown policy it would be covering Corrections, it would cover police, it would cover those kind of, you know, sitting outside Crown agencies like Stand. So, you know, if it purports to be a Crown policy, that's what it should be.

MS JANES: And you've described that you currently have an agreement which has the potential for enforceability, but this is a policy which has a discretion which could be changed at any time. In terms of the confidence of your responsibilities to the claimants who come to you, how assured would you be that you could discontinue filing in case there was a short change in policy?

MS HILL: Unfortunately I have a low level of confidence. We have an election in a couple of weeks and these things are matters of political will, and should the Government decide that it doesn't want to take this route anymore it just repeals the policy. We would have a judicial review sort of route, but I'm not convinced that judicial review of a policy to pause, effectively, a legislated defence -- I'm not a judicial review specialist but I sense that is a very complicated and difficult endeavour. Unfortunately we have a low level of confidence, we're absolutely coming at this in good faith, but, yeah, you cannot help but worry, even with the agreement, we worry that one day the Government will just say we're not going to do that anymore.

MS COOPER: I really think with the Limitation Act we have to behave in a way that's consistent with our Commonwealth counterparts who have already recognised that the Limitation Act needs to be specifically amended for child abuse victims. And you know, I think if we look at Scotland and we look at Australia, that for child abuse victims limitation periods have been repealed. And in Australia there is still a discretion permitted to get rid of claims that a defendant is able to persuade a court that it can't fairly argue.

And I do understand that, I think what we would know is that's going to be rare because most claims there's still enough documentation and there are enough witnesses that you can still pull a case together. But I'm absolutely clear that in this area legislation is the only thing that will work and we've got lots of precedent for that. And it actually then embodies our better understanding and our better knowledge of the way in which abuse victims have all these impediments to being able to report and to take claims.

I don't think we should have to rely on goodwill or policy, I think it has to be legislated and then -- and it should cover everybody. I mean it shouldn't also be just State,

I mean that should cover across the board, it should be church claims as well because the churches have also relied on their limitation defences and still do from time to time. I mean I think we are seeing a shift and I think that's a real benefit of this Royal Commission, I think we are seeing a real shift in attitude, so we can be only grateful for that, but if there's no eye anymore will that shift back again?

So I think we're clear that the only way this can be done in a manner that will properly protect this vulnerable group in terms of their rights is to repeal it and to replace it with legislation as Australia and Scotland and other Commonwealth countries are doing or have done.

MS JANES: I'm conscious that we're into the lunch, but can I just clarify that when you suggest repeal of the Limitation Act, are you talking about in its entirety or just as relating to this?

MS COOPER: No, there are specific legislative provisions for child abuse claimants, and that's what I'm suggesting is that we just specifically repeal the provisions for this group of claimants. We started that, we tinkered with it in the 2010 Act and, as I say, we pulled from New South Wales and Victoria legislation and kind of grafted that on, but their thinking has already moved on, their greater understanding and the fact that they've had their Royal Commission and Scotland did its own inquiry and actually relied on some research that we'd done in our firm to repeal its legislation. So I think we just, now that we have this better understanding and we've got all this material and, you know, it has to be done legislatively.

CHAIR: A good note to end on. We'll take the lunch adjournment.

Adjournment from 1.06 pm to 2.16 pm

CHAIR: Good afternoon everybody. Ms Janes.

MS JANES: So we're still on the Limitation Act and we were talking about the Limitation Act 1950 and the Limitation Act 2010. Is there a change in the age of majority and what does that impact have?

MS HILL: So I think Sonja said earlier the age of majority in the 1950 Act was set at 20, but in the Limitation Act 2010 the age of majority for when time starts to run becomes 18. So it means there's a shift and you have almost less time in that six-year period we've been talking about for younger people who are covered by the 2010 Act, so that cut-off point is now 24 rather than 26.

MS COOPER: And for some clients, as we're getting younger clients, we have more and more clients who will actually straddle both Acts. So that's really confusing, so you've got two completely different limitation periods which apply. So we always have to take the most

restrictive, so we'll typically aim for the 22 if we can. But, yeah, it makes it really difficult now with our younger clients having two different pieces of legislation applying.

I should note too, there is again a discretion in the 2010 Act for a defendant to agree that the later Act applies, but so far we haven't seen any agreement from any defendant to the later Act apply.

MS JANES: And in terms of the process that you are aware that Oranga Tamariki is going to be applying, is there an impact on the Limitation Act period and filing in court?

MS HILL: Yes. So one of the important changes in the Oranga Tamariki legislation that came in after that department was created provided that people who had experienced abuse in care had to make a complaint to Oranga Tamariki and go through Oranga Tamariki's complaint process first before they could file a claim or begin civil proceedings. So there's that requirement in the legislation that they go through a complaints process first and the evidence before this Commission is that it's still in process. There's a complaints process and claims process, so there seems to be two different things. So it appears there is a functioning complaints process, but not a historic, not very historic with Oranga Tamariki, but a claims process.

But what the effect of that is, is time, so if you're 23 years old or 24 years old, according to my reading of the legislation, you have to go through this complaints process before you can file your claim. And by the time you go through that process, your limitation time could have run out. So it's a disadvantage for a young claimant, and to be honest they hardly ever come to the claims process at 22, 23, 24, they're more likely to come to it 30, 35. So this is going to be down the track.

But there are people, like Chassy Duncan, who starts the process at 18. And it's a built-in disadvantage, because that uses time under the Limitation Act and also we're not clear that that process is a functioning one. There's certainly no claims process, but the complaints process, and it seems to be a lengthy one too.

COMMISSIONER ERUETI: When you say there's no claims process, you mean there's no process like the historical claims process?

MS HILL: Yes.

COMMISSIONER ERUETI: Where the end result is redress, some form of redress?

MS HILL: Yes.

MS COOPER: There has been an ad hoc process, because some people have received settlements through Oranga Tamariki. But in terms of an actual constructed process where, you know, there are some guidelines and policies that's still in development. From our perspective we

ignore the legislation; we file. We are not going to potentially jeopardise somebody's legal rights under the Limitation Act, given that is still a defence, we will not prejudice somebody's legal rights by waiting.

MS HILL: And it does make me wonder, how do you legislate against someone filing proceedings, so I'm not quite sure how that works in practice either and I don't think that's been tested. But we are not going to take that risk.

COMMISSIONER ALOFIVAE: Can I ask, section 386(a), which is all part of the new suite of amendments that came through, does that have any impact at all, because it says that the Ministry's supposed to still be able to offer advice and support, up to the age of 25?

MS COOPER: It's a good question. Yeah, I think that's going to be another really good question in terms of how that operates in terms of its interface with limitation periods, because, as we know, I think even guardianship can operate up until now up to 25. So, yeah, how is that going to interface with limitation provisions and complaint provisions if you're still in care. And I don't, you know, there isn't a connection between that, which I think is another reason why legislatively there needs to be no limitation period for this claimant group.

MS HILL: The reality, from what we can see, the whole interface between MSD and Oranga Tamariki is fraught on a number of levels. Who holds records. So lots of MSD's records were transferred to Oranga Tamariki. So when you do an Official Information Act to MSD, part of it will get sent to Oranga Tamariki, some might stay with MSD. It's really unclear who actually has records now, even historic ones. And we've been in meetings with both MSD and Oranga Tamariki where they say yeah, we're not really sure who's got control over things. That worries me greatly about who has control of information.

MS COOPER: And it's another way in which important records can slip through the cracks, because if they're held by different agencies in different places and cover different timeframes, again it's another way, as I say, in which records cannot be produced or can appear to be lost, they may not be. And given that the latest iteration of the process which we'll talk about is so document reliant, that's a real fundamental issue for survivors for claimants.

MS HILL: And it does appear that Oranga Tamariki's process for redress and claims is going to be modelled on MSD's process, which is quite flawed and we'll take you through why we say that is. But there is that replication of those problems there. So there's a view of Oranga Tamariki as a fresh start and we're not convinced that's the case.

MS JANES: And just you talked earlier about there's no concluded limitation agreement with the Ministry of Education, and so when one goes to the minute of MacKenzie J in August

2015, which is at paragraph 729 of your brief, where it recommended that the Ministry of Education claims included in your DSW litigation group, how are they being dealt with if there's no Limitation Act but they've effectively been parked until further order of the court?

MS COOPER: Well, I mean we're kind of in that kind of no-win situation, so we have to file to stop the clock, but they just sit there. So there's no obligation, as Your Honour asked, there's no obligation to file a statement of defence. And so they're caught up then in the ADR process. So it's considerable extra work that is required for us to do, because pleadings are a lot of work, and then they just sit there.

MS HILL: So the sole purpose of it is to stop time. And the group is – we talk about the management protocol for the DSW and MOE claims and that's filed – the only ones are filed in court, but in reality that's sort of managing this slow moving mass that doesn't really go anywhere, and eventually claims are either joined to the group because they've been filed, or they're discontinued when they are settled. And the MOE group sit there as a subset, but the agreement is that they sit there without moving to allow us to try and settle the claims.

MS JANES: So how does one manage the process, for example in the *White* claim, where the Limitation Act wasn't pleaded as an affirmative offence until some years after the claim was filed, how do you deal with that with the Ministry of education?

MS COOPER: Well, I guess with the litigation that we – the trial next year, as I say, it will involve the Ministry of Education. And it's really a question for us of watch this space. As at the present time we are told by the lawyers for the Crown that they haven't actually finalised their position on the Limitation Act yet. So we don't know yet whether we're going to actually have to deal with the Limitation Act for these upcoming trials, because for both of these plaintiffs their claims were filed I think in their late 20s, so we're already passed that 26 age cut off. So there is, you know, the Limitation Act is a live issue. We have got obviously good psychiatric reports to say that they filed within time, but, you know, we don't know yet.

