

**ABUSE IN CARE ROYAL COMMISSION OF INQUIRY  
LAKE ALICE CHILD AND ADOLESCENT UNIT 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)  
Ali'imuamua Sandra Alofivae  
Mr Paul Gibson

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Ms Moira Green for the Citizens Commission on Human  
Rights  
Ms Susan Hughes QC for Mr Malcolm Burgess and Mr  
Lawrence Reid  
Mr Michael Heron QC for Dr Janice Wilson  
Ms Frances Everard for the New Zealand Human Rights  
Commission  
Mr Hayden Rattray for Mr Selwyn Leeks  
Mr Eric Forster for Victor Soeterik  
Mr Lester Cordwell for Mr Brian Stabb and Ms Gloria Barr  
Mr Scott Brickell for Denis Hesseltine  
Ms Anita Miller for the Medical Council

**Venue:** Level 2  
Abuse in Care Royal Commission of Inquiry  
414 Khyber Pass Road  
AUCKLAND

**Date:** 25 June 2021

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**TRANSCRIPT OF PROCEEDINGS**

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**Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei**

**[10.03 am]**

**CHAIR:** Tēnā koutou katoa, nau mai ki te rā mutunga o tēnei wiki. Welcome to everybody to the last day of this week of hearing. Thank you for returning, Mr Burgess, and you remain on the affirmation you took yesterday.

A. Yes.

**CHAIR:** Morning Ms Finlayson-Davis.

**QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Good morning

Commissioners, good morning Mr Burgess.

A. Morning.

**Q.** Yesterday we left with you reading out paragraph 6.37 of your statement to the Commission. If I could summarise that, it was a response to the UNCAT criticism and you note that you could accept that the administration of the shocks in certain circumstances was punishment, but for you the disputed issues was whether that was acceptable in the 1970s. And you go on to note your opinion that further inquiry was unlikely to resolve the issue given the differing medical opinions. Is that a summary of -

A. Yes.

**Q.** - your response? I want to turn now to examine in some more detail the expert evidence that you did have on the file. And once we go through that I'll have some questions for you. So the first piece of evidence you had, and you've mentioned this already, was an opinion from Professor Walters, and that was an opinion you asked for to guide you on the use of ECT, Ectonus and electric stimuli as Aversion Therapy. That was the parameters of the opinion you sought to cover those topics?

A. Yes.

**Q.** And that was a report dated 20 January 2009?

A. I'll take your word for that, I'm not sure, yes.

**Q.** I'll just get that report brought up on our screens, Mr Burgess. If we can go first to - first of all let's orientate ourselves. I think those first pages, I think we start on page 3. This is an e-mail exchange between the two of you I think following the report. So this is the report?

A. Yes.

**Q.** 20 January 2009. And if we can go - the report follows a process where you've asked a question and Professor Walters has responded to those questions. I want to go to page 7 of that report and if we can call out paragraph 2. This paragraph, Mr Burgess, gives Professor Walter's opinion that:

1 "In the 1970s in western countries it was no longer considered appropriate to  
2 administer unmodified ECT (ie ECT without anaesthetic and muscle relaxant) to patients,  
3 including children and adolescents." And he goes on, doesn't he, to refer to the data he was  
4 relying on to support that statement which we won't go through, it's quite lengthy.

5 If I can take you now to page 9 of that report and the question you have asked at  
6 10, if we can highlight that, "What was the method or equipments generally used to  
7 administer ECT or electric stimuli? Were these methods used in children and adolescents?"

8 Now the first paragraph he notes he could find no literature specifically on the use  
9 of Ectonus. But if I can take you to the next paragraph and perhaps halfway down from the  
10 word "importantly", he advises at this part of his opinion:

11 "...it has never been medically approved that these aversive treatments may be  
12 administered via an ECT device/Ectonus, as (i) the degree of discomfort and side effects  
13 would have been excessive compared to standard Aversion Therapy, and (ii) the theory  
14 underpinning Aversion Therapy requires the patient to be awake during the procedure (ECT  
15 generally renders the patient unconscious). Stated otherwise, the use of ECT by Dr Leeks  
16 would not constitute Aversion Therapy due to a combination of the following factors."

17 And he goes on to list what those factors are. And there are five factors, again  
18 noting at:

19 "1. ECT was not a recognised form of Aversion Therapy (related to this,  
20 I presume that Dr Leeks was not formally evaluating or studying ECT as a type of Aversion  
21 Therapy).

22 2. The specific behaviours that Dr Leeks was seeking to abolish were not always  
23 clear.

24 3. The level of discomfort reported by patients was presumably extreme, and thus  
25 way beyond the pain and discomfort levels described in conventional Aversion Therapy.

26 4. The patients and families presumably did not consent to ECT for this purpose  
27 (and indeed may have protested about use of the treatment).

28 5. The general atmosphere that may have pervaded the unit and ECT sessions was  
29 possibly not therapeutic."

30 I want to go now to question 11 which is on page 10. The question at 11 was,  
31 "Was the practice of applying electrodes to parts of the body associated with the offending  
32 behaviour accepted practise?" And the paragraph, his answer is a long one but perhaps  
33 I could do the first part of that:

34 "This has never been accepted practise. In ECT, it has only ever been

1 recommended that the electrodes are applied to the patient's head. I note, for example, that  
2 patient Zentveld alleged that ECT was administered to his knees and genitals. This would  
3 have been inappropriate because:" And he sets out the five criteria or five reasons, rather,  
4 for that opinion.

5 "1. There is no evidence base for this being an effective treatment method (e.g. in  
6 the case of electroconvulsive therapy, application of the electrical stimulus to the genital  
7 area would not produce a convulsion;

8 2. There may be medical risks associated with the procedure, including to the  
9 genital area;

10 3. Patients would regard this as a procedure whose primary purpose was to punish  
11 rather than to treat;

12 4. There may be longer term serious psychological complications (including  
13 flashbacks, nightmares etc) associated with such an invasive act;

14 5. For those patients with a history of sexual abuse (including childhood sexual  
15 abuse) this would bring back painful memories of that abuse."

16 And he goes on, doesn't he, to indicate again why application of ECT to a limb  
17 would be inappropriate.

18 I want to go now to question 12. The question you've asked there:

19 "Is there or was there any sound rationale for inviting children who were victims of  
20 offending by the patient to apply electric stimuli to the patient/offender as part of an  
21 Aversion Therapy?"

22 Perhaps if we can just bring up the first paragraph.

23 "It was never appropriate for a doctor to permit children and adolescents (whether  
24 or not they were victims of offending) to administer to fellow patients or offenders electric  
25 current, aversion electrical stimulus, electroconvulsive therapy, or use the Ectonus  
26 technique for several reasons." And he goes on, doesn't he, and lists out the reasons for  
27 that. In essence, his opinion is it was never appropriate.

28 And then finally on the report, if we can look at question 14, you've asked Professor  
29 Walters for a general summary of how the treatments described compare to acceptable  
30 medical practice in 1970 to 77. And his answer:

31 "In summary, Dr Leeks' treatments appeared to depart significantly from the  
32 standards of the day." And he goes on to note the reasons for that.

33 During the course - we're finished with that document thank you. During the course  
34 of your investigation, Mr Burgess, you also had CCHR bringing to you further statements,

1 information that they had collected; is that correct?

2 A. From time to time, yes.

3 Q. And one of the pieces of correspondence we've found on the file is a letter from CCHR that  
4 I'd like to bring up now, that's EXT17004. This was a letter from CCHR to you on 13  
5 November 2007. And they're bringing to your attention to some media statements or a  
6 media statement made by the Executive Director of the Royal Australian and New Zealand  
7 College of Psychiatrists. They're referencing a recent documentary in which Craig  
8 Patterson, the Executive Director of the College, had commented on the treatment that had  
9 taken place in the unit.

10 And if we could just bring up - it might be on the next page. This was the  
11 comment made by the Royal College through their Executive Director. Sorry, it might just  
12 be on the first page. The bottom two paragraphs:

13 "It is torture, it is terror. And this college and this organisation and this fellowship  
14 absolutely distances itself from that form of behaviour. Electric shocks for the purposes of  
15 getting children to modify behaviour is not medicine, it is not psychiatry, it is unacceptable.  
16 And in these circumstances it is an assault, it is grievous bodily harm.

17 If the allegations against Dr Leeks are shown to be correct, he should not be a  
18 psychiatrist. I'd probably go a step further and say he shouldn't be a doctor at all."

19 That was the official view presented in the media by the professional body  
20 governing psychiatrists and leaving no grey area in terms of how they viewed the acts  
21 carried out in the unit.

22 The third item I'd like to refer you to is the material that you obtained from former  
23 nurse of the unit, Brian Stabb. He was the only nurse you interviewed that had witnessed  
24 or administered Aversion Therapy prior to being at Lake Alice and he gave you statements  
25 he had made to Crown Law and to the Victorian Medical Board which demonstrated what  
26 Dr Leeks was doing was not Aversion Therapy. And he gave that account when he came to  
27 give evidence in this hearing on Monday of this week.

28 He told us, as he had said in his earlier statements, that he had worked in hospitals  
29 in the United Kingdom where Aversion Therapy was carried out and he compared it to  
30 what he came to understand was being carried out at Lake Alice. His statements confirm  
31 that what was being done under the guise of Aversion Therapy bore no resemblance to  
32 what he had seen before and he described it then as he did this week as a barbaric and cruel  
33 practice.