MS HILL: The statements of defence filed for the Crown do plead the Limitation Act as an affirmative defence, it's just whether the Crown will actively pursue it is the bit we don't know. It's certainly pleaded.

COMMISSIONER ERUETI: Was this the litigation you say was tracking for August 2020, so it's now next year?

MS COOPER: Yeah, it's now next year, June 2021.

CHAIR: So is it the case now that the Limitation Act is filed as an affirmative defence in all the defences, but you have to wait to see whether in fact it is going to be relied on, is that correct?

MS COOPER: That's correct. And what we've done, so what we did in the previous Whakapakari trials where we were told by the Crown reasonably late on in the piece that they were going to be asking for a pre-hearing on the limitation issue, quite close to trial, we just actually took the step of withdrawing the application for leave, and we just – we said we're just going to rely on our psychiatric evidence and leave it as a trial issue. So we had to play tactics back. And that's a big call on our part. But just the thought of these claims, you know, facing the outcome of the previous litigation that we'd been involved in and just being stopped in their tracks even though these were Bill of Rights Act claims as well, we just didn't want to face that, so we withdrew that application for leave and we just said we're going to rely on our psychiatric evidence, and make it a trial issue, and as I say, those claims settled, so we didn't have to do that, but we were certainly being pushed to a leave hearing. And we just don't know yet, I think the silk that's been appointed for this litigation hasn't yet made a call about whether limitation will still be made an issue for these new trials.

MS HILL: On a practical level it's really hard to explain to a claimant that, you know, that you've got this whole claim but they're going to have a one day hearing on the Limitation Act and it's a king hit hearing, so if you lose on that one day your whole claim's gone. Trying to explain why that can happen and the response inevitably is that's so unfair, well yes, it is, but this is the position. So yeah, it's a king hit hearing, the whole thing goes.

MS JANES: So you've given, before the lunch break, you outlined your proposed solution so we won't go backwards on that, but before we move on from the Limitation Act, just want to check whether there was anything else that either the Commissioners wish to ask or you wish to say on that topic because we're moving to the mental health immunity.

COMMISSIONER ERUETI: You want to perform the Limitation Act, so you see a process still through the judicial process as well as this Tribunal that you describe it as a one stop redress scheme, both operating at the same time. Is that right?

MS COOPER: Look I think the majority of claims should continue to be dealt with outside of the court process. I think, you know, I think for this claimant group particularly there needs to be a non-adversarial process that deals with the majority of them. But one of the things that we're very conscious about is that there are really, really important issues of law that these claims give rise to, particularly for our younger clients, where the Bill of Rights Act yet has

never been tested. And if we could do it in a way that was survivor-focused, so that it's not traumatic.

I mean we could do – I mean one of the things we talked about in our brief is what we call rule 10.15 hearings, so that you just deal with discrete either factual matters or discrete legal matters. MSD has always opposed that for this claimant group and said "No, we're going to do that, it's full trial or nothing". But that's a way we could get discrete legal issues or factual issues done where we could even agree on facts and then say to the judge can you determine what that means in law, what rights does that give rise to, what might that look like for damages.

MS HILL: The other reason I think both of those things need to happen, the amendment to the limitation legislation and an independent Tribunal is that what we don't want to see happen is a mini court addressing the same issues. So you're just replicating the same problems in an independent Tribunal. I think then, you know, otherwise you're just doing the same things again in a different forum. So that's why both of those things need to happen in our view.

COMMISSIONER ERUETI: Thank you.

MS JANES: Just as we're on that point, because we are going to go there but you've addressed it and I think just for tidiness let's do that now. In the Gallen J report of the MSD processes in 2009 one of the recommendations was that there was an independent body that was either a lawyer or a panel of lawyers that took evidence, there could be cross-examination by the fact finder but not by the agencies. So I was going to ask you when we looked at the Gallen report whether you thought that was something that you would recommend or whether there were reservations that you had about that?

MS HILL: Well, any process that is independent is, on its face, an improvement. The process set out by Gallen J in 2009 is that sort of replication of the same problems. But there's a really big fish hook in there, it's an expensive sort of thing that looks and sounds like a trial, it's still got psychiatrists, it's still very expensive, very time-consuming, but your claim isn't filed. So a process that could take several years uses up all of your time that you would, you know, under the Limitation Act time is ticking while you're doing this.

And it's all without prejudice, the Gallen proposal. And so if something went wrong, if you wanted to then proceed to a court, none of it matters. Everything is without prejudice, it can't be put before the court. So you've got to start again. And so when you get into what does this look like in practice, it's terribly traumatic, because you're going through everything that looks like a court except it's not, the cost will be very high, the

trauma, because there's still a lot of court-like things about it, and at the end of the day you could end up getting yourself, your actual legal claim barred under the Limitation Act, because you went down this road first.

COMMISSIONER ERUETI: Are there any qualities of that proposal that you like of Gallen's proposal?

MS HILL: Independence.

MS JANES: Happy for us to move on?

CHAIR: Yes please.

MS JANES: So we will touch very lightly on the mental health immunity legislation, Commissioners, mainly because again that was covered in quite some detail at the contextual hearing. And Sonja, if I can ask you there was also another reason why we thought we could lightly touch on that now because of changes that arose out of cases.

MS COOPER: So the Mental Health Act immunity, as we explained before, so there are two immunities, but the immunity in that legislation said that if something was an act in pursuance of the legislation then there was an immunity against civil liability. And the reason that was important was all the way through to the Supreme Court the Crown argued that that immunity applied to all acts except for serious sexual abuse.

Thankfully that argument was given pretty short shift, but still, you know, I mean I remember very vividly the then Solicitor-General arguing that – he was asked about, you know, stubbing a cigarette out on somebody and he was in the invidious position of trying to argue that that was treatment because it was teaching somebody not to smoke. He had also written a medical text in which he'd talked about that sort of conduct being an assault and we were able – we had his text with us and we were able to read from that text.

So yeah, so I think that's the kind of argument that we were having to deal with. And the important thing about that litigation was that at Supreme Court level it was firmly established that any of those immunities in that legislation did not apply to informal patients and most of the client group were informal patients. So the whole impact of that fell away, and so it ended up that actually there was a reasonably limited impact.

MS JANES: And so is there anything that you would want to say to the Commission in addition to your contextual hearing evidence about where the use of mental health immunities are impacting on current claims?

MS COOPER: Well, I think, as I said yesterday, I think the Mental Health Act claims for a start they're restricted, the Ministry of Health only deals with claims up to the end of 1992 and actually the middle of 1993, which is when the current Mental Health Act kicks in, and then

liability transfers to the DHBs. And I mean that's just another barrier.

The DHBs obviously all have their own lawyers, they rely on the Limitation Act, and so, you know, it's been impossible for us to try and assist again a very big potential client group where I don't even know how many DHBs there are in New Zealand, but they play their defences very hard. And so that's just a very, very big barrier for psychiatric hospital clients who were in care from 1 July 1993. So, you know, even though again they would have rights under the New Zealand Bill of Rights Act, just the kind of logistics of pursuing those claims is really difficult, as we said Corrections or Police.

So that's why if that Limitation Act barrier is gone, that just opens up a whole world of possibility for this claimant group, because it should apply to vulnerable adults, it's not – it shouldn't just be children. I know that's the biggest paradigm, but it should also apply to vulnerable adults. If that limitation barrier was gone, then that would just be, you know, would provide access to justice for that group.

MS JANES: And is there a possibility that a lot of this claimant group now go to the Health and Disability Commissioner and – you're shaking your head.

MS COOPER: Well, we know that the Health and Disability Commissioner will not look at historic claims. I think we had claims that are about three or four years old and the HTC didn't want to look at them. So if you're talking about claims that are 10, 20 years old, then they're just not going to look at them. And so that's a massive gap. There's no remedy. We do have people coming to us with current very serious claims, but we don't have the resources to do that, because of those additional barriers that there are in place and, you know, the additional funding that we would have to ask Legal Aid for, which we know they're going to say no to. So yeah, they're a group that don't get any access to justice. Another group.

MS JANES: So you've reinforced why the Limitation Act is still an issue for that particular claim group. So just for completeness at paragraph 1035 of your evidence, you talk about the contextual hearing where the then Human Rights Commissioner, Rosslyn Noonan, gave evidence saying that the Ministry of Social Development had assured the Human Rights Commission it did not rely on the Limitation Act or other technical defences to resolve the claims. You've probably sufficiently answered it, but just in your experience, succinct response to that.

MS COOPER: Well, I think the succinct response is it will still rely on the Limitation Act where it decides to.

MS JANES: We're now going to move on to the Crown litigation strategy. And if we can look

please at document number 12 which is the Crown tab 7. This is a document that we have seen earlier, but there are some other matters to look at. So if we can go – this is the Cabinet policy committee POL (04317). It is about psychiatric hospital claims. It talks about the Crown's position in relation to those claims at paragraph 7, if we can call that out please. If I can have you read them thank you.

MS COOPER: So, "agree that the Government's position to these claims is, statutory and other defences should be used, but in meritorious cases the Government may waive its Limitation Act defence. The Government will require the plaintiffs to show their case where compensation is claimed, at least to a prima facie standard".

MS JANES: And then if we can go to paragraph 60 which is on page 14. This talks about the advantages and disadvantages of the proposals for alternative dispute resolution. If I can just call that 60 to 65 out. Just if I can have you read through those paragraphs.

MS COOPER: So "Advantages". "It is inefficient, costly and time-consuming to take 73 (or possibly 300) claims to court if a simple alternative can be established. It is an expected step in the case management of litigation that the parties consider ADR and/or settlement negotiations where possible. It allows containment of the issues. It may avoid any adverse, wide-ranging finding by the court of Crown liability. It allows the plaintiffs to choose a forum in which to air their grievances, which they say is one aspect of their claims. It provides independent investigation of the claims (which the plaintiffs say they want) without compromising the Government's need for a principled and transparent process".

MS JANES: And just if we then go to the disadvantages at the bottom, paragraph 66.

MS COOPER: "The increased costs to Government in establishing the infrastructure of the alternative are likely to be considerable. Costings have not been done, but given the number of potential claims to be considered individually by a qualified independent person and the proposed travelling Tribunal to hear claimants' stories, the costs are likely to amount to several million dollars. By way of comparison, the infrastructure –

MS JANES: Go to the next page.

MS COOPER: - cost (that is, not including the settlement money) of the Gisborne cervical cancer screening inquiry was $5 million". Do you want me to read that next paragraph?

MS JANES: No, that's fine thank you. Then if we can go to paragraph 68.

MS COOPER: "Offering these plaintiffs an alternative process may, encourage a flood of historic abuse claims, encourage a proliferation of requests from future claimants for ad hoc purpose-built alternatives to consider the claims, and be seen as a signal that the Government is prepared to lower the standard of proof for historic claims against it".

MS JANES: And then if we can go to paragraph 84. So this is looking at courts, so those were alternative dispute processes. And if we look at particularly paragraphs 86 and 87 on the next page.

MS COOPER: "Even if some cases went to trial and the Crown lost (a matter that is too early to assess with any certainty) there would still be a benefit in having key issues decided by a court. The benefit is that regardless of whether the Crown wins or loses, the court's determination will assist in clarifying the key issues and the applicable law and to provide guidance for how any other similar issues could be settled without having to go to trial. Therefore, it is unlikely that all cases would proceed to trial.

If the Crown was successful in some or all of the claims, there would be real advantages in sending a signal that unmeritorious claims will be defended and that numbers of claims alone will not drive the Crown to an alternative, softer approach".

MS JANES: And so this pre-dated the *White* litigation and we're talking about strategy. So having now read that, because you won't have seen that document before, as we go into the discussion of Crown tactics, any thoughts arising from that?

MS COOPER: Well, I had a few thoughts. I think the outcome of that was obviously that we had to file everything. So, I mean, yeah, so we had to put everything through the court process because there had been a deliberate decision not to create an alternative process. And when I think now, when I think now of the cost of setting up the confidential forum, so that dealt with the psychiatric hospital claims, then the cost of the Confidential Listening and Assistance Service, and then you think of the cost of this Royal Commission of Inquiry, if you think of all of that cost and you put yourself back to that timeframe, how much further ahead would we be and how much cheaper would it have been to have actually set up that independent Tribunal, done it once and done it well back then and how much further ahead would we be in the resolution of these claims.

And I, you know, when I think about that now, we weren't obviously aware of that document until now. You know, when you think about all that infrastructure cost that's gone in in the meantime to try and avoid actually, you know, one, I think you need public kind of inquiry until now into what's happened, and to, in a sense, push claimants away from compensation, you know, wouldn't we have been better off to have grappled it way back then?

When I think about how many claims could have been settled when we've got this massive backlog and all of the Government agencies have these massive backlogs of claims, wouldn't all of those millions of dollars that have already been spent in a sense

batting the issue away and saying we don't know there's any systemic stuff here, you know, it doesn't look like to us that they've been able to prove there's any systemic abuse, how much further would we be ahead?

So yeah, that's where I thought about this. The other thing that occurred to me in reading this, is that we were never offered, for example, the option of a judicial settlement conference up until 2010. And that was when Miller J, I think, you know, here we're right in the middle of this catastrophic withdrawal of aid process, and Miller J actually hauled us all into court, including Legal Aid, and said look, you know, these claims might have legal problems, but at the end of the day, the Crown's got a moral responsibility, it must be very clear to everyone that these people have suffered abuse, you need to start resolving them.

And so it was only from that point that we actually were able to engage in judicial settlement conferences. I have to say they were spectacularly unsuccessful and you've heard about some of the claimant's experiences of those judicial settlement conferences. You heard Georgina Sammons talk about hers, you heard Gay Rowe talk about hers.

You know, I mean they were processes in which we always have gone to a huge amount of effort to actually prepare will say statements and to set out the legal position and we've always felt that the other side, whether it's been the Ministry of Education or the Ministry of Social Development or the Ministry of Health has done minimal work, and really rocked up not intending really to change the position. I mean the purpose of these are settlement conferences, and to us they've just been another mechanism to coerce vulnerable people into accepting settlements that are not just.

MS HILL: The thing that struck me, and Sonja's just mentioned the sort of six-year gap between this paper and the beginning of these processes, but what struck me was that real hardening of attitude. This is post-Lake Alice.

MS COOPER: Yeah.

MS HILL: And this idea of, you know, "We're not going to be seen so give an inch, we're not going to be seen to be softer". The statement about the standard of proof, post-Lake Alice where there wasn't really an investigation into the allegations, there wasn't a factual inquiry on an individualised basis, but that hardening of attitude was really apparent to me in this paper. And in light of the Lake Alice settlements, and not to detract from what people suffered in Lake Alice.

MS COOPER: No.

MS HILL: But that real change of Government approach struck me.

MS COOPER: And of course we saw that played out over the next however many years.

MS JANES: And just on the Lake Alice, there was also no application of the Limitation --

MS HILL: No.

MS JANES: - Act in that settlement.

MS COOPER: Or the ACC bar, and all of those claims would have been barred by ACC and barred by the Limitation Act.

MS JANES: You talked about the morality aspect of settling claims and that takes us neatly to Gallen J's 2009 assessment of the Ministry of Social Development. First question is, when did you become aware of that document?

MS HILL: Only at this Royal Commission. We'd not seen the Gallen – the 2009 Gallen report before.

MS COOPER: No.

MR HILL: I understood it had been legally privileged up until now, or it had been not shown to us at least.

MS JANES: And as you read that document, because you will have seen the Crown's evidence that they find it a reassuring document about their process.

MS HILL: Yes.

MS JANES: So before we go into some of the aspects that are covered in the Gallen report, do you have any broad comment that you would make?

MS HILL: I think describing as complimentary or expressing confidence in MSD's settlement approach at that point in 2009 was over reaching I think to say the least, because when you actually read Gallen J's report and his review of some of the claims, he found problems with just about every claim that the Ministry had dealt with, and he expressed concern more broadly on a couple of things, but one thing that he noted in relation to several of the claims he reviewed, and he talks about file C in his report, that there's no mention of solitary confinement when MSD were assessing these claims. And he notes that the use of solitary confinement for children is not something which should simply be ignored, and Sir Rodney set out his view of the legal considerations which needed to be taken into account. And for one of the claims that he was reviewing, that young person had spent 14 days in solitary confinement and he said that would need substantial justification. And it just wasn't addressed in the Ministry's settlement approach.

Now that's 2009 and we're in 2020 and the characterisation of the use of solitary confinement is still a bone of contention between us and the Ministry. And when we talk about the Ministry's current processes, and we'll talk about our concerns around how the use of solitary confinement and false imprisonment doesn't seem to factor as an issue for

settlement. So 11 years down the track we're still looking at the same issues. So I found it really interesting that even back then Gallen J was saying this is an issue you can't ignore. But, of course, we didn't know that at the time.

So Sir Rodney Gallen J also commented in relation to that same claimant that their complaint of abuse from another named person who had been convicted of similar behaviour but not against that complainant had not been accepted. And Gallen J thought it should have been. And he had reservations about MSD's view that causation was an issue.

So he described MSD, yeah, it was MSD at that point, as down-playing a claimant's experience. And that's something we're still seeing now. And then to Gallen J – I keep going between Sir Rodney and Gallen J, he's the same person – he expressed unease about the treatment of another claimant who'd been made a very low ex-gratia offer, a low offer of settlement and that claimant had committed suicide. And he reviewed a number of other claims saying that MSD not infrequently failed to acknowledge some aspects of the claim which were important to the claimant but not to the investigator.

And lastly, Gallen J dwelled in some detail on the Limitation Act and his disquiet about its application to these claims. So he contrasted the Crown position that all of these claims were potentially barred by the Limitation Act, but he felt it was at least arguable that the kind of claimants, and that's how he described them, with which the Crown were dealing could be said to have a disability. So he seemed to be at odds with this Crown blanket view that all of these claims were barred by the Limitation Act.

So when we see descriptions of the 2009 Gallen report as being complimentary of MSD's process and that's been reported to Cabinet at that point, but when you read the report it's not very complimentary at all. There are certainly complimentary parts, he says there's obviously sympathy with some claimants, and he does talk about the moral liability which I think we'll come on to. But I just wanted to highlight those parts of the report because it's easy to accept a report to Cabinet saying I know it's quite good, but when you get into it into the granular parts of it it's not actually that good at all.

MS JANES: So we'll generally work through the report although we may skip some of the bits that you have –

MS HILL: Sorry about that.

MS JANES: No, that's absolutely fine. So the starting point really was Gallen J outlined what he understood the Department's definition of meritorious claims were. Can you read that out, that's at paragraph 164.

MS HILL: Is that the one on the screen?

MS JANES: No, it's not.

MS HILL: 164 of our brief or – there we go.

MS JANES: We're now calling out 164.

MS HILL: Thank you. "The view which has been taken by the Department and the Department's advisors is that a meritorious claim is one where there is some moral liability as a result of indisputable conclusions that abuse has taken place, but that a claim in the courts may be defeated by the limitations which stand in the way of such claims. In such cases, that moral liability is not to be met by way of a payment for compensation but rather an ex gratia payment to be seen as an acknowledgment that there was a moral if not a legal obligation. That was a generous conclusion".

MS JANES: And in your reply brief of evidence, could I please have you read paragraphs 12 to 14.