34 Mr Burgess, would you be prepared to accept that the Police had a significant

- 1 amount of evidence on the file or within easy reach to establish that Dr Leeks' practises  
2 were not an accepted form of medical treatment in the 1970s and did not constitute  
3 Aversion Therapy?
- 4 A. We certainly had the documents that you've referred to. I think there was also some  
5 documents from an earlier Medical Council inquiry that may have been less definitive in  
6 terms of what the, you know, whether the practice was acceptable or not.
- 7 Q. So that was the - I think Professor Roberts had prepared an opinion for the Medical  
8 Council?
- 9 A. Yes, I think that's who it was.
- 10 Q. And he had raised concerns over Dr Leeks' practice, but as you indicate, he had probably  
11 not, or he certainly didn't go as far as the material that you had from Professor Walters,  
12 would that be fair to say?
- 13 A. Yes.
- 14 Q. And identifying that in your mind there was some difference of opinion, one way to have  
15 addressed that would have been to obtain evidence from an expert in Aversion Therapy as  
16 we have for this hearing, that could have been a possible way to clarify your understanding  
17 of the evidence you had before you?
- 18 A. That's possible, yes.
- 19 Q. I'd just like to ask you, I'm not sure if you saw Dr Parsonson give evidence in our hearing,  
20 but I'm going to ask the Registrar to play you a brief portion of his evidence. **[Video**  
21 **played]**. I appreciate I'm asking you to look back in hindsight, but having obtained  
22 additional expert evidence or perhaps even relying more heavily on the opinion you had  
23 from Professor Walters might have changed the course of your investigation and might  
24 have changed the thrust of the report that you gave to the opinion writers at the conclusion  
25 of your investigation, would you be prepared to accept that?
- 26 A. I accept that if I had additional information of any form then clearly that would have played  
27 into the report that I prepared. I think the report that I prepared accepted the findings of  
28 Professor Walters and had identified those instances where there was an allegation, there  
29 was corroboration, and it was the application of unmodified ECT or an electric shock of  
30 some form to modify behaviour as a punishment, and those were the seven instances that  
31 I thought there was sufficient evidence to proceed with a prosecution.
- 32 Q. And we'll come back and have a look more closely at that report in a moment. Just,  
33 I guess, tying up this section, Mr Burgess, were you aware that at the time that you were  
34 investigating this matter, lawyers for the Crown were describing the treatments or the

1 practises of Dr Leeks as indefensible?

2 A. No, I didn't know that.

3 Q. Would it have been helpful for you to have known that that was the way it was being  
4 viewed by the Government?

5 A. It's hard to say what impact that might have had. Essentially I was looking at the facts and  
6 attempting to frame criminal charges to meet the standard of beyond reasonable doubt. The  
7 opinions of other people are interesting but not necessarily definitive in terms of the action  
8 that you might take.

9 Q. Reviewing the material on the Police file throughout the history of the investigation, it  
10 would appear that the fact that there had been previous inquiries or investigations was seen  
11 as a complicating factor, would you agree with that, for the Police?

12 A. Yes.

13 Q. The file also received considerable political attention during the time that you were  
14 investigating it and you were asked to respond to at least several ministerial inquiries?

15 A. I think I responded to two.

16 Q. I'd like to bring up one of the letters that you did receive and were asked to respond to and  
17 this is NZP069. Just while that's coming up, this was a letter received from MP Tau Henare  
18 and it's page 15. This was a letter, it was actually initially addressed, well it was addressed  
19 to Annette King, then Minister of Police, 7 December 2006 and it made its way to you, I  
20 understand, to provide a response. If we could just call out paragraph 2 and 3:

21 "I understand that the individual alleged that included in the serious abuse inflicted  
22 on him and others was unmodified electroconvulsive therapy applied to the patients'  
23 genitals. I believe the alleged abuse cannot be justified by any medical standards past or  
24 present. By any measure, this type of abuse must surely constitute cruel and unusual  
25 punishment of a sadistic and sexual nature and amount to torture."

26 In your letter you state - and this is a reference to an earlier letter by the Minister of  
27 Police - "As a Government we have been determined to acknowledge what happened and to  
28 take what steps we can to put things right. Given the awful nature of the alleged abuses, I  
29 would appreciate if you could tell me what steps, if any, the Government has taken to bring  
30 Dr Selwyn Leeks (the head of the Child and Adolescent Unit at Lake Alice during the time  
31 when the alleged abuses took place) to account before the New Zealand courts."

32 We'll bring up your response to that letter, which is in the form of an e-mail to  
33 perhaps an internal recipient, a Raewyn Thomson, and this was 22 February 2007. And if  
34 we go to the prospect of criminal charges. You note there in your response:



1 "The prospect of criminal charges being successfully brought after this time is not  
2 assisted by:

3 1. A Police inquiry in the mid-70s that found no case to answer, noting the Police  
4 file is unable to be found.

5 2. An Ombudsman inquiry released in April 1977 that found unsatisfactory  
6 practises but did not establish any criminal misconduct.

7 3. A Commission of Inquiry report in 1977 which did not reach any conclusions of  
8 criminal behaviour.

9 4. Civil litigation and an agreed civil settlement process in 2001.

10 5. The death of several suspects/witnesses in the intervening years.

11 6. The loss of medical notes relevant to the alleged 'treatment'."

12 Why was the fact that there had been previous inquiries and investigations an  
13 impediment in laying criminal charges?

14 A. It was - it was not an impediment in itself, I think my e-mail said it's not - it doesn't assist  
15 the criminal inquiry. There had been a range of earlier inquiries that had not reached any  
16 conclusion around criminality. There were, as that e-mail says, witnesses and suspects who  
17 were dead, so the evidence you had available was diminished. So those were just, in my  
18 view, factors that needed to be considered when you were thinking about mounting a  
19 criminal prosecution.

20 Q. You are aware, Mr Burgess, maybe you weren't at the time, that the 1977 inquiries didn't  
21 have a mandate to make findings of criminal liability?

22 A. I have very limited knowledge of the 77 investigation.

23 Q. Not the Police investigation, I'm talking about the Ombudsman Inquiry and the  
24 Commission of Inquiry in 1977?

25 A. I'm not aware of their terms of reference or what their mandate was, or what limitations, if  
26 any, there might have been.

27 Q. I want to just go up to the paragraph above the one that we've just read out and ask you  
28 about this observation:

29 "The allegations themselves vary in the degree to which they will withstand  
30 scrutiny. There are evidential problems with the recovered memories and/or  
31 embellishments provided by some witnesses over the course of several years."

32 What did you mean by that?

33 A. There were, or - yeah, there were accounts that had emerged subsequent to the earlier  
34 statements that were not entirely consistent with the statements that had been made in the

- 1 civil hearings, that increased the frequency and the number of times that people said that  
2 they'd received electric shocks. There were, yeah, there were some accounts where the  
3 medical records were inconsistent with the recollection of a survivor.
- 4 **Q.** Dealing with the first part of that answer, you hadn't interviewed any of the complainants,  
5 so how had their accounts changed from the statements that you were provided?
- 6 **A.** Some of the complainants had made multiple statements, some of the complainants had  
7 participated in media programmes or reconstructions. The statements across those, you  
8 know, the two or three times or four times that they had recounted what happened were not  
9 entirely consistent.
- 10 **Q.** In dealing with the second part of your answer, which was that there was inconsistencies  
11 with the medical records, I think you've acknowledged earlier on there were a number of  
12 records missing or unable to be located?
- 13 **A.** Yes.
- 14 **Q.** And if there were inconsistencies in the medical records, that wouldn't necessarily mean  
15 that the complainants had embellished their accounts, would it?
- 16 **A.** We're talking about two different things there I think. The embellishment I was talking  
17 about was where the number and frequency of the application of shock treatments had  
18 increased over the years as each account was given. Inconsistencies in the evidence where  
19 a survivor in their statement said that a certain thing happened to them and in a certain way  
20 at a certain time and that is directly contradicted in the nursing notes or medical record,  
21 does call into doubt or certainly caused me to doubt whether that allegation could be  
22 properly advanced.
- 23 **Q.** I want to change course just a little, Mr Burgess. You've accepted in the statement that  
24 you've prepared for the Commission, and your colleague Mr Reid accepted in a statement  
25 he prepared for the Commission that this case was given low priority during the course of  
26 your time with the file and also his time overseeing the file.
- 27 **A.** It was given a lower priority or a low priority in comparison to active current investigations  
28 that both he and I were overseeing.
- 29 **Q.** And we heard yesterday, Detective Superintendent Fitzgerald has apologised for the Police  
30 failing to give this investigation the sufficient priority it deserved?
- 31 **A.** Yes.
- 32 **Q.** There's reference in the file to you only being able to give this part-time commitment, given  
33 other more pressing work matters you had on your plate at that time?
- 34 **A.** Yes.

1 **Q.** And the fact that there had been these previous inquiries and investigations, that was also a  
2 factor affecting its priority, would that be fair?

3 **A.** I don't think they necessarily affected the priority. I think the factors that we took into  
4 account was that these were quite historic allegations, they were made about a person and -  
5 a person who was no longer practising medicine, that the institution where they happened  
6 no longer existed, and there were no - there was no immediate concern or danger to any of  
7 the victims or any other party from the people that we were concerned about.

8 **Q.** By the time you had the file, and I think you indicated yesterday fairly early on in the time  
9 that you held the file you had got up to perhaps 41 complainants?

10 **A.** I got to 41 complainants, I'm not sure exactly when that happened.

11 **Q.** And at paragraph 4.3 of the statement you prepared for the Commission, you note that the  
12 number and similar nature of the allegations suggested a systemic issue at Lake Alice, do  
13 you recall that observation?

14 **CHAIR:** Do you need a reference to that Mr Burgess?

15 **A.** I've found it thank you, Madam Chair. Yes, that's what I said.

16 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** You're also aware that there  
17 were potentially 195 complainants based on the number of people who had received  
18 compensation or ex-gratia payments from the Government in the early 2000s?

19 **A.** I knew that there were a far larger number who had been involved in the civil process. My  
20 understanding was that I had the complaints of those that wanted the Police to look at this  
21 matter.

22 **Q.** Did the Police advertise in anyway that you were looking into the Lake Alice Unit at that  
23 time?

24 **A.** No.

25 **Q.** Given the fact of the number of complainants you had, and your observation that this  
26 suggested a systemic issue, are you able to comment on how that didn't change the low  
27 priority given to this investigation?

28 **A.** It identified an historic systemic issue that was no longer at play.

29 **Q.** Are you aware of any other examples of that number of complainants coming from one  
30 institution?

31 **A.** Not off the top of my head, no sorry.

32 **Q.** Were you familiar with the investigation of the St John of God institution?

33 **A.** I was obviously aware of it because of my role, but I had no active - I played no active part  
34 in it.