MS HILL: "It is unclear what moral liability means in reality. It appears, however, to be a claim which could be proved on the facts, but maybe defeated by statutory bars or affirmative defences. Several of the later court decisions referred to in our evidence were successful in proving the facts of a claim but lost on the limitation point, including *White* and *J*. These claims fit the definition of meritorious claims but the plaintiffs were left without any remedy. For many years, indeed *J* never received any compensation to our knowledge.

The decision-maker for meritorious claims has always been the Crown. The Crown also controls the access to information across claims, giving it the ability to accumulate a body of knowledge which is not available to the claimants. It is never clear whether this information is applied in determining whether a claim is meritorious, disadvantaging survivors. The approach that the Crown may not be legally liable for a claim but may have a moral obligation has served to minimise the Crown's legal liability. With no transparency around what the Crown deems to be its moral liability, the goal posts for people trying to assess claims against this threshold continuously move".

MS JANES: If we can go to paragraph 17 of Gallen J's report, because in his report he recognised that most plaintiffs seeking redress for historical abuse would have difficulty and be unlikely to succeed in the courts because of the limitation provisions. And he talks about that. So can I have you read paragraph 17.

MS HILL: "It should be remembered that a number of claims had proceeded to hearing in the courts, with the result generally being that the various limitation provisions prevented the claimants from succeeding against the Department in respect of which they sought damages. It was on the basis of these outcomes that in respect of most claims which were

referred to the Ministry of Social Welfare unit, legal advice was received that it was unlikely that the claims would succeed if they proceeded to a hearing in court. For that reason, the risks of a claimant succeeding against the Crown in most cases were assessed as low".

MS JANES: Gallen J had some thoughts about why potentially that could be overcome. So we will have a quick look at paragraph 21 and 22, if we could call those out please.

MS HILL: "There is also a significant factor which points to a conclusion that it was the intention of the Government that claims where appropriate should be met with a degree of sympathy. The Cabinet policy committee at every stage had been advised and was aware of the view of the Crown Law Office, on the basis of the relevant court decisions that the risk of the majority of claimants recovering damages, even when they were able to establish the allegations upon which the claims were based, was low because of the limitation provisions which applied in respect of individual claims. This was especially true in the case of claims against the Crown Health Funding Agency. Nevertheless, reference was made to the settlement of meritorious claims.

The direction to settle meritorious claims can only, I think, be interpreted as a direction that the overall justice of the claim, having regard to the circumstances, needed to be taken into account or at the very least balanced against the legal barriers which most of the claimants would face".

MS JANES: And we won't go to them in the interests of time, but there are similar references at paragraph 31 to 32 and 154. So in light of the expectation firstly of the Department about what a meritorious claim is in terms of moral versus legal liability, and the thought that there was a Cabinet directive that there should be sympathy with these claimants, how would you say you have experienced the Crown's approach, is that aligned with the expectations Gallen J outlines?

MS HILL: No, it's not been. The approach has been starting from a position of disbelief, there's been very little sympathy and we've never seen – we didn't know about the test of meritorious claims, but we've certainly never seen, or we didn't see that approach for a very, very long time, and arguably it's not there now.

MS JANES: So we go back to our body of knowledge discussion yesterday about where a department is aware of a particular time period where there is no abuse or convicted abusers, how would you think that body of knowledge, taking into account also the culture of abuse paper which you prepared and the institutional updates that you provide, how could you suggest that things could be done differently using that knowledge and applying

the meritorious claim approach?

MS HILL: Even if we take the position that, you know, you can prove your claim on the facts, I mean you look at someone like Keith Wiffin and the evidence he's given about what knowledge he was given and then given more later. There's an enormous amount of knowledge by 2009. I would have thought if the Crown policy was truly aligned with the Gallen report and the way that Gallen perceived claims to be dealt with, then I would have thought a lot of those claims would have been resolved in that short space of time. But none of them were.

MS COOPER: I mean we would have expected reasonably that most of the witnesses, for example, who'd given evidence in the *White* trial, including the two plaintiffs, would have had offers made to them. But they didn't appear at that time. And I mean Keith Wiffin is an example of that. And, you know, it took years for those people, and again, we had to keep advocating for an outcome for them.

MS HILL: Can I just illustrate the point that Sonja's made. So some of the witnesses in the *White* trial received settlement offers this year.

MS COOPER: Yes.

CHAIR: 2020?

MS COOPER: Yes.

MS HILL: Late 2019 at a push but to illustrate that point.

MS COOPER: Yeah, indeed.

CHAIR: And in terms of the body of knowledge, I mean did more come to light in that intervening time that then made settlement more likely?

MS COOPER: Well, I think as a result of the *White* trial we started certainly to start collecting as much conviction information as we could. So about staff members.

CHAIR: That would have been known to the Crown anyway, wouldn't it.

MS COOPER: Yeah.

MS HILL: I think it comes down to what do you mean about come to light, what they already know and what we're able to dig up, and those are two quite different things.

CHAIR: I was really thinking, do you know if the Crown subsequently found out things they didn't know earlier which then changed their minds about settling. You can't be expected to know, but you can be expected to speculate.

MS HILL: I can certainly give you an example. There was a staff member at Epuni called John Ngatai. He's now deceased so that's why I can use his name. For a long time claimants who made allegations about him, and there were quite a few, had their claims declined,

MSD would not accept that he was an abuser. And that went as far as a judicial settlement conference for a client, he's referred to in our brief as SNF. And at judicial settlement conference MSD would not accept any allegations against that particular man. And then a year or two ago, I don't have the dates in front of me –

MS JANES: We can actually bring up the documents, that's document number 19.

MS HILL: If you don't mind jumping to that I thought it would be useful to point out.

MS JANES: Yes, and it ends in witness 94 150.

MS HILL: Yes. There we go, March 2019. "Do you want me to read some of this out? How do you want to do this?

MS JANES: Yes, I think use this as you want to just to illustrate your point.

MS HILL: Yes. So as I said, Mr Ngatai, it says there at paragraph 2, he was employed at Epuni, Weymouth and Arbor House which was a smaller institution for around 15 years. And he died in 1991. And as I've explained there, there was a JSC, judicial settlement conference, in February 2013. This is a few years after the Gallen report and MSD would not accept Mr Ngatai was abusing children. We should have said there was a group of witnesses at that point, there wasn't just one.

MS COOPER: And he would have been -- he was referred to in our 2006 paper.

MS HILL: Yes. So I've said at paragraph 5 of my letter, "As a result of the Ministry's stance a number of clients were forced to accept settlement offers which did not address their allegations about Mr Ngatai". And then, "In October 2017 the Ministry of Social Development appeared to accept Mr Ngatai as a sexual abuser for the first time". There was no explanation about why this was, we just got a response to an offer one day, a response to a claim one day in relation to a particular client where allegations about Mr Ngatai were accepted with no explanation of why that was. So this letter asks why.

We said you've never told us what caused this change of position, but we were concerned at the number of people who had settled their claims when the Ministry refused to accept that. We asked the Ministry to revisit those claims or let us know what steps it intended to take.

MS JANES: You received a response and that's document 20 ending in 4151. Keep talking.

MS HILL: Yes, I'll keep talking while it's waiting. So our timeline now is 2013 is a refusal, there's four years and suddenly there's a change of position. And we queried that with the Crown in March 2019, August 2019 we get a response from the Crown. "MSD is currently unable to provide you with a substantive response to this request as your query raises wider issues that MSD is in the process of considering. However, we are looking into this matter

and will be able to provide you with a considered response in due course.

MSD will be discussing the wider issues with other relevant Crown agencies as part of its commitment to the principles guiding how the Government agencies will engage with the Royal Commission and survivors of historic abuse in State care which includes being joined up".

We still don't know what changed MSD's position in relation to Mr Ngatai. But it shows that something came to MSD's attention, we don't know what. This is the lack of transparency that we work with all of the time. But he died in 1991, so I would think that there's something in the body of knowledge that MSD has found, we're at the point of guessing at this point, but it demonstrates not just the change of approach and change in information, but the time it can take for information to change, and how it disadvantages people along the way. So I thought that was a useful example in terms of that changing knowledge.

MS JANES: And it also addresses something that we were going to come to later, but let's cover it now, in that you had wanted to say something about the application of the findings in the *White* trial as to when they were applied and when they weren't applied.

MS COOPER: Yes, we deal with that in our brief. We gave a number of examples of clients who were at Epuni or Hokio at exactly the same time as Earl and Paul, and made very similar allegations to those that had been accepted by Miller J in that trial. And curiously and frustratingly they were rejected for quite a number of clients, and this continues to be the case.

And when that was challenged, it was obvious that the Ministry was relying on Miller J's recitation of the defence witnesses' evidence to deny something as being a fact rather than his actual findings. And when you read Linda's evidence she actually says well yes, we're aware of this decision but we'll choose when we apply it. I mean I'm really paraphrasing it, but that's the essence.

So even when we do have findings by a court, independent findings by a court, the Ministry chooses and picks when it will apply it, even if clients are there in the exact same timeframe.

And so we just have this frustrating lack of consistency, reliance on evidence that the court has said is not proven, so it's totally self-serving and that's just one of the ways that even last year this year is used to deflate, deny, minimise claims. Which again is another reason why it has to come out of the State, you know, because the State is -- it's the fact finder, you know, it performs all functions here and it can't do that with any integrity

when it's got -- when it's the defendant, its job is to protect itself.

So yeah, that is a very, very big frustration for us, and you say it's recorded in the briefs, that's what they do, if they don't want to apply it they don't. So when you've got a situation where a Ministry can pick and choose what it's going to accept, which it does, then you've got the paucity of records added to that, you've got a – it's completely unfair to claimants.

I was going to illustrate also too we were talking about the records issue, I was going to illustrate this with a claim I've dealt with recently, if I can just say because this might identify the clients that I'm going to talk about I'd ask for a section 15 order please.

MS JANES: So if we can excise on the live stream and have a section 15 order so that what is next said does not identify them.