- 1 **Q.** And when you say your "role", at the time we're concerned with, you were - perhaps if you  
2 can explain your role in terms of oversight of the South Island?
- 3 **A.** I was one of three Detective Superintendents in the country who had oversight for major  
4 criminal investigations across a geographic location. Mine was the South Island. We were  
5 also called on to carry out investigations or oversee investigations virtually anywhere in the  
6 country, and to, yeah, carry out special projects, I guess at the behest of the Commissioners.
- 7 **Q.** And because of that role you would have been briefed on the investigation into St John of  
8 God?
- 9 **A.** I don't recall any particularly - any detailed briefing on that at all. I was aware of what was  
10 going on, there was a perfectly competent team running it, that was really my concern to  
11 ensure that there was a competent team running it, I didn't need to get into the detail of  
12 what was going on.
- 13 **Q.** I wonder if we could just spend a bit of time on that investigation and ultimate prosecution.  
14 As I understand it, that involved historic offending of a significant number of complainants  
15 who had been in care as children or young people. They were vulnerable and they had also  
16 received or in the background civil payments as well. So in terms of a comparison, perhaps  
17 a rudimentary comparison, fairly similar situations to what you were investigating in  
18 respect of Lake Alice. Would that be fair?
- 19 **A.** I don't have enough detail around the St John of God inquiry to make - to give you a  
20 sensible answer. There may on the face of it be similar, you know, similar circumstances,  
21 but as I've said, I wasn't involved in a detailed way with St John of God, I can only really  
22 talk to you about what I know.
- 23 **Q.** Perhaps if I can just take it a little bit further and you may not be able to answer. But that  
24 was an investigation that was carried out in the early 2000s and as a result of that  
25 investigation two defendants were successfully extradited from Australia.
- 26 **A.** Yes.
- 27 **Q.** Were you aware of that -
- 28 **A.** Yes.
- 29 **Q.** - fact. And so at the time that the investigation into Lake Alice is continuing, an  
30 investigation that on its face of it has some similarities, is being investigated and ultimately  
31 prosecuted. Do you have any comment on the difference in approach, and perhaps given  
32 your last answer you may not be able to comment on that?
- 33 **A.** I think it's very difficult to compare one inquiry to another, because you have to reach  
34 conclusions based on the evidence and frame charges around what the evidence tells you

1 and then carry out whatever other investigation or prosecution activity you might want to  
2 do and no two investigations are identical or will have the same set of facts or the same  
3 evidential issues.

4 **Q.** I guess one other feature I just wanted your observation on. As I understand it, the  
5 complainants in that investigation and prosecution were all evidentially interviewed. Were  
6 you aware of that?

7 **A.** I assumed that they were, but I don't have personal knowledge.

8 **Q.** I want to change tack again and look at one particular complaint that was before the Police  
9 in the 2000s. We heard last Friday from Sharyn Collis. In 2002 she went to the police  
10 station, she believes the Palmerston North Police Station, and she went through the process  
11 of making a statement which she described as reasonably unpleasant. At around that time  
12 her lawyer at that stage, Grant Cameron, sent her statement through as one of the group of  
13 34 who wanted their complaints to be investigated. In 2004 her lawyer at that stage,  
14 Mr Steve Winter, sent on her behalf correspondence to both the Crown Law office and to  
15 the Police to follow-up on her complaint.

16 Now I appreciate these steps have all occurred before your time with the  
17 investigation file, but I'm sure you'd agree there was, on the face of it, a persistence by her  
18 to have her complaint investigated by the Police.

19 Now unfortunately it seems that her statement was one of the 14 that we've spoken  
20 about yesterday that was lost between the time it was received by the Police in 2002 and  
21 you inheriting the file in 2006. But we can see her name on a schedule of complainants that  
22 you sent in an e-mail to Gordon Vial, who was District Inspector in the 1970s and you  
23 were, I think, looking to him for any comment about the work he had done on the file. And  
24 that was in an e-mail you sent through to him on 12 April 2007. So at some point you have  
25 obtained Ms Collis' material from Grant Cameron. And I think you spoke about going back  
26 to Grant Cameron yesterday and getting some more material?

27 **A.** Yes.

28 **Q.** Now her complaint was one of sexual violation by rape against Dr Leeks and so on the face  
29 of it still part of the scope, the narrowed scope of investigation that you were conducting,  
30 because it was against Dr Leeks and not a member of staff, would you agree? Are you able  
31 to help us -

32 **CHAIR:** Do you agree with that?

33 **A.** In terms of examining the application of electric shocks, no, it wasn't. I was aware of the  
34 complaint and it did form part of the file.

1 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** But in terms of your scope, it  
2 was looking at Dr Leeks' actions in their entirety, or was it simply the misuse of the ECT  
3 machine?

4 A. It was essentially focused around the shock treatment. If there is a glaringly obvious  
5 offence of another nature then obviously that was considered.

6 **Q.** We heard her evidence and it's consistent with what was contained in her Grant Cameron  
7 statement. It was a clear allegation of rape by Dr Leeks, would you accept that?

8 A. It was - yes, it was an allegation, well, as I understood it and certainly from her statement,  
9 Ms Collis firmly believed that she had been raped and she believed that the offender was  
10 Dr Leeks. She was - there were some - there are and were some evidential difficulties with  
11 proving those allegations.

12 **Q.** What steps did you take to investigate her complaint?

13 A. I examined the statement that she gave and I didn't take any other significant steps.

14 **Q.** A report was commissioned by an investigative journalist from a former senior Police  
15 Officer, Detective Sergeant Pizzini, where he was asked to review the investigation of Ms  
16 Collis' complaint that's part of the material that the Police have supplied to us. I wonder if I  
17 can bring that up and ask you to have a look at that. We see there this is dated 16  
18 November 2018, the title "Report: Review of Sharyn Collis Police file." I think if we go to  
19 the end of that document we'll confirm there the writer of the opinion is Dave Pizzini, noted  
20 there as a director of Veritas Investigations, formerly a Detective Sergeant in the New  
21 Zealand Police?

22 A. Yes.

23 **Q.** Now he identifies at the following paragraph 211 steps, perhaps if we just bring up from  
24 "I found". "I found this statement compelling reading. It is rich in investigative  
25 opportunities to obtain independent corroborative evidence of the allegations, had those  
26 opportunities been taken in a timely manner. I will now tabulate those opportunities as they  
27 appear chronologically in the text."

28 I won't read them all out, Mr Burgess, but in essence, they are following up lines  
29 of inquiry that emerged from her statement. People she had spoken to at the time, nurses  
30 who may have been present, records that may exist, and what I've referred to as recent  
31 complaint witnesses.

32 Would you agree, Mr Burgess, that those are steps that could have been taken to  
33 investigate Ms Collis' complaint?

34 A. They are steps that could have been taken closer to the time of these events, they could

1 have been taken, I guess, at the time I received the complaint, but given the passage of  
2 time, many of those potential lines of inquiry were significantly limited.

3 **Q.** How would you know that not having embarked on them?

4 **A.** Well, I knew that we had little or no evidence in terms of a medical file. The prospect,  
5 given the state of the Lake Alice records that we had obtained, the prospect of identifying  
6 the nursing staff seemed to me to be extraordinarily remote. A number of those steps, had  
7 they been implemented close to the offending, or the alleged offending, would have been  
8 quite valuable, but 30 odd years down the track I had little confidence that they would be  
9 successful.

10 **Q.** I think we'll just go to the conclusion of that report if we can. If I can just call out the  
11 second paragraph. This is personal opinion, Mr Burgess, perhaps if I can read that out and  
12 ask you to comment on that:

13 "Any investigator with an objective mindset (ie wanting to place the best evidence  
14 before a jury) would have pursued the inquiries tabulated above, at the very least. No  
15 decision on a prosecution is contemplated until the investigation is complete, so that that  
16 decision can be fully informed by the available evidence and the public interest factor) ie  
17 reference against the prosecution guidelines)."

18 Do you have any comment to make in respect of that opinion?

19 **A.** Not really, no.

20 **Q.** All right, we can bring that down. I want to turn now to a particular incident you  
21 mentioned at paragraph 6.12 of your statement. You have spoken or drawn out a particular  
22 incident and provided a reason for your assessment that no charges should follow. And the  
23 paragraph, if you could perhaps read that out for us?

24 **A.** Certainly.

25 **CHAIR:** What's the paragraph number again?

26 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED: 6.12.**

27 **A.** "I decided not to consider charges in relation to the incident in which a group of boys had  
28 been permitted to administer electric shocks to a boy that had allegedly abused them (refer  
29 paragraph 5.3). My rationale was that the incident had already been the subject of the  
30 contemporaneous 1977 inquiry by Police (as well as the Medical Council inquiry) and it  
31 had been concluded then that there was no basis for laying criminal charges. I did not come  
32 across any fresh evidence that suggested it was appropriate to reopen the investigate."

33 **Q.** Are you aware, Mr Burgess, that in the 1977 inquiries you refer to in that paragraph, that  
34 the fact that the electric shocks were delivered to the patient's genitals during this incident

1 was not considered by either the Police investigation or the Medical Council inquiry?

2 A. I'm not familiar with the scope of the 77 inquiry.

3 Q. Before I move on, just to orientate the Commissioners, this is the incident we've heard  
4 something about during the course of the hearing involving the boys applying electric  
5 shocks.

6 I'm going to suggest that in fact during the course of your investigation you did  
7 obtain two items of fresh evidence. I'm going to outline what they are and invite your  
8 comment at the end. In August 2006 you obtained an account from former staff nurse  
9 Terry Conlan who told you he witnessed shocks to the patients' thighs and genitals by  
10 Dr Leeks. And this was the first time that it had been mentioned that the shocks had been  
11 to the genitals as well. Do you recall speaking to former staff nurse Terry Conlan?

12 A. I do recall speaking to him, yes.

13 Q. If you would like I can bring up the job sheet?

14 A. That might be helpful.

15 Q. Certainly. So again, to orientate ourselves, this is a job sheet 17 August 2006, a reference  
16 to you travelling to Auckland to interview Terry Conlan, and the part I am asking you about  
17 I think is on the second page, paragraph 3, thank you:

18 "On another occasion Dr Leeks applied the electrodes from the ECT machine to the  
19 genitals and thighs of a boy in the Child and Adolescent Unit. This boy - redacted - had  
20 apparently sodomised another boy who was in the unit. The Aversion Therapy was applied  
21 as a punishment. The boy who had been offended against was invited to operate the  
22 apparatus. Other boys were also involved." And you note, "It is noted that there is no  
23 complaint from - redacted - on the Lake Alice file."

24 That was you recording what Terry Conlan told you on that occasion?

25 A. Yes.

26 Q. You also had Professor Walter's opinion, and we won't go through that again, but I took  
27 you to a part earlier where Professor Walters confirmed that application of ECT electrodes  
28 to any part of the body other than the head would be inappropriate, and involving children  
29 to apply electric stimuli to a fellow patient would never be appropriate either.

30 Both of these pieces of evidence were obtained during the course of your  
31 investigation; is that correct?

32 A. Yes.

33 Q. Now in relation to the same incident and in response to a media inquiry, you sent an e-mail  
34 to then Assistant Commissioner Richard Chambers, in fact I think he still is Assistant



1 Commissioner, setting out the position in respect of this incident. If we can just bring that  
2 up on screen. So just to again orientate ourselves, this is an e-mail from you to Richard  
3 Chambers on 27 September 2019. And at paragraph 3 beginning with "The main thrust":

4 "The main thrust of his inquiry appears to be why no prosecution was brought  
5 against Dr Leeks for the actions he took against a child named - redacted - is one of 41  
6 complainants identified during the course of the inquiry. He was allegedly subjected to  
7 electric shocks on his testicles and legs after he sodomised some other children in the unit.  
8 It seems very clear on the evidence that electric shocks were administered. There was an  
9 inquiry completed at the time and Leeks claimed then the shocks were given as a form of  
10 Aversion Therapy and not as a punishment or an assault. His explanation appears to have  
11 been accepted by medical authorities and Police at the time."

12 If we can just go to the next paragraph please:

13 "The reason no prosecution subsequently took place in 2010 was because having  
14 examined the history of the complaint, the law and the evidence (including corroborating  
15 evidence from a nurse of the alleged assault) both Police legal section and Pip Hall QC  
16 (who independently reviewed the legal section advice) gave advice, which I followed, that  
17 there was insufficient evidence to proceed with a prosecution. In fact, my recollection is  
18 that Pip Hall said there was no legal basis on which to bring the charges under the sections  
19 we were considering."

20 I want to now bring up the synopsis of evidence you provided to the legal opinion  
21 writers when you sought their opinion and in particular the synopsis in relation to this  
22 survivor and to this incident. It is the last two paragraphs of this page. I won't read out that  
23 in its entirety, but perhaps if you could read those two paragraphs, Mr Burgess. There is no  
24 mention in those paragraphs to the evidence you had from Terry Conlan.

25 **CHAIR:** Sorry, I'm just going to check with Commissioner Gibson if he would like to have it -

26 **COMMISSIONER GIBSON:** I would be interested in it.

27 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Certainly. "Redacted - was  
28 admitted to Lake Alice Hospital in 1973 from Kohitere training school. He was admitted as  
29 an informal patient aged 14 years. He was diagnosed with an antisocial character disorder.  
30 He was discharged to Waikeria borstal in 1974 after being charged with indecencies on  
31 fellow patients.

32 Redacted - states that he was given ECT as a punishment on numerous occasions.  
33 He describes three separate occasions where he received this treatment. On the first  
34 occasion he does not identify the reasons for receiving the treatment. He describes a form

1 of unmodified ECT. On the second occasion he said that he received ECT for running  
2 away. He also claims to have received shocks to other parts of his body as a form of  
3 therapy administered by Dr Leeks.

4 The third occasion he describes relates to the time after he had been identified as the  
5 offender for indecencies on fellow patients. He describes getting ECT administered by  
6 Dr Leeks and also by other boys. He does not describe where the electrodes were placed  
7 but - redacted - describes them being placed on his thighs. He claims, and is supported in  
8 this assertion by another survivor, who is redacted, that after the boys had applied the  
9 current, Dr Leeks took over and administered a final application of the electric current  
10 which knocked him out."

11 We can see there that there is no reference to the corroborative evidence you had  
12 obtained from Terry Conlan.

13 A. No, there's not.

14 Q. And there's no reference to what Professor Walters said about those two aspects of that  
15 incident, and when I say two aspects, I mean electrodes to a different part of the body and  
16 administered by another patient.

17 A. No, there's not.

18 Q. Looking back on this incident perhaps while we're focused on it, and with hindsight, do you  
19 accept that you had a corroborated and clear account of electric shocks being applied to a  
20 child's genitals?

21 A. Yes, there is evidence that this child received electric shocks and on the face of it, certainly  
22 from the document you've referred me to, it appears that Mr Conlan corroborated that. I am  
23 obviously assuming that the two patients are the same person.

24 Q. Yes, you do need to take that from me.

25 A. I do indeed, yes.

26 Q. And we know, of course, that no charge was recommended in respect of this incident.

27 A. No, there wasn't.

28 Q. I want to turn to the report that you prepared, Mr Burgess, and this was for the purposes of  
29 seeking legal opinions. This was prepared on 14 September 2009. And it's addressed to  
30 the Senior Legal Advisor in Canterbury, we know that to be Mr Ian McArthur; is that  
31 correct?

32 A. Yes.

33 Q. Now you were asked questions about this yesterday by your counsel and you said in  
34 response to a question by her that you referred to the expert evidence that you had from

- 1 Professor Walters, and I think you said you also considered it in reaching conclusions  
2 around evidential sufficiency; is that correct?
- 3 A. Yes.
- 4 Q. Now this is a nine-page report, and the reference to Professor Walters can be found on page  
5 4, if that could be brought up. And if we can bring up - it's in the last paragraph, it's four  
6 lines down. There is a line there, "An expert opinion regarding the use of ECT to children  
7 has been obtained and is attached to the file." That is the reference to Professor Walter's  
8 opinion?
- 9 A. Yes.
- 10 Q. And that is the only reference in the report to his opinion; is that correct?
- 11 A. I believe so.
- 12 Q. You again spoke or answered questions from your lawyer yesterday as to the purpose of the  
13 legal opinions that you sought and confirmed they were limited to the public interest  
14 component of the test to prosecute. So just so we're clear, you were not instructing them to  
15 independently review your assessment of the evidence, or the sufficiency of the evidence?
- 16 A. I was not, but I think at least one of them made some comment about the sufficiency of  
17 evidence and I think disagreed with my opinion.
- 18 Q. Can we confirm the material that was provided to those opinion writers. Mr McArthur in  
19 his statement, and you were taken through some of this yesterday, confirms he had your  
20 report, and that's the report that we've just been referring to; is that correct?
- 21 A. Yes.
- 22 Q. And he notes that he had some staff statements?
- 23 A. Yes, I think he asked for and was provided a folder of additional material.
- 24 **CHAIR:** That was Lake Alice staff?
- 25 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Lake Alice staff, sorry, yes.
- 26 A. That included Lake Alice staff statements.
- 27 Q. There was no reference in his report that he provided back to you to staff accounts provided  
28 by either Brian Stabb or Terry Conlan. Were you aware of that?
- 29 A. I'm not sure whether he specifically identified staff members or not. I can't recall. But he  
30 certainly had that material.
- 31 Q. Well, he had access to that material if he wanted it, was that the effect of your evidence  
32 yesterday?
- 33 A. Well, he had access to the entire file if he wanted it. My recollection is that he asked for  
34 and was provided with the statements of the staff, and that logically would include

- 1 Mr Stabb and Mr Conlan.
- 2 **Q.** In his report provided back to you, he sets out the staff members' statements that he had  
3 before him and would you accept from me that Mr Stabb and Mr Conlan were not referred  
4 to in that material?
- 5 **A.** If that's what his report says, of course.
- 6 **Q.** I want to come back to the expert evidence point, Mr Burgess. It would appear from the  
7 statements that both Mr McArthur and Mr Hall have provided to this Commission that they  
8 did not have Professor Walter's expert opinion. Are you able to comment on that?
- 9 **A.** I don't think they did have the statements - Professor Walter's statement. As I said  
10 yesterday, it was referenced in the report, I guess as an indication to them that it was there  
11 if they required it, but I had used Professor Walter's report to reach conclusions around  
12 evidential sufficiency based on what the allegations said and what the supporting evidence  
13 appeared to be.
- 14 **Q.** Would you agree that for both of the report writers the key issue as they saw it, would be  
15 that it was too difficult to establish that the use of ECT, the use of the machine rather, was  
16 for punishment and that such a use was outside the standards acceptable of the day, that  
17 seemed to be their main concern?
- 18 **A.** Sorry, can you run that one by me again?
- 19 **Q.** Certainly. It seemed, or from a review of their opinions, it seemed that they - the key  
20 concern for them was that it was too difficult to establish that the use of the ECT was  
21 outside of the standards of the day?
- 22 **A.** That was certainly one of the aspects they commented on, yes.
- 23 **Q.** And in reaching that view, they were relying entirely on your report?
- 24 **A.** I provided the report, I don't know whether they went beyond that or not, that's, I guess,  
25 questions that you'd need to ask them.
- 26 **Q.** Well, we've confirmed that the reference to Professor Walters was that one line in the  
27 report?
- 28 **A.** Yes.
- 29 **Q.** So you didn't set out in your report the material that I took you through this morning in  
30 relation to his expert opinion?
- 31 **A.** No. I -
- 32 **Q.** So they were not provided with any expert opinion to guide their assessment?
- 33 **A.** There was an expert opinion available should they have wished to examine it. I had used  
34 the expert opinion to form a view on evidential sufficiency. I can't really take it beyond

1 that I'm sorry.

2 **Q.** Sure. Perhaps if we just bring up page 2 of your report, paragraphs 5 and 6. We can see  
3 there the heading "Treatments Applied".

4 **A.** Yes.

5 **Q.** If we can take it from paragraph, "The third treatment". I'll read this into the record:

6 "The third treatment which appears in the notes is what has since been characterised  
7 as Aversion Therapy. It appears this is referred to in the nursing notes as ECT, Ectonus or  
8 Ectonus Therapy. This apparently entailed the ECT machine being used on a different  
9 setting to the setting that would be used to deliver ECT. It involved the patient receiving an  
10 electric shock at a lower level of electric current as a means of modifying behaviour.

11 The location in which the electric shock was delivered during these treatments was  
12 apparently determined by the sort of behaviour that led to the application of the electrodes  
13 in the first instance. For example, boys who ran away might expect to have the electrodes  
14 applied to their legs, boys who were caught masturbating or offended in a sexual fashion  
15 could expect to have the electrodes attached to their penis or their testicles, and boys who  
16 were fighting might expect to have the electrodes attached to their shoulders. These  
17 applications of electric shocks are not recorded in the ECT notes but are often referred to in  
18 the nursing notes."

19 That statement of perhaps the evidence or what you had gleaned from the material  
20 you read was directly addressed by Professor Walters in his opinion. The appropriateness  
21 of what's been set out there.

22 **A.** Yes, I'd agree with that.

23 **Q.** So do you agree it would have been necessary to set out the expert opinion to confirm that  
24 what was being described was inappropriate and not consistent with the standards of the  
25 day?