CHAIR: Did you want me to make such an order?

MS JANES: Yes, if we could thank you, it's whatever the time is, 3.24, the evidence coming after 3.24 on Wednesday I think we are.

CHAIR: 3.24 on Wednesday 30 September, 3.21, is not to be published.

MS JANES: Is not to be published.

CHAIR: Do we have an end point for the non-publication?

MS COOPER: When I've finished narrating this.

MS JANES: But in terms of it not being published, it would have to not be – it would have to be a permanent one because this is a new case.

CHAIR: I think what we should do, it's 25 past 3, let's take the afternoon adjournment and let's sort this out because I don't want to make an order that doesn't apply or is appropriate. So I'll ask you to consult over the adjournment and we'll make a formal order after that.

MS JANES: Yes, we'll take the adjournment now and we'll resolve that, thank you.

Adjournment from 3.23 pm to 3.49 pm

CHAIR: Ms Janes.

MS JANES: Commissioners, just to highlight where we'll be going in terms of what happens next, is that we will halt the live stream.

CHAIR: Yes.

MS JANES: And Ms Cooper will provide the answer about the evidence that she was going to give. Mr Mount very kindly is keeping track of the actual lines of the transcript that that relates to, we'll then ask you, Madam Chair, to make a section 15 order over those particular lines of the transcript and then we will resume the live stream.

CHAIR: And just to be clear, that will be a permanent order?

MS JANES: That will be a permanent order.

CHAIR: Thank you.

(Evidence given under section 15 order)

Individual Restriction Order

Individual Restriction Order

Individual Restriction Order

CHAIR: I believe the cone of silence is now able to be broken. And we will start again. Thank you.

MS JANES: In the interests of time I won't take you to the document that sets out the Crown litigation strategy, but I think the Commissioners have read it in the evidence and you're aware of it. So the question is, it hasn't changed substantially since 2008. What has been your experience, if any, of how it's been applied over that period until now?

MS HILL: Since 2008, we didn't see any substantial movement in terms of, or any real meaningful engagement in terms of settling claims until mid to late 2010, and then there was slow progress to build an alternative dispute resolution, call them ADR process from that point. And that's had many iterations since then.

And this idea of meritorious or moral claims has really -- we didn't know that terminology for a long time, but this idea of the State sort of having a benign role and deciding when it would settle and on what terms has been a theme from 2010 through to now.

MS JANES: In fact you received a letter, if I can call up document 15, which is witness 94 ending in 068, and that's Cooper Legal chapter 4 document 2. And this is a letter from the Ministry of Social Development to Cooper Legal and it's from Peter Hughes, the Chief Executive.

MS COOPER: Yes, I remember it.

MS JANES: Can you just, if we call out the highlighted paragraphs, if you can read the bits that you would like to take us to.

MS COOPER: "In your letters you noted my comments to Mr Keith Wiffin that where MSD believe it is fair and agreement can be reached we will seek to settle with claimants, and that I would investigation the issues people raise around their past care and seek to respond fairly, regardless of the forum people chose to raise the issues they have with the care they received".

MS JANES: Before you go on, it does refer to Keith Wiffin and we know that this is a 2007 document, but we've also heard that in 2009 he effectively withdrew his claim.

MS COOPER: Yes, that's right. And, you know, we can talk more about that because I think there is some interesting evidence in Garth Young's brief that I want to particularly highlight about that.

MS JANES: So we'll return to that when we come to that section. If you carry on.

CHAIR: Just to make it clear, this is Mr Hughes writing to you is it?

MS COOPER: It is, it's Peter Hughes who was then the Chief Executive of MSD writing. He also says there, "I believe it is the responsibility of public servants to own mistakes and be accountable for them, do what they can to fix them and ensure that they are learned from".

I think that next paragraph is interesting, he talks about New Zealand being served by committed social workers who seek to make a real difference to people's lives. "Everything I have seen suggests this has been true in the overwhelming majority of cases going back many years. That does not mean that there have been cases -- abuse and neglect and where this can be shown I will act fairly".

Then he goes on to say, "With any allegation or claim regarding this Ministry we will seek to address concerns in a way that acknowledges an individual's needs and attempts to provide for those needs in a way that will achieve some positive long-term outcomes for them and their families. You will appreciate that claims must also be addressed in a way that fairly represents the past actions, proper or otherwise, and responsibilities of Child, Youth and Family and its predecessors, their staff and agents".

MS JANES: We'll just very quickly go to the second page and that just confirms that it is indeed

Peter Hughes and there is a – we'll call out that paragraph.

MS COOPER: So here we were referring to a client who was reaching the age of 26, for two clients, and there we're specifically told, "You may wish to preserve your clients' position by filing a statement of claim and any necessary applications. Please be assured that I am still committed to continuing to consider your clients' claims".

MS JANES: And you replied, if we can call up document 16 which is witness 94 ending in 073. And this was on 10 May 2007. And when it comes up you have outlined your concerns. So if we can – this is – if you could just quickly call out the bottom number for the Crown, thank you, and then call out the paragraph that's highlighted.

MS COOPER: "As you are aware, I have been acting for clients who are bringing claims against MSD and its predecessors for nearly 12 years now. In that time, your organisation has settled only one of my client's claims without requiring that client to prove their claim in a court. The only other client of mine whose claim has been settled was forced through nine years of litigation and protracted negotiations, which caused him considerable distress and cost over $200,000.

In respect of my current clients whose claims are filed in court, my only experience is of your organisation vigorously (and in my view ruthlessly) pursuing its legal rights, pushing all the claims through the litigation path and failing to consider any alternative resolution processes (including negotiating settlement or mediation) to resolve client's claims. Further, I have seen no progress towards any alternative process for resolving our clients' claims, which was our desired outcome in facilitating meetings between your staff and a number of our clients last year. Indeed, we have repeatedly been told that no alternative process has been agreed to yet and none may be".

MS JANES: And so tying – yes, let's go to the last paragraph.

MS COOPER: So we're obviously pre-trial, "As you must be aware, my firm has just over six years to prepare before we commence a nine week trial against MSD. All of the resources of the firm are devoted to managing the very heavy demands of this trial and the other litigation we are progressing in this office. While it is regrettable, due to MSD's delays, we will have to leave further communications about the matters addressed in our correspondence until after our trial commitments have been completed".

MS JANES: And so taking those two pieces of correspondence, one, MSD saying that where we make mistakes we will be accountable, marrying it with the Crown litigation strategy of settling meritorious claims early, and your response that only one case has settled in 12 years, what would you say about how you have experienced and more particularly your

clients have experienced that meritorious approach to early settlement of claims?

MS COOPER: Well, I mean I think that letter is evidence that certainly at that point, and as Amanda says really until mid-2010 when there was judicial intervention and United Nations reported adversely and Human Rights Commission was involved, we didn't see any progress at all. And from our perspective, and we'll talk more about the Crown pushing on hearings where we had no Legal Aid funding, again to strike out claims, you know, we saw no offers coming through, I think we talked already about the trial witnesses, I mean the plaintiffs didn't see any outcome for years.

So from our perspective, it's either a view the Crown didn't think any of the claims were meritorious, which you just have to think that must have been the case, and there was also this Crown strategy of pushing everything on for trial. I mean we were also embroiled in the psychiatric hospital litigation at that time too which was tracking its way from two levels of the High Court up to a full bench of the Court of Appeal and then up to the Supreme Court, so we were embroiled in that litigation too through this process.

So from our perspective, we just felt like from a claimant's perspective that the Crown had decided it was on full scale attack, get rid of all of the – I mean for the psychiatric hospital claims, I think the clear intention was to get rid of them all through the strike-out process. And with the Ministry of Social Development, I think the strategy there again was to use that armoury, and we saw that in the earlier paper, you know, to use court losses as a bludgeon, in a sense to kind of say you've got no merits, so go away, that's how we and the claimants felt.

MS JANES: Contrasting that with the Lake Alice experience, and I understand you weren't involved in that litigation, but from your understanding, was there a commitment to that global settlement for Lake Alice by all of the departments, and if so why did it not translate into the MSD and residences Child Welfare?

MS COOPER: In our discussions with Crown Law at that stage, I mean we – and Grant Cameron, we certainly came to understand that that settlement had come about really as a political process. So when Labour had been in opposition, it had said very strongly these people should not be forced into litigation, you know, they've suffered terrible abuse, they've been traumatised, they should not be forced into a litigation process. And so of course then it became the Government, and so then, you know, you've got, in a sense it was hoisted on its own petard because it had made these statements in opposition, and so it was then in a sense bound to put in place a process to resolve these claims out of court.

But I think reading the documents now, but again we'd never seen before until now,

it was very clear that in kind of manoeuvring through that process the Crown was very conscious of the claims that my firm was starting to take coming forward and I think it was very conscious of being deliberate about not setting up a precedent.

And so you see this rhetoric that is even repeated in the briefs before this Commission now, that Lake Alice was just so different and it was a clear example of systemic abuse and, you know, it was documented and so, you know, it can be treated as this special circumstance that merited being treated differently. But we have never seen it that way, it was part of a whole system. And, you know, we've said before, many of the Lake Alice claimants are our clients now because they were State wards when they were taken to Lake Alice and treated. And they talked in their statements about the abuse they'd suffered in places like Hokio and Epuni and Holdsworth.

So there was a lot of cross-over. And again, a lot of the clients who'd had Lake Alice settlements, and you saw that with one of our witnesses, yeah Patrick, you know, so he gets this huge settlement for this brief period of time that he has in Lake Alice, it's about $80,000 or something, and then he gets this tiny little settlement from the Ministry of Health for experiences that, you know, perhaps if we weigh them, not as, you know, given that always in these processes things are graded in terms of seriousness and moderate and less serious in terms of what they attract for compensation, so while it might not have been at that same level of seriousness, still he's making significant allegations and there's such a significant disparity in the settlement.