26 **A.** I guess I can only say it might have been helpful. I was providing a report which  
27 summarised my inquiries. There may have been some merit in providing additional  
28 information from Professor Walter's report, but I didn't and I can't take it any further than  
29 that.

30 **Q.** The consequence of that is that they are left with the impression, are they not, that this is  
31 the opinion of the day that this is to be expected or appropriate treatment?

32 **A.** Well, no, I don't think they were, because I was recommending that there was sufficient  
33 evidence to charge Dr Leeks for applying EC, well, Ectonus or unmodified ECT in those  
34 sorts of circumstances.

1 **Q.** In your statement to the Inquiry -

2 **[Fire alarm]**

3 **CHAIR:** We will adjourn.

4 **Adjournment from 11.22 am to 11.52 am**

5 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** One factor that appears to have  
6 assumed great significance in the Police assessment of the evidence is the credibility of the  
7 complainants. Would you agree, looking back over the documents that you have in  
8 preparation for the hearing?

9 **A.** I certainly highlighted credibility as an issue.

10 **Q.** There's a number of documents that speak to this, but perhaps if I can take you back to an  
11 earlier document and that is NZP316, page 8 paragraph 3. Entitled "Credibility of  
12 Complainants". This is the report I took you to yesterday, I believe, this is a report you  
13 made to Assistant Commissioner Marshall in June 2006 and under the heading "Credibility  
14 of Complainants":

15 "The complainants in these matters generally come from disadvantaged or  
16 dysfunctional backgrounds. Many of them have found their way into various institutions,  
17 including prison, since leaving Lake Alice. Several of the complainants could be rightly  
18 described as recidivist offenders who have horrific criminal histories. There are therefore  
19 bound to be issues of credibility that will emerge from any inquiry." And the remainder of  
20 that passage I read out to you yesterday and speaks to the significant corroboration of their  
21 allegations in the files.

22 Is this reflective of your personal view, Mr Burgess, or was that a view held by the  
23 Police during the 2000s in respect of complainants like those that you were considering in  
24 respect of Lake Alice?

25 **A.** I'm not sure that - I guess I'm not sure what you mean by "a view". That to me is a  
26 statement of fact that says a number of the complainants have criminal histories. My  
27 experience, and I'm sure the experience of most other police officers and no doubt lawyers,  
28 is that people who have significant criminal histories are likely to have their credibility  
29 called into issue if we were to proceed down the path of a prosecution, for instance. So  
30 that's just a factor, it's just a thing there that we'd have to be aware of. That's not saying that  
31 I don't believe what I'm being told or what I've read, that is just saying that that is a factor  
32 that we need to think about.

33 **Q.** Was any consideration given by you or the Police at that time to the fact that the existence  
34 of the difficulties that you've noted in that paragraph were inherently related to the abuse of

1 which they complained?

2 A. I'm not sure I quite understand what you're trying to ask me.

3 Q. Perhaps I'll give you an example. We've heard from several survivors during the course of  
4 this hearing that their time in State care, and particularly Lake Alice, has set them up for a  
5 life in and out of prison. One survivor described it, this is Charlie Symes, he said, "I got so  
6 used to being inside, Lake Alice made sure of that, it was like being in a prison. I guess it  
7 got me ready for the time that I would go to prison as an adult."

8 So my question is, was any consideration given to the experiences that they had  
9 had as children in considering the impact of any criminal offending they may have  
10 committed as adults?

11 A. Not by me because that wasn't relevant to my inquiry. It would only - that would only be  
12 relevant if you were considering, you know, whether you were likely to be charging them  
13 rather than them being complainants, surely, unless I'm misunderstanding your question.

14 Q. Perhaps I'll ask it in another way.

15 A. If you could.

16 Q. The references throughout the material suggest that the experiences that the complainants  
17 have had as adults somehow impact on their credibility. Was any consideration given to  
18 the reasons or the background experiences they had had that may have caused those later  
19 difficulties?

20 A. I think the short answer is no, if I understand what you're asking me. I mean essentially  
21 it's - what I am noting there is the fact that these issues might arise. I haven't gone beyond  
22 that to determine why they had had criminal convictions, that's not relevant frankly.

23 Q. Did the Police in the 2000s in the time you were investigating this matter, did they provide  
24 training in identifying and understanding those links between childhood experiences and  
25 adult involvement in the criminal justice system?

26 A. I don't know, I can't recall.

27 Q. I want to -

28 **CHAIR:** Are you leaving that topic?

29 **MS FINLAYSON-DAVIS:** I am, yes.

30 **CHAIR:** Could I just ask one question, because you raised it in that heading under credibility was  
31 an issue. The first thing you say is that many of them came from disadvantaged or  
32 dysfunctional backgrounds and then you go on to talk about the criminal. Just taking the  
33 criminal histories out of it, would the fact that they came from disadvantaged or  
34 dysfunctional backgrounds have an impact on your assessment of credibility?

1 A. Absolutely not.

2 Q. I just wonder why you put it in there then under the credibility issues?

3 A. Might not have been the right place to put it, but again, it was an acknowledgment of the  
4 fact that many of them did come from very difficult backgrounds. Perhaps it should have  
5 been referred to somewhere else.

6 Q. Thank you.

7 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Have you had the opportunity,  
8 Mr Burgess, to read a report that was prepared by Professor Mike Rowe and provided to the  
9 Commission by the Police entitled "Policing abuse in State care: Lessons from  
10 international experiences"?

11 A. I've read his report, yes.

12 Q. I wonder if I could just bring up a paragraph of that report and it is at paragraph 26. Just  
13 the first sentence there. Professor Rowe observes:

14 "Furthermore, discrediting victim testimony was relatively easy in an environment  
15 where those in institutional care are already identified as troubled, unreliable or malicious  
16 complainants."

17 Do you have any comment on that observation, Mr Burgess?

18 A. Not really, it's his observation.

19 Q. Do you think that had any application in the policing period that we're talking about in the  
20 2000s?

21 A. I can only speak for myself, I guess. I don't agree that I was attempting to discredit victim  
22 testimony. I was taking it at face value. This is - doesn't have context around it so I'm not  
23 sure whether this statement is talking about police officers or those who had care of  
24 children who were able to discredit victim testimony. All I can say is, I took their  
25 statements at face value.

26 Q. Thank you. I've just got perhaps one more topic for you, Mr Burgess. I want to turn to  
27 some observations made by Sir Gallen and Justice Collins QC, former High Court Judge  
28 Sir Gallen prepared the report and you refer to his findings both in your statement in  
29 September of 2009 and also in your statement for the Commission, and Justice Collins QC  
30 we've heard some evidence about was involved in the second round of civil claims in this  
31 matter.

32 Sir Gallen and Justice Collins were perhaps in a distinct position to the Police in  
33 respect of their work on this matter, they had gone around and they'd interviewed  
34 approximately 40 of the survivors and they had formed fairly clear views on what they'd



1 heard and read and you recite Sir Gallen's findings in your report, and if I can summarise  
2 those, Sir Gallen noted that ECT was constantly in use as punishment and in the  
3 circumstances as they were described to him could not possibly be referred to as therapy  
4 and when administered to defenseless children can only be described as outrageous in the  
5 extreme. Justice Collins has prepared a statement for the Commission and I'd just like to  
6 take you to a paragraph of that statement and that is paragraph 44:

7 "I have seen an affidavit from Mr Boyd, a researcher at the Citizens Commission on  
8 Human Rights, who says that in 2006 I told him Dr Leeks had engaged in criminal  
9 offending (or words to that effect). I do not now recall making that statement, but I am sure  
10 I would have done so. Both Sir Rodney and I discussed Dr Leeks' role in the unit, and we  
11 were both certain that if the Police had seen the records that had been made available to us  
12 in confidence then the prosecuting authorities would have agreed with our conclusion. It is,  
13 for example, impossible to justify the application of ECT to children on the basis that such  
14 extreme measures could cure bed wetting. I have never been made privy to the decision not  
15 to prosecute Dr Leeks, nor have I been told the basis of the decision."

16 Mr Burgess, would you be prepared to accept that if the Police had similarly  
17 interviewed the complainants you may have taken a different assessment as to the strength  
18 of the case?

19 A. I would accept that thorough investigative interviews might have clarified some of the  
20 evidence, yes.

21 **Q.** A final question for you, Mr Burgess. Having gone through the process of preparing to  
22 give evidence and giving evidence yesterday and today, in reflection, on reflection, is there  
23 anything you would do differently were you to investigate this matter again?

24 A. Well, again, as I think I said yesterday, this should have been resourced appropriately from  
25 the outset to give it the attention that it required. Beyond that, I'm not sure that there is - I  
26 think essentially I gathered the evidence that was available given the approach that was  
27 agreed and reached certain conclusions, and at the end of it I guess I was left with advice  
28 that said a prosecution was not going to succeed and therefore it didn't go any further.  
29 There are bound to have been things in how I recorded my reports or provided advice that  
30 with 20/20 hindsight I might do slightly differently, but other than that probably not.

31 **Q.** Thank you for your time, Mr Burgess. Madam Chair, I understand my friend will have  
32 some questions. CCHR have also sought and been given leave to question. Again, their  
33 counsel is unable to be here today, so while Ms Joychild is asking any questions she may  
34 have, if I may just consult with them to confirm there's nothing further they wish -

1 **CHAIR:** I have another suggestion that I've consulted with at least one of my colleagues. What  
2 we would like to do now is to take a very short break to confer with counsel about any  
3 other questions that we might wish to have, so while that's happening, during that break  
4 then you can consult with CCHR as well.

5 **MS FINLAYSON-DAVIS:** Certainly.

6 **CHAIR:** And then we'll come back and resume with questioning after that. So if you don't mind  
7 just waiting, Mr Burgess, we'll be back shortly thank you.

8 A. Not at all.

9 **Adjournment from 12.09 pm to 12.21 pm**

10 **CHAIR:** Yes Ms Finlayson-Davis.

11 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Mr Burgess, you'll have to  
12 endure me for a few more questions I'm afraid. We've heard during this hearing from some  
13 of the survivors that there were deaths at the unit in the Child and Adolescent Unit, perhaps  
14 following or during treatment and I just wondered if that was something you were aware of  
15 or looked into during your time investigating this matter?

16 A. There was no evidence in the material I saw of any deaths at the unit.

17 **Q.** Did you consider during your time investigating whether you should, or the Police should  
18 be, rather, refer the matter to the Nursing or Medical Council for consideration?