So I mean I've gone on to a slightly different point, but the point there is the Lake Alice, what happened to that group of clients was not significantly different to what happened to clients of ours in psychiatric hospitals throughout New Zealand and in Social Welfare residences and in Ministry of Education schools and in health camps, it's just that it, you know, it's still presented today as if it's some discrete area that was different.

But I just think given already the evidence that you've had us present showed that there was already such a big body of knowledge. Otherwise what was the point of the confidential forum? What was the point of the Confidential Listening and Assistance Service? There's all this information that has been accumulated and reports given that shows this wasn't just confined to this small number of years in this adolescent unit in Lake Alice Hospital, and yet I think you're still being asked to believe this fantasy that that's somehow out there on its own and that anything else is just a few rotten eggs, you know. And so, you know, on the whole you're asked to accept, I think, that there's just a few rotten eggs and a few bad things that happened to a few people instead of it being systemic.

MS HILL: Can I just add to that in going back to what things looked like in that sort of 2007 to 2010 period, and I think the reason that Lake Alice is described as systemic is because it could be contained to the Child and Adolescent Unit. And it was easier politically and from an understanding what your risk is, because these were children in the Child and Adolescent Unit. And so the – and rightly so, the public response to it was significant.

But they never interviewed the staff at Lake Alice in any depth, there was no real look at the facts. And when we contrast that with meritorious claims, this idea of you can prove your claim on the facts.

So Lake Alice, it was because it was Dr Leeks, it was because of the aversion therapy which was documented and horrific, that was tagged as systemic, without any significant or balanced investigation of the facts. But when we get to the rest of the claims, they have to be meritorious and you have to prove it on the facts.

So there's this really different approach. And it's because, I think, there was a floodgates concern there, the size of it. They were able to contain Lake Alice and they couldn't contain the rest.

MS COOPER: Yeah, and the other interesting thing about Lake Alice reading the documents, again we weren't so aware of that, is that the way it was being presented to Cabinet was that any compensation was only in respect of this narrow aversion therapy aspect. But actually, when you read the compensation it covers the physical abuse, the sexual abuse, being caged, all sorts of aspects. And those who got the higher levels of compensation were the ones who claimed those other aspects. And yet, the documentation given to Cabinet said that's actually not part of the compensation process, it clearly was and it's –

CHAIR: All of that was documented in, again, Gallen J's report.

MS COOPER: Yes.

CHAIR: It was he who identified the differentials.

MS COOPER: Right, but in terms of how that's been presented to Cabinet, it's like that's not been compensated, that's not part of this package. But clearly it was because, as you say, Gallen J set out this is how I'm going to divvy up the money. And that's all done with, as Amanda says, no investigation, staff never got an opportunity to comment. And we know from the Crown lawyers that they said, you know, if we'd been allowed to have a say about this, we would have never allowed that settlement process to proceed, because the staff denied it.

So yeah, it's interesting I think to show how political statements actually end up in processes occurring and then you can constrain that and re-define it and that's why that that's still presented as though it's an anomaly.

MS JANES: Going back to – so you've done your 2006 culture abuse paper, there is a lot of information that is going forward with claims, but you also mentioned the Confidential Listening and Assistance Service. And we know from Judge Henwood's evidence that they saw 1,103 victims and survivors.

From your perspective, did you see or experience or have referenced how that information was applied to settlement of your claimant categories?

MS COOPER: Well, I mean it was interesting, because they weren't allowed to report on individual experiences of course, so I mean that was the terms of reference for both the confidential forum and the Confidential Listening and Assistance Service. Actually I know Judge Henwood actually fought, in a sense, about that so that at least she could present the more generic themes that were coming through and so she did provide those reports of that generic information that she was coming through.

But I mean this was one of our big concerns about the confidential forum and the Confidential Listening and Assistance Service was that it was this big funnel into which all this information was going and then it was buried in a box somewhere. In fact, you know, with CLAS, they actually destroyed all of the transcripts of evidence at the end of their process. So for those individuals who asked for their transcripts they'll have them, but otherwise, that's again a massive source of information which this Inquiry could have had, for example, which has gone.

MS HILL: Although CLAS did refer, when it was requested CLAS would refer people to MSD directly.

MS COOPER: Yes.

MS HILL: And their transcript, as I understand it, would follow them. And it says something about the time a process takes that MSD continues to make offers of settlement based on CLAS transcripts even now, it's taking quite a while. So where those individuals have been referred from CLAS to MSD, their information follows them. They were usually put through a second interview with the MSD team. But I think the majority, as Sonja said, that information got destroyed because that was what CLAS was supposed to do, it was a vortex.

MS JANES: So in terms of what would have been an invaluable body of knowledge to feed into settling meritorious cases, from what I'm understanding of your evidence is it never made its way to be applied in that manner.

MS COOPER: No, it wasn't allowed to, it was expressly a terms of reference that individual claimant experiences could not be provided, you know, could not be commented on unless

the client had given their permission, but then it just went and off it went to the Ministry to do its own processes. So that was a limitation on the terms of reference, and same with the confidential forum which, of course, dealt with the psychiatric hospital claims.

MS JANES: So when you talk about your preference for an independent body, what would you say would need to be different to CLAS, who did have some therapeutic referral counselling, access to records, how different would it look and why would it look that way?

MS HILL: Certainly Judge Henwood did an extraordinary job within the terms of reference, we absolutely acknowledge that she did an amazing job with what she had. But that information should never just go into a position to be destroyed, it needs to be retained, it needs to be analysed, and the people who are identified as perpetrators, if they are alive they need to be located, if they are still working for MSD or another organisation then that needs to be established. All of those things and that information needs to be used, not just gone into a vortex and to disappear forever, that's no use to anyone, especially claimants.

You know, one of the things that we see so much now is MSD saying "We want to learn from this, we want things to be different, we want Oranga Tamariki to be this new and radically different organisation". But if you just send things into a vortex and destroy it, you don't learn anything at all. So part of the, what I would love to see of this independent Tribunal is an on-going recommendation function where it not only responds to claims, but it helps make sense of what happened in terms of those cultures, that what needs to happen to go forward. And I don't think there is any learning happening in the current way that MSD deals with claims in particular, and certainly none from MOE.

MS COOPER: And I think the other thing too is that the reason why it's really important that it's independent is that if you have an independent body holding that repository of information, it's got no vested interest in protecting it, it's got no vested interest in minimising people's experiences or denying that a particular perpetrator abused children or vulnerable adults, it's there as an independent body with, as I say, with no vested interest in its own self-protection to collect information and then review that information when it's coming to assess claims.

And I think the importance of that is, is that as more information comes in, it can update what it knows about placements, perpetrators, systems, cultures, and build up that information so that it can keep reassessing what it knows about happened to those who are in care and who come to it.

And I think that then means we've got an independent and transparent body of knowledge that can be cross-departmental, that can then be applied to assessing claims in a

fair, independent and transparent way. It's not hidden, it's not something that nobody else has really got a clear idea about except the Ministry itself. And it's not a situation where the Ministry can decide what it's going to accept and what it's not going to accept and whether it's going to say well it was at this level rather than at this level.

So that's another benefit of it being an independent body, it can just – it should be the repository of all of this information because, let's face it, we've now got a lot – we should have – a lot of accumulated information from which to build up this body that can then be applied transparently and across ministries and other, you know, like churches to say this is what we know, so if an individual comes and they say "This is my experience", those on that independent body can say "Oh, yes we've heard all about this before". If it's a new one then that just gets added into that body of information, and so when another person comes it's "Aah, we've heard about this before".

CHAIR: Would you also see it as having a function of maybe reporting –

MS COOPER: Yes.

CHAIR: - on thematic issues, systemic issues to Government?

MS COOPER: Absolutely. I think as Amanda says, one of the things that we think is really important, if practice today is going to be better, we actually have to really learn from the past. And, you know, our clients are getting younger, you know, our youngest clients are still in their teens. So if we're really going to learn, and that's again why I think it's important that it's independent, because otherwise the organisations have got their own self-interest in protecting their image, then again, that information is really important in saying this is the information that's coming forward to us, this is where we see that social work or residential care or secure or the use of seclusion needs to be improved. This is what's causing harm.

And I think too, if you have independent bodies, you might be more likely to have former staff members, for example, or other professionals. I mean like I've had so many e-mails over the last few days from people who've been associated with the residential schools, or the residences who said "I'd love to help". I'm going to be encouraging them to come to the Royal Commission because they've clearly got relevant information.

So and it may be that if there was this independent body, where they weren't worrying about whether they're going to be disciplined or they're not worried about, you know, are they going to have their professional integrity attacked if they disclose, that we might get that information coming more from, as I say, staff or former staff as well to add to that body of information.

COMMISSIONER ERUETI: So this is quite a large body you've got in mind, right, it's not only a redress scheme, a one stop Tribunal, but it also has an oversight role as well, which feeds back into the ministries and agencies.

MS HILL: And bear in mind that what we propose will always be what I call the Rolls Royce experience, so I imagine –

MS COOPER: Not the Toyota.

MS HILL: Yeah. Currently we've got more like a Lada-type experience, whereas I envisage a top of the line model. But I appreciate that, you know, that might get knocked around a wee bit in the process. But currently all of these different things are trying to be – different parts of the State are trying to do all of these things. Some parts, MOE, MSD, Oranga Tamariki are all saying we want to learn. Are they doing it in an efficient way? Probably not. If we took that function out and put it into one thing, I think that's probably more effective and probably more cost efficient.

So yes, I'm proposing a fairly large body, because I think that's what's needed. Because what I see now, of course, is the children of some of our clients and sometimes their grandchildren, they're in care too. And that's just one of the grimmest things you can see. It's horrible. And nothing's changing. So I think we have to think large, we have to be ambitious, because nothing's going to change otherwise.