19 A. I didn't, I don't know whether anybody else thought of that.

20 **Q.** Would that have happened during that time period, is that something that would have been  
21 considered on other files?

22 A. I guess it would depend on the circumstances. All I can say is it's not something  
23 I considered in relation to this file.

24 **Q.** Finally, Mr Burgess, we spent some time going through the report that you wrote in  
25 September 2009 that invited opinions by Mr McArthur and Mr Pip Hall. Now you note, I  
26 think, in your statement to the Commission that you found their opinions determinative of  
27 the matter?

28 A. Yes, essentially. There's two parts, as I understand it, there's two parts to having a  
29 prosecution that's going to be advanced successfully. One is evidential sufficiency and the  
30 other leg is the public interest. I had sought advice on that and they essentially told me that  
31 it didn't meet those criteria and on that basis I was convinced that prosecution wouldn't  
32 succeed.

33 **Q.** It was still open to you as an investigator, however, to continue with the investigation  
34 should you have felt differently?

- 1 A. I suppose I could have, but given that I'd received legal advice that suggested it was  
2 essentially dead in the water, that would be a very rare thing to do.
- 3 **Q.** Those were my final questions, thank you Mr Burgess. I believe my friend Ms Joychild  
4 may have some questions for you.
- 5 A. Thank you.
- 6 **CHAIR:** Yes Ms Joychild.
- 7 **QUESTIONING BY MS JOYCHILD:** Mr Burgess, I'm counsel acting for the survivors. So I  
8 am not going to trawl through the embers of the failed Police investigation because my  
9 friend has done that and picked it apart with you this morning, apart from asking you to  
10 confirm that it really was a failed Police investigation.
- 11 A. No, I think I've said it was an under-resourced investigation. It reached certain views  
12 about - I reached certain views about evidential sufficiency and was quite willing to  
13 proceed to prosecution, but in the face of legal advice, terminated the inquiry.
- 14 **Q.** Well, the legal advice itself, Mr - just looking at that legal advice, Mr Philip Humphrey  
15 Brett Hall, he was one of the people who gave the independent advice. In his own evidence  
16 he says that he had just completed acting - this is at paragraph 14 - for a former brother of  
17 St John of God who had been charged with historical abuse of former pupils of the school  
18 operated by the order. So you went to get an independent advice, or independent advice  
19 was obtained from someone who had acted for a sexual offender, a prolific sexual offender.  
20 I mean why would you go there? Obviously this person is going to be very focused on  
21 weaknesses in the complainants rather than strengths, because that's their specialty.
- 22 A. As I think I said yesterday, I didn't determine where we went for the independent legal  
23 advice. That's not a question I can answer, you need to ask the person that sought that  
24 advice.
- 25 **Q.** You relied on it, though, didn't you?
- 26 A. I did rely on the legal advice that I received. In my experience it's normally provided  
27 dispassionately. And with regard to the law, I had no question to think otherwise in this  
28 case.
- 29 **Q.** Well, it shows someone who is full of the prejudices and stereotypes around a complainant  
30 who's in a psychiatric institution and who later become criminal offenders. I'll read on  
31 what Mr Hall says is that -
- 32 **MS HUGHES:** With respect, ma'am, is there a question in that?
- 33 **MS JOYCHILD:** Yes, I'm asking for the question. The question will come.
- 34 **CHAIR:** We'll let you read - what you're reading from is the statement from Mr Hall, is that

1 correct?

2 **QUESTIONING BY MS JOYCHILD CONTINUED:** Yes. And he says, "I was aware of the  
3 difficulties these cases presented, especially where the complainants were mentally or  
4 intellectually disabled to a degree or otherwise vulnerable and also the fact that  
5 compensation payments had been paid or were being paid. Similarly there had been  
6 considerable media reports concerning the alleged ECT treatment. All of these factors are  
7 likely to have had some influence or impact on the memories of patients and the reliability  
8 of their statements.

9 I put it to you, Mr Burgess, having read that sentence out, that the legal opinion  
10 upon which you rely to not do any investigation at all, was obtained from someone who had  
11 very negative attitudes towards complainants in cases such as this.

12 A. All I can say is that in my experience when I seek legal advice, lawyers act in an ethical and  
13 proper way, and that's what I expected on this occasion. I understood from the passage you  
14 recounted, that the lawyer was drawing on experience he'd previously had to examine some  
15 of the issues that might impact on the public interest question, which I'd asked him to  
16 consider.

17 **Q.** Well, looking at the public interest now, with hindsight, it's very clear that that was  
18 weighed woefully inadequately, wasn't it?

19 A. Well, that's clearly your view. I asked for advice, I received the advice, and I acted on it.

20 **Q.** So even with everything that you've heard or that you know about the terrible damage that's  
21 been done to the survivors on an ongoing basis, the fact that we've had case of(sic) child  
22 torture on a systemic nature in this country, to consider that the public interest was not in  
23 prosecuting, that must - you must agree that that was a very wrong decision to come to?

24 A. I can only repeat what I've already said. I sought advice, I got advice, I acted on the advice.  
25 Whether, with the passage of time, that advice can now be viewed in a different way, is  
26 open to debate, I suppose. But at the time, that was the legal advice.

27 **Q.** So you're not prepared or willing to give a hindsight view?

28 A. Well, my view, as I think I said in my report, was that there was sufficient evidence for this  
29 man to be prosecuted, and that's what I had intended to do. But it would be foolish, in my  
30 view, if you were taking a prosecution when you had legal advice that said you've got no  
31 prospect of this being successful, and that's essentially what my legal advice told me.

32 **Q.** Well, Mr Burgess, you can get legal advice from any source you like generally on many  
33 things, because there is so much discretion and judgment involved in giving legal advice.  
34 So moving on to the point I want to make about that, is the sense that one gets from your

- 1 evidence, and from looking at how the decision-making went, was that there was a real  
2 sense of lethargy and disinterest and lack of appetite to prosecute Dr Leeks, and that was  
3 coming from the Police. Would you agree?
- 4 A. No.
- 5 **Q.** Resources weren't given to it?
- 6 A. And we've acknowledged, and I've acknowledged, that there should have been more  
7 resource applied to the Inquiry. But that doesn't mean that we weren't interested in the  
8 inquiry and indeed, as I've said several times, it was my intention that we should prosecute  
9 Dr Leeks.
- 10 **Q.** I'm going beyond you and talking about the general Police attitude to this claim, because  
11 not only that, but 14 whole files were lost. How could that be if there was a real interest or  
12 focus on the investigation?
- 13 A. I have no idea.
- 14 **Q.** And important documents were lost as well.
- 15 A. These are all things that I've got no personal knowledge of, I'm sorry. I don't believe it  
16 showed - well again, I can speak for myself, I did not have a lack of interest in the case.  
17 I did have competing priorities.
- 18 **Q.** You mentioned this morning about the fact, one of the important factors was in prioritising  
19 this case was that there was - there was no longer issues at play, it was a historic case. Is  
20 that right?
- 21 A. Words to that effect, yes.
- 22 **Q.** But of course, Mr Burgess, it was still at play in a big way, at least in the 300 or so  
23 children's minds who went through Lake Alice. Would you accept that?
- 24 A. Absolutely accept that, the survivors were still, you know, concerned and aware of what  
25 had taken place, what had happened to them. But in terms of the threat posed to others and  
26 for a continuing course of behaviour, by Dr Leeks, that threat had been eliminated.
- 27 **Q.** Well, that particular threat had been eliminated, but for these survivors, and everyone has  
28 said it today, and even ones who haven't appeared before this Inquiry, they had no closure  
29 from the steps that had been taken to that time, the apology meant nothing, the  
30 compensation was not the complete answer, they had to have accountability. They had to  
31 know that this terrible criminal action, which happened to them, was serious enough for the  
32 Police to prosecute the wrongdoer. Because that's giving a message to society that what  
33 they suffered was wrong. Was that view anything that engaged the police's interest or  
34 thoughts at the time?

1 A. I was obviously aware from discussions with some of the complainants about how strongly  
2 they felt that Dr Leeks should be prosecuted. However, the prosecution had to be based on  
3 sufficient evidence and had to pass the test of public interest, and it did not do that.

4 Q. One of the - Mr AA who gave evidence today said that he went to a meeting with Justice  
5 Gallen where Justice Gallen reassured the survivors that Dr Leeks would be prosecuted.  
6 Were you aware of that?

7 A. No.

8 Q. You talked about the difficulties with - on the one hand we have what the complainants say  
9 and all the possible risks of exaggeration and changing memories, but you would have been  
10 aware that one complainant, Kevin Banks, had made a complaint almost  
11 contemporaneously, I think it was either 76 or 77, where he gave quite detailed information  
12 about what happened. Were you aware of that?

13 A. Yes.

14 Q. Others gave statements from 1994, Leoni McInroe, and the others were in the late 20s.  
15 Generally that was only 20 to 25 years since what had happened to them happened. Do you  
16 accept that?

17 A. Yes, the maths would tell you that, yes.

18 Q. Now the staff witnesses who did not corroborate the complaints of the complainants, of  
19 course they have their own interest in what they say, haven't they?

20 A. I don't know what you - sorry, what are you asking me?

21 Q. Well, what I'm saying is, the staff who were so strongly against what the complainants were  
22 saying, were the very staff who were also engaging in the torture and probably sexual  
23 abuse. So it wouldn't be in their interests to tell the truth, would it?

24 A. There's a couple of bits of speculation there, I guess. If you are asking were the staff telling  
25 the truth -

26 Q. I'm not asking that, I'm asking when you considered on the one hand we've got these  
27 witnesses, and they're only seven that you considered would be able to be prosecuted, on  
28 the other we have the staff saying very different things. Did you weigh into the mix of why  
29 you only prosecuted - thought seven should be prosecuted, that the staff evidence could be  
30 very unreliable and self-serving?

31 A. I made an observation in my report that the passage of time might have led to staff having  
32 faulty recollections as well. Beyond that, I guess I took their statements on the same basis  
33 as I took the complainants' statements. They had told me what they had to tell me.