MS COOPER: And it may be that, you know, ultimately the need for this body might actually become much smaller, but I think the reality is at the moment there is such a big backlog of claims that need to be addressed. You have to at least set up a reasonably substantial body for the meantime to actually clear this big backlog, and to gather that information. Because if we are real, if the ministries that committed to the Royal Commission and, you know, have committed to the learnings, if we're going to be real about this, then, you know, we have to make sure that we learn all the information, because there will be younger people who can come forward and talk about their current, you know, their very recent experience. And there's a lot to be learned from that still, because that impacts on those who are now in care, who are now in residential schools, who are now in youth justice residences being put into secure care.

So, you know, there is I think – and then as I say, if we've managed that, I mean we know that the Waitangi Tribunal, for example, is expected to have a discrete timeframe. And I don't see, you know, it may be that it gets to a smaller body in due course. I think there will always be these kinds of claims, because my – I think our view, our vision of this is that it would be across Ministry, it wouldn't just, you know, it would cover Corrections,

and let's face it Corrections claims are going to keep coming. It would cover police claims, it would cover Oranga Tamariki, it would cover the Ministry of Education, it would cover health camps, it would cover NGOs that are contracted to provide care.

I mean I think you would know from the recent Children's Commissioner and other reports there are still substantial issues that need to be addressed. There are still substantial children, numbers of children, particularly, who are abused in care. I think it's like – I think the last report was like 20% or something. I mean that's a big number of children. And that's just what we know. And as I say, given what we know about the lack of reporting we can guess that the actual figure is considerably higher than that.

So I think there is an on-going function for it, but starting off it probably needs to be big.

COMMISSIONER ERUETI: I'm just wondering how – I'm not sure if we've got time to discuss this now, maybe it's for later, but how this idea would fit with the current reforms for oversight, like the Children's Commissioner role, like independent monitors that have been established.

MS JANES: We'll definitely be building up to that, as we go through the processes we'll tease out certain things and then there will be a much more formed, once you've heard the evidence, how the integral parts all fit together. So if you're comfortable to leave it there.

CHAIR: Yes.

COMMISSIONER ALOFIVAE: I'll save my questions for when we get to that part then.

MS JANES: You're welcome.

COMMISSIONER ALOFIVAE: No, carry on.

MS HILL: Sorry, we digressed quite substantially.

MS JANES: No, this is such an important part of why you're here and what you're contributing, so very comfortable. But I'm just conscious if we do too much of it now it won't weave together in the coherent way.

CHAIR: We'll leave it to you, Ms Janes.

MS JANES: Thank you very much. So just taking you a little bit back but still in the same realm, because it underpins one of the concerns that you have about this independent body that you're talking about. If we can go to document 18 which is witness 94, 114, Cooper Legal chapter 4 document 35. And this is a letter from Cooper Legal to Rupert Ablett-Hampson, who is the Acting Deputy Chief Executive Ministry of Social Development.

Can we just go through the highlighted parts. And this is talking about the accelerated settlement categories and the Ministry's approach to how they assess within

those. So if we can go through the highlighted parts and make any comments you wish as we go through.

MS COOPER: On 17 January 2014, Garth Young sent through a revised set of accelerated settlement categories, Mr Young also provided a spreadsheet showing the range of payments made over the past two years.

MS JANES: And going to the – thank you. Calling those out.

MS COOPER: "We attached a spreadsheet which identifies by numbers of clients the spread of offers when compared against MSD's proposed categories. We observe that we have adopted a critical conservative and analytical approach applying the draft categories as we understand them. The categorisation work has been peer-reviewed. We assessed all the offers at least twice, if not three times, before finally adopting the position represented in the spreadsheet attached.

You will see there are only two categories where our categorisation matched MSD figures and that was in relation to categories 1 and 4. We have a significantly higher proportion of clients represented in categories 2 and 3. We have no clients receiving a zero payment as we expected. This is because we have, to the best of our knowledge, weeded out all of the claims where we consider MSD has no liability".

MS JANES: Then as we move to the next page, can you just briefly talk about what categories you're talking about and where this then leads to.

MS COOPER: So this was what came to be the Fast Track process and we were involved in negotiations from the start about the categories which the highest category, at that stage 1, allocated the top amount of money, which was $50,000, and then down through to the lowest category which allocated $5,000.

We actually said at the very first meeting to MSD, look we don't know – your figures are going to be wrong because you've based this on set elements you've already made, where you deny a lot of what the clients allege happened to them. And so they've got a lower payment than what the Fast Track process would say they were entitled to, where you're going to do a sniff test, and as long as they were in the places – their records show that they were in the places they said they were, you're going to accept those allegations and pay them according to that category, you know, depending on the seriousness of their allegations.

So what we were doing here is we were pointing out some of the problems with the categorisation, for example, it didn't take into account practice failures – and social work practice failures are a major component of many claims – didn't take any account the Bill of

Rights Act, we weren't sure about how the Ministry was defining false imprisonment, had a very loose definition which wasn't a legal definition. And so we were explaining here that we had applied the categories to, I think at that stage it was about 188 offers, which the Ministry had at that stage, and we'd been really tough, and as we've explained in that letter, we only had two categories that were roughly the same, and that was categories 1 and 4. So that was the $50,000 category and the $20,000 category from memory.

And what was the outcome of that is we – MSD agreed to do a dummy run of the same 188 offers and they came up with figures that were very similar to ours, in fact they got more category 1 claims than we did, which was interesting, so we were obviously too tough. But otherwise their categorisations were very similar to ours and yet the proposal that had gone to Cabinet and which Cabinet had approved was based on a very, very different bell curve.

And so we said to MSD well, you can't do this process in a way that's fair because you don't have enough money. You haven't asked Cabinet for enough money. And so we said well, are you going to go back and ask – say you've made a mistake and go back and ask for more? And then there was a long period of silence, and then we were told no, they weren't going to go back to Cabinet. And we know from the Cabinet papers that to this day Cabinet wasn't told that MSD had made mistakes in its budget, that instead they were going to apply something called a moderation process.

MS JANES: And we'll come to that, so for the moment, so this –

MS COOPER: Sorry.

MS JANES: That's okay because there's quite a lot to unpack around that particular subject. And I think we'll do that tidily under the MSD processes tomorrow. So just quickly going through this document again, you've already alluded to the fact that you raised some concerns about physical abuse, secure care, false imprisonment, sexual abuse and moving on to the next page. In particular, and this is going to your independence point, it's, if we could call out the top two – if you can read those out.

MS COOPER: "In Mr Young's e-mail of 20 February 2014 he has referred to an element of subjectivity in the assessment and how that is informed by MSD's experience across a large number of cases and by assessing claim against claim. These comments give us considerable concern about the objectivity and transparency of the accelerated settlement process. It appears that MSD will ultimately decide what category a client's claim falls into, regardless of what we say. This is not at all how we understood the process would work and makes it impossible for us to advise our clients". And then we had some

additional concerns as well.

MS JANES: Then you also have a number of examples where, within the exact timeframe of the *White* litigation and the findings of the judge, where there was disparity. So can you just quickly talk us through some of those and they're at your evidence I think chapter 4 – don't worry, just give me the examples. So you've got the case of TW at Epuni which is paragraph 444 to 445.

MS COOPER: Yes.

MS HILL: So this was – you're right it is set out in our evidence, so TW and WW from Epuni. So just let me grab that out of the brief.

MS COOPER: I think they're the ones I referred to earlier. So they're clients who were at Epuni at the same time as the White brothers. But the way in which their claims have been assessed has been to reject their allegations even though they were there at the same time. And under the Fast Track process both of them actually got $5,000 offers. I note that. Yet they were, as I say, if the sniff test had been applied properly they'd identified staff members, they were in well-known institutions, they'd made allegations of physical assaults, one of them had made allegations of sexual assaults. So they'd made all the kinds of allegations that if, you know, applying that categorisation should have justified at least category 4, if not category 3, so $20,000 or $30,000, but when we got their offers both of them were offered 5.

MS HILL: If I can just clarify a phrase that Sonja uses the "sniff test" – we have nicknames for things unfortunately. What we mean by that is that the allegations a person makes are accepted unless there is evidence that they were not in the institution or the staff member that they make the allegations against wasn't there at the time. So it is on its face acceptance of a claim is what we mean by that. But the phrase we use really reflects, we think, the element of meaningful work that went into some of those assessments.

MS JANES: And we won't go to it because of time, but I will refer it so that the Commissioners can note, but there is at the Crown tab 111, it's an internal Crown document dated 28 August 2006 authored by Garth Young and that talks about what they did with the DSW culture of abuse paper, and this will be addressed with the Crown. So the investigations that they undertook, and also identified the no marking and the kingpin culture.

MS COOPER: Which of course were not part of the assessment process at all, and are not currently part of the assessment processes either.

MS JANES: And you've seen documents now in preparation for this which names a number of alleged perpetrators and convicted perpetrators.

MS HILL: Yes.

MS JANES: How would you say that information could or should have been used relative to your client categories?

MS HILL: I think sometimes where a person's been convicted then those allegations were accepted on the face, but sometimes they weren't, and so there was no consistent treatment. One of the problems with the Fast Track is that you couldn't see what was happening. A Fast Track offer, it came in and it said you've made a claim, we've assessed your claim and this is the compensation, and it's take it or leave it and there's no discussion about what's accepted or what's not.

And so we couldn't see what information was taken into account or how it was assessed, which is one of the challenges with the Fast Track process. And we don't know – so, for example, there's a staff member called Mr Zygadlojudic and we can say his name because I believe he has died. He was recorded as being shifted to another institution after indiscretions with residents.

Now we don't really know what impact that had, like did that mean they accepted allegations about him, we don't know. So there's no real transparency there. Mr Chambers, he was convicted after we assisted clients to make police complaints. Generally accepted as an abuser, but we don't know if that was a higher category which they apply for particular offences, or a lower level of compensation for what would have been a less serious offence if we were talking around criminal offending.