34 Q. Yes, the concerns about the credibility of the complainants are set out in various places, and

- 1 the issues that the complainants will face, having been from dysfunctional homes and then  
2 ending up in various institutions, including prison. But there does not seem to have been a  
3 recognition of the credibility of the staff in any of the documentation that I could see.
- 4 A. I guess you - as an investigator you always weigh the credibility of any witness. There  
5 was, other than some health issues, there was nothing that alerted me to issues of credibility  
6 in the staff statements that I saw.
- 7 Q. Apart from the fact that they've been accused of criminal offending, serious systemic  
8 criminal offending, and though you're investigating Dr Leeks, they may well be in the  
9 firing line themselves?
- 10 A. Well, the staff members that were clearly identified as potential suspects were in the main  
11 part dead.
- 12 Q. Not all of them.
- 13 A. I was not aware of, or did not identify evidence that the staff members that we were talking  
14 to were involved in serious systemic abuse as offenders.
- 15 Q. Moving on to another topic. There is a clear correlation between abuse as children and  
16 criminal offending as adults. Is that a matter that you accept?
- 17 A. That's been my experience.
- 18 Q. And there's plenty of research to back that up?
- 19 A. [Nods].
- 20 Q. So that would have been a factor actually, I think my friend was trying to explain that this  
21 morning, but that would have been a factor actually strengthening their credibility, could  
22 have been seen that way, couldn't it?
- 23 A. I'm not sure I follow your logic.
- 24 Q. Many of them have said that they were taught to be criminals by the way other people  
25 treated them. Raping them, beating them up, being extremely cruel to them, torturing them.  
26 They learned to be criminals at Lake Alice. Was that something that you took into account  
27 when you looked at their worrying criminal histories?
- 28 A. No, as I think I said just a little while ago, I noted the criminal histories because they were  
29 facts. I was not questioning or trying to analyse how they came to have those criminal  
30 histories. That was not part of my inquiry and I was merely recording it as an issue because  
31 in my experience a witness who has significant criminal histories, particularly of  
32 dishonesty, are likely to have those addressed in any hearing.
- 33 Q. Yes, I was talking about people who were abused as children.
- 34 A. I'm sorry, I might have missed the point.

- 1 **Q.** That's all right, I think that I've got no further questions, thank you.
- 2 **CHAIR:** Thank you. Ms Hughes, did you wish to ask anything in re-examination?
- 3 **MS HUGHES:** Just a couple of matters if I might ma'am.
- 4 **CHAIR:** Yes certainly.
- 5 **QUESTIONING BY MS HUGHES CONTINUED:** Now it's been suggested, Mr Burgess, that
- 6 you displayed a lethargy and disinterest in the investigation of these matters and you've also
- 7 spoken about how it took three years to complete an initial report.
- 8 **A.** Yes.
- 9 **Q.** Can you just explain to the Commission what it was that was occupying your time during
- 10 those three years?
- 11 **A.** There were multiple serious inquiries, two Police shootings, the culmination of the
- 12 Commission of inquiry into Police conduct, some significant criminal investigations and
- 13 prosecutions. There was some work done with the IPCA around managing the Police
- 14 response to investigative workload, there was a fairly significant workload of pressing and
- 15 current inquiries.
- 16 **Q.** And you of course were a resource of one, is that right?
- 17 **A.** Yes.
- 18 **Q.** So the end point for you was a view that there was evidential sufficiency to prosecute
- 19 Dr Leeks in relation to seven complaints; correct?
- 20 **A.** Yes.
- 21 **Q.** And that took into account Professor Walter's opinion?
- 22 **A.** Yes, that helped form the decision, inform the decision.
- 23 **Q.** And the sole purpose you, therefore, sought legal advice on was the public interest aspect
- 24 of the prosecution?
- 25 **A.** Yes.
- 26 **Q.** Because you'd already satisfied yourself regarding the first limb?
- 27 **A.** Yes.
- 28 **Q.** So the reason you didn't proceed with the prosecutions you wanted to take was?
- 29 **A.** The advice I received that it would not meet the public interest test and that it would be
- 30 unlikely to lead to a successful prosecution.
- 31 **Q.** Thank you Mr Burgess, thank you ma'am.
- 32 **CHAIR:** Mr Burgess, I wish to thank you on behalf of the Commission for coming. Appreciate
- 33 that you are quite long retired from the Police and that in preparing your statement of
- 34 evidence and the relevant documents you've had to trawl through historic matters and that



1 can't have been easy and - but it is appreciated because it's very important that people  
2 involved in that inquiry are prepared to come forward and assist this Commission with  
3 assessing the whole picture, and the Police role in this is a very important part of that and  
4 it's our - sorry, I just wish to say that it is important that we've had the Police perspective  
5 from somebody actively involved and for that we thank you.

6 A. Thank you, ma'am.

7 **Q.** You may stand down of course.

8 **CHAIR:** We have 10 minutes, are we going to use that or shall we take an early lunch and resume  
9 a little earlier.

10 **MS FINLAYSON-DAVIS:** In your hands, Madam Chair, I don't know whether my friend has  
11 any view on starting the next witness?

12 **MS FEINT:** Entirely in your hands, Detective Superintendent Fitzgerald is in the building  
13 somewhere.

14 **CHAIR:** I think what we'll do, it's only 10 minutes, it seems unfair to start and stop. Let's take an  
15 early adjournment. Shall we resume again at a time please - I always get the time wrong so  
16 I need some help on that.

17 **MS FINLAYSON-DAVIS:** Perhaps so that we can complete Detective Superintendent  
18 Fitzgerald's evidence today, perhaps an hour lunch would be -

19 **CHAIR:** Yes, all right, we'll come back at quarter to 2 then, thank you.

20 **Lunch adjournment from 12.49 pm to 1.54 pm**

21 **CHAIR:** Good afternoon Ms Feint.

22 **MS FEINT:** Tena ra tatou. We're now going to hear the evidence of Detective Superintendent  
23 Fitzgerald. You affirmed him yesterday, Madam Chair, so do you want to do it again?

24 **THOMAS JOHN FITZGERALD**

25 **CHAIR:** No, you remain on the affirmation you took yesterday, Detective Superintendent.

26 **QUESTIONING BY MS FEINT:** Good afternoon superintendent. Can we confirm for the  
27 record please that your name is Thomas Fitzgerald, you're a Detective Superintendent and  
28 you're the Director of the Criminal Investigation Branch of the New Zealand Police?

29 A. That's correct.

30 **Q.** And you've been in the Criminal Investigation Branch for 28 years?

31 A. That's correct.

32 **Q.** Thank you. Now we've heard in this Inquiry that there is a current Police investigation and  
33 you've got oversight supervision of that investigation; is that correct?

34 A. That's correct.

1 **Q.** And because the investigation is ongoing, you need to be a little bit careful in what you say  
2 before this hearing so as not to prejudice that investigation?

3 **A.** Yes, that's right.

4 **Q.** And are you able to tell the Commission when you think that investigation might wrap up?

5 **A.** We're hoping that we're in a position to advise the victims in early July.

6 **CHAIR:** This year?

7 **A.** Yes.

8 **Q.** Thank you. We need to be quite specific about that.

9 **A.** Yes.

10 **Q.** Thank you.

11 **QUESTIONING BY MS FEINT CONTINUED:** And did you want to say anything more about  
12 the scope of that investigation or would you prefer to leave that for the record?

13 **A.** I think it's fair to say that it's a major investigation and again, we could apologise for the  
14 length of time it's taken, but it is thorough, and we need to take that time and make sure it's  
15 done right.

16 **Q.** Understand that. So the Commission has asked you to give evidence concerning Police  
17 investigations, Police investigation policies and procedures, and I think you'll probably be  
18 prepared to concede your brief is somewhat on the dry side?

19 **A.** Yes, very.

20 **MS FEINT:** So if it's all right with you, Madam Chair, we thought we'd only read out the most  
21 relevant parts of it.

22 **CHAIR:** That's perfectly all right. Just to let you know, Superintendent, we've read it all of  
23 course, dry as it is.

24 **QUESTIONING BY MS FEINT CONTINUED:** Can I ask you to go to paragraph 4 please  
25 Superintendent. And that's an overview of how Police generally conduct investigations?

26 **A.** Yes.

27 **Q.** If I ask you to read that for us please.

28 **A.** Sure. "The goal for all investigators is to conduct a good, thorough and effective  
29 investigation. Although policy and procedure set a benchmark, they are general in nature  
30 and need to be tailored to each specific investigation. The style, approach and heart of  
31 investigation are not and cannot be mandated by policy or driven by a desire to comply  
32 with policy and procedure. There will be differences in how different investigations carry  
33 out - how different investigators carry out an investigation and within an appropriate range.  
34 That exercise of discretion and judgment is appropriate and conducive to good

1 investigations.

2 Within the framework provide by policies and procedures, investigations often  
3 include an initial fact-finding stage which builds the evidentiary picture and may include  
4 interviews, followed by an assessment of the evidence which may include obtaining expert  
5 and legal advice. These phases overlap and inform each other and progression of an  
6 investigation will not always be linear.

7 During the initial phase, the investigator must consider the urgency of making  
8 inquiries based on current risk to the alleged victim or others who may be unsafe and what  
9 steps need to be taken immediately to secure their safety. All investigators are constantly  
10 required to consider the appropriate prioritisation of the cases they are looking at.

11 Investigations are conducted with an awareness of context. At each stage an  
12 investigator considers the growing factual picture and likely outcomes, the level of urgency  
13 at threat and the future of the case.

14 There is an awareness that prosecution decisions will be challenged through the  
15 criminal process, criminal prosecution process if charges are laid and a corresponding  
16 desire to ensure that decisions are robust.

17 Initial action contextual fact-finding phase. First, an officer has to understand  
18 what they are dealing with in terms of the facts. The whole circumstances of the matter  
19 have to be considered. Every available fact must be considered and synthesised so that it  
20 can be used in advance in the investigation. Facts that are needed but not immediately  
21 available must be uncovered. The fact-finding process is guided by the possible shape that  
22 the investigation may take. Even at the early stages, an investigator will be thinking of the  
23 possible charges that may result from the investigation. Those possible charges may guide  
24 the types of facts the investigator looks for. If it becomes apparent that a particular factual  
25 issue is going to be particularly difficult, this may become the focus of the inquiry. For  
26 example, in cases where there is a strong evidence of an assault, but the identity of the  
27 perpetrator is in question, the focus of the fact-finding may turn to the identity issue.  
28 Without sufficient evidence of the identity of the perpetrator, further facts on other aspects  
29 of the investigation are unlikely to contribute to a successful prosecution.