Mr Calcinai; again, he's since died after he had a second set of charges laid against him for sexual offending. We don't know how MSD treated his offending, if they took it into account and then we'll talk about the moderation process later. So even if they're accepted at a certain level it may have been pushed down even further. Does that answer your question?

MS JANES: Yes, and adding to that you've got the Mr Ansell from the Earl White case.

MS HILL: Yes.

MS JANES: And Mr Moncreif-Wright from the Wiffin.

CHAIR: Can I just ask quickly there, when you get your Fast Track decision, do you get reasons or –

MS COOPER: No.

CHAIR: You just get "Your client's been assessed and this is what they're getting"?

MS COOPER: Yes, you have the example with Kerry Johnson, he had a Fast Track offer, so that's in his –

CHAIR: Yes.

MS COOPER: - in his evidence, so it was just –

CHAIR: You've got nothing other than that?

MS COOPER: No.

MS HILL: And it was a way of trying to clear a backlog of claims very quickly.

CHAIR: Yes.

MS HILL: And if a person rejected a Fast Track offer they then went into the full investigation process, which would take a lot longer but you could sort of see how they were working through the claim.

CHAIR: The point is if you don't have the reasons, you don't know –

MS HILL: No.

CHAIR: It's hard to evaluate whether to accept it or not because you don't know what they've taken into account, would that be right?

MS HILL: Yes, yes.

MS COOPER: And the thing is that's why we'd gone through the exercise, and we still do that exercise with every client offer that we prepare, we go through an evaluation process to assess where we think it might fall in terms – and so I mean that was one of the reasons why we judicially reviewed MSD in relation to the Fast Track process, because they wouldn't give us the final categories. So it's like well how can we provide any advice to clients if we don't know how it works?

And I mean we'll explain, it's the same reason why we did a complaint to the Ombudsman about the current MSD process, because again they wouldn't give us the categories. So again it's like well there's no transparency around how you assess what dollars you put on what, we still don't know how the Ministry of Education does it. So with the Fast Track, yeah, you just got this offer and then we –

MS HILL: Non-negotiable.

MS COOPER: Non-negotiable. We had our own views about what we thought where it fitted.

CHAIR: Thanks.

COMMISSIONER ALOFIVAE: Despite repeated requests for the clarification, it just wasn't forthcoming?

MS COOPER: So with the Fast Track no, they wouldn't give it to us. As I say, we ended up having to take judicial review proceedings and we got it as part of their affidavit evidence, otherwise they were not going to give it to us.

MS HILL: When we talk about it we mean the specific categories of what compensation was

allocated to what sort of things in a claim. So that specific – the core rules was the thing that we couldn't see until we launched that proceeding.

MS JANES: I wonder if we go to the Ombudsman decision because that, rather than beleaguering that point, that is quite a –

MS HILL: Is that the most recent one?

MS JANES: Yes, the current one. Let me just see if I can – it's document 36, MSC for committee ending in 655.

MS HILL: Do you want me to give a very quick background on this?

MS JANES: Yes, very quick background, you've got 5 minutes.

MS HILL: So we've just talked about obtaining information, rules of the process in 2016, that was the Fast Track process. Jump forward to 2018, early 2019, MSD says we've got a new process, and we're going to streamline it and it's – and it will sort of be like the Fast Track but better, and this is what we're going to do and we're going to implement it shortly.

Now we did have some consultation with MSD prior to that about what it may look like, but then it was just imposed, this process just was started, we actually were told about it several months after it was launched. And what happened was when we were told about it we found a document on the internet, it wasn't given to us about the process. We were sent the brochures that direct claimants get, so we got the brochure and we were told about this process, but when we found the actual, what's called the business process document, it was redacted and we said can we have that document please under the Official Information Act, because that tells us how you're assessing claims. And MSD said "No you're not going to have an unredacted version; A because it relates to negotiations, and B because people will use that to inflate their claims and lie about their experiences".

So we complained to the Ombudsman, which is what you do when you want clean copies of things, and this is the Ombudsman's decision; which clearly says that this issue around compromising negotiations can't apply because this is a take it or leave it process. So in 2019 take it or leave it process. And we were allowed to have – I say the Ombudsman recommended that we had a clean copy of the whole documents and MSD later provided that to us.

MS JANES: If we can just call out that and if you can read that from the case note.

MS HILL: So this is the Ombudsman case note: "Engagements conducted on a take it or leave it basis are not clearly negotiations for the purposes of the OIA. The possibility that release of procedures and guidance would in future prompt fraudulent or exaggerated claims was too remote".

MS JANES: If we go to the second page, and while they're doing that I promise we actually will be talking about the MSD processes, so we haven't jumped over that entire topic to this point.

MS COOPER: That's fine.

MS HILL: So the Chief Ombudsman, I'll wait until it comes up so I can read it. "The Chief Ombudsman observed that requesters have a right under section 22 of the OIA to access documents containing policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any person. The right under section 22 is subject to, among other things, section 9(2)(j) of the OIA but not section 9(2)(k). The Ministry agreed that section 9(2)(k) was not applicable in the circumstances".

MS JANES: We'll just jump down to the bottom.

MS HILL: "Consequently the Chief Ombudsman was not persuaded that disclosure of the document would prejudice any 'negotiations' of the kind that section 9(2)(j) is, as a matter of public policy, intended to protect.

Even if the Ministry's dealings with claimants did amount to 'negotiations' of the kind contemplated by section 9(2)(j), the Chief Ombudsman was not persuaded that disclosure of the guidance material would prejudice or disadvantage those negotiations. The Ministry contended that disclosure of certain information would enable people to make fraudulent or artificially exaggerated claims. The Chief Ombudsman was not persuaded that such a prejudice would arise, however, as there was nothing in the guidance material to suggest that the Ministry would not conduct checks on each claim".

MS JANES: Just go to the final page, the Ombudsman made a clear finding about rights of access to information, so we'll just call those out.

MS HILL: "Finally, the Chief Ombudsman was not persuaded that the likelihood of harm arising was so great that it was necessary to withhold the full guidance material. This was in part because the Ministry had made some redactions in its original release of the guidance to the requester, when many of them could be figured out by an experienced advocate. The Ministry had also expressed some wavering views on the likelihood of fraudulent activity.

Nevertheless, the Chief Ombudsman observed that claimants must have access to the rules, guidance and policies affecting their claims to make sure they are receiving a service that is consistent and fair.

The Chief Ombudsman observed that release of all the guidance material at issue in this case would help claimants to be fully informed about how their claim will be assessed and in turn provide a better sense of closure and an increased feeling of fair treatment by

the Ministry. Consequently, even if the Ministry had established that disclosure of the material would create a harm of the kind contemplated by section 9(2)(j)the public interest in release of this information would have carried a significant weight".

MS JANES: Just rounding that out, in terms of your ability to access exactly what was being applied in assessment, is this the first time that that has been available to you?

MS HILL: Yes, so – but I have to caveat that slightly. So the Ministry agreed, it complied with the recommendation of the Ombudsman and gave us the business process document alongside a note saying "This is now out of date and we'll provide you with subsequent iterations of the document shortly". And I think about a week later we got.

MS COOPER: Two weeks.

MS HILL: Two weeks later we got the next two versions and we've subsequently been advised there's another version.

MS COOPER: We got that last week.

MS HILL: Yes, we got the latest version last week. So not all those changes are substantive, but it reflects the sort of information environment that we're in.

MS COOPER: I think it's important because I think Amanda said we got that in 2019, we actually only got that a few months ago.

MS HILL: We got the redacted version in 2019.

MS COOPER: Yeah, but actually the Ombudsman decision was only a couple of months ago. You'll see that that note, that case note is 6 September, so literally only a couple of weeks ago. So that's how long it's taken us to get this information.

And a caveat came with that as well. We got a letter from the Ministry saying, "Now this is publicly available, if we get any letters from you from clients arriving shortly after this letter that are slightly different from information you might have given us before, we'll be treating that with scepticism". So –

MS HILL: They'll be applying – and I'll explain that more a little tomorrow when we talk about what's called a step 2 analysis, there's a process. But there is, yeah, it's a different treatment now if a person makes subsequent allegations where the Ministry's already received their claim; after the release of the handbook they'll be treated differently. But we'll address that in detail.

MS JANES: There is a letter that will come up on your screen tomorrow.

COMMISSIONER ERUETI: Is the handbook online now?

MS HILL: It is.

COMMISSIONER ERUETI: So do clients get –

MS HILL: For the small amount of people who would know where to find it. It is not something that is easily accessible, even for someone who's well-versed in using the internet. But yes, like everything released under the OIA it is online.

MS COOPER: I just wanted to comment too, I mean I think, you know, this has to be seen within the context of the principles in relation to the Royal Commission which is about openness and transparency and mana tikanga, you know, and yet there are still all of these obstacles to this very day that you have to fight to get basic information to understand how your claim's going to be dealt with.

So I just think that needs to be seen within what the State agencies are saying to this Royal Commission are going to be their principles and that's also in the Crown litigation strategy compared with actually its conduct on a day-to-day basis which is, in our view, not consistent with those principles.

MS HILL: And with the greatest – we are very grateful to the Ombudsman for actually turning around that complaint quite quickly in the scheme of things.

MS COOPER: Yes.

MS HILL: The Ombudsman will now be dismayed to notice that we've made a fresh complaint about the content of a document that was released to us, and we'll explain why that is when we talk to you about the actual processes.

MS JANES: Then on that cliffhanger.

CHAIR: But wait there's more. Thank you.

Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei.

REGISTRAR: This sitting is now adjourned.

Hearing adjourned at 5.07 pm to Thursday, 1 October 2020 at 10 am