30 Factual ground work will include interviews of witnesses and victims, scene  
31 examinations and gathering forensic evidence. Throughout the fact-finding process, the  
32 goal is to develop a thorough understanding of the factual situation, which requires an  
33 assessment of witness credibility and thorough due diligence.

34 There is a risk of bias and of poor investigation when investigations are conducted

1 without the entire factual picture. The factual ground work is absolutely essential to a good  
2 investigation.

3 In the course of the fact-finding, the purpose of the investigation must be  
4 considered. This allows consideration of the urgency of the investigation and consideration  
5 of how to develop the investigation to allow for movement to the critical phases.

6 Investigation and evidence assessment. Suspect interviews, arrests and laying  
7 charges are critical phases of an investigation. Priorities and timeframes determine the  
8 progress through those phases. It is common for suspect interviews to take place later in  
9 the investigation once most of the other information has been located. But this varies from  
10 case to case. Sometimes witnesses will be interviewed more than once.

11 Decisions to arrest and charge are commonly made after witness interviews and  
12 the completion of factual investigations. However, arrests and prosecution decisions can  
13 bring to light further information and further witnesses, which may require additional  
14 rounds of fact-finding, witness interviewing and similar.

15 As part of evidence assessment, the investigator must consider how persuasive the  
16 evidence, including witnesses, are likely to be in a court context in front of a judge or jury.

17 Charging and expert legal advice. In a complex investigation, Police will take  
18 expert and legal advice in relation to the case in order to make a prosecution decision. A  
19 decision to lay charges requires both that there is sufficient evidence to produce a  
20 reasonable prospect of conviction and that the prosecution is in the public interest. Legal  
21 advice may be relevant to whether there is sufficient evidence to charge, in particular in  
22 considering whether the evidence meets the legal test for offending and the availability of  
23 any defences."

24 **Q.** Can I just stop you there, Superintendent. So you've referred there to the two limbs of the  
25 test and the prosecution guidelines, which is footnoted in your footnote 1. Are you able to  
26 explain to us what those two limbs constitute?

27 **A.** The first one being evidential sufficiency which is the first limb, do we have the evidence  
28 that gives rise to a successful prosecution and then the public interest test has a number of  
29 aspects to it that need to be considered. Some of those including the seriousness of the  
30 offence, the age of the offender, elderly or young, the criminal history of the offender, the  
31 authority of the offender over the victim and a number of other things that are considered in  
32 the public interest.

33 **Q.** And if you don't meet the evidential sufficiency threshold, could you nonetheless determine  
34 to proceed in the public interest?

1 A. The first arm is the evidential threshold.

2 Q. So you need to do that first?

3 A. Yes.

4 Q. Thank you, if you continue at paragraph 4.13.

5 A. "Ultimately a charge and prosecution decision is a Police decision. Advice is sought and  
6 peer review of advice may be sought alongside consultation with other officers. The  
7 ultimate decision will finally be made on the basis of the facts and taking into account the  
8 advice given. In that regard, and with the Lake Alice investigation in mind, it would be  
9 extremely uncommon for an investigator to proceed to lay charges where they have  
10 received clear legal advice against doing so. I cannot recall any such case in my career.  
11 The situation would be different if the legal advice is ambiguous or different opinions are  
12 received, in which case the investigator would have latitude to proceed to lay charges.

13 An investigation may not end at the prosecution decision. Following a decision to  
14 prosecute, further witnesses may come forward or further information may come to light."

15 Q. Thank you. If I stop you there then. So just considering some of the factors that are  
16 relevant to the investigation in the Lake Alice case, what difference does it make if the  
17 Police are investigating allegations which are of an historical nature of several decades  
18 standing?

19 A. There's a number of issues with historical investigations. In respect of reinvestigation, if  
20 we start, clearly time and the build of evidence is one of those factors. In relation to the  
21 victims, there's a number of considerations. In the early part of the investigation in the  
22 scoping phase, recontacting of victims is a phase that has to be very considered about what  
23 that will be do as far as re-traumatising, privacy issues in relation to making contact with  
24 people where you may expose things they haven't discussed with their family, new partners.  
25 So there is a lot of consideration into what is done in those early scoping phases of  
26 historical complaints.

27 **CHAIR:** Can I just be clear about this. Did you say reinvestigation, or did you just say -

28 A. Yes.

29 Q. I understand the topic is historical investigation, it could be two couldn't it?

30 A. Both, yes.

31 Q. It could be from scratch or a reinvestigation?

32 A. Yes.

33 Q. Are there different considerations in relation to both?

34 A. No, only the fact - same considerations for contacting and scoping phases, yes.

- 1 **Q.** Okay, thank you.
- 2 **QUESTIONING BY MS FEINT CONTINUED:** Thank you. Can I now take you to paragraph  
3 5.10 and just ask you to read from the second sentence in that paragraph please?
- 4 **A.** "The initial stage of a mass allegation investigation such as Lake Alice may include a  
5 scoping phase. This means working out the depth and breadth of the investigation that  
6 should be undertaken. In a historical investigation, scoping is often the most complex  
7 exercise, and it can change as the investigation goes on. Determining what facts are  
8 available and the nature of the circumstances is complex. Witnesses will need to be  
9 interviewed or re-interviewed with the additional awareness of the risk of memory lapse  
10 given the time that has elapsed."
- 11 **Q.** So when you refer to mass allegation investigations, presumably you're talking about  
12 something like Lake Alice as being a mass allegation investigation?
- 13 **A.** Yes.
- 14 **Q.** And so I understand what you're saying is that you are constantly evaluating, as you  
15 proceed with your investigation plan, what additional steps need to be taken and what  
16 further evidence you may need to gather?
- 17 **A.** That's correct.
- 18 **Q.** And what the scope of the investigation is?
- 19 **A.** Yes, it may be that initially you have to keyhole down the evidence to find out what's  
20 happened without the risk of re-traumatising everybody, you will go to the court and see  
21 where that goes and then reconsider and widen from there.
- 22 **Q.** Right, thank you. So an example of that, for instance, is when Detective Superintendent  
23 Burgess was discussing that he was going to interview the staff at Lake Alice first, he  
24 thought about that sequencing quite carefully presumably?
- 25 **A.** I would think that that was in his mind.
- 26 **Q.** Now the other question I wanted to ask you about how you approach an investigation, you  
27 make a point in, if I can take you to paragraph 9.2(c) of your evidence which is on page 14?
- 28 **A.** Yes.
- 29 **Q.** You make the point there that allegations concerning medical treatment, including ECT and  
30 Aversion Therapy, relate to a set of facts involving technical psychiatric evidence and a  
31 pattern of alleged offending not commonly seen by Police. Can I ask you to expand upon  
32 those factors as complications in planning your investigation please?
- 33 **A.** Yes, any investigation that revolves around expert evidence and expert opinion has some  
34 challenging factors, both in the investigation phase and at the prosecution phase. Police

1 obviously are heavily reliant on the experts and on expert opinion. And very conscious of  
2 trial by expert and what that brings from years of experience. So there's a lot to be mindful  
3 of in relation to how we're going to be guided by experts.

4 **Q.** And if you're considering criminal offending of a professional, such as a doctor in relation  
5 to their occupation, presumably establishing criminal intent may be a somewhat fraught  
6 exercise?

7 **A.** Again, yeah, very conscious of that in these types of inquiries, both for doctors and nurses  
8 and implied authority or medical defence is available for what is perceived to be medical  
9 care or ill treatment.

10 **Q.** Thank you. Just before we leave your brief of evidence, I think it was raised this morning  
11 and so I thought I'd ask you, if you could give the Commission an overview of how Police  
12 policies and procedures have changed in relation to child abuse and sexual assault  
13 allegations please?

14 **A.** Right. The policies have moved on through the years from start of looking at 1998 through  
15 to 2006 and then forward. In general terms, all the policies - it is recognised by the Royal  
16 Commission into Police conduct in 2008 that although the policies were adequate, they  
17 were somewhat messy and too many and they asked us to refine them down, that's been  
18 done. So the policies are much more succinct and they are very victim-centric in the way  
19 we treat victims of child abuse and adult sexual assault.

20 They detail how expert witnesses, the interviewers will do the interviews, what the  
21 level of training people have to hold certain files and to supervise files, and probably one of  
22 the main points of the policy, to ensure consistency across the country, is that we have  
23 national oversight of files. First off there's a prescribed audit at district level four times  
24 a year and then a national oversight of five per cent of files carried out by a central team at  
25 Police National Headquarters.

26 **Q.** Thank you. Now unless the Commissioners have any questions about that last answer, I  
27 was going to move on to look at the Lake Alice investigation.

28 **CHAIR:** Yes, we'll just check to see if the Word document has come through. We'll keep going  
29 and just with the proviso that if anything - that you read out anything into the record that  
30 you're referring to, thank you.

31 **QUESTIONING BY MS FEINT CONTINUED:** All right, so this document is  
32 CRN0000153\_0001 and it's named "Lake Alice Child and Adolescent Unit sequence of  
33 events, Police actions and response". So can you please tell us, Superintendent Fitzgerald,  
34 who prepared this document?

- 1 A. It was prepared by one of my - one of our team at Police National Headquarters.
- 2 **Q.** And what were their sources, was it the documentary record within Police files?
- 3 A. Yes, it is.
- 4 **Q.** And can you please tell us why you directed for this timeline to be prepared, what is its  
5 purpose?
- 6 A. The sequence of events is critical for me supervising any major investigation, especially  
7 historical investigations, in relation to what actually happened at the time in context. It's an  
8 investigative mistake to look back with the bias of hindsight and everything that goes with  
9 that, presuming when you're reading a document one-off and your knowledge is biased by  
10 that. This sequence, and I've used it at another major Royal Commission actually, enables  
11 us to make sure we are looking at things in context and exactly what was known and what  
12 was available at the time.
- 13 **Q.** So that you can pinpoint at any particular time what the available record was to the  
14 investigation team?
- 15 A. Yes.
- 16 **Q.** Thank you. So if we turn to page two on this document. It has the overview. And could  
17 we highlight the timeline at the bottom please so that we have a chance of seeing it. So can  
18 you please explain what this shows, Superintendent?
- 19 A. That's the front page which gives the very basic timeline of the major events starting back  
20 from 1969 when Dr Leeks was registered through to the Police investigation beginning in  
21 2018.
- 22 **Q.** And it would be helpful if you can read it, if you can explain to us the colour coding system  
23 you're using there.
- 24 A. So on this page and on the subsequent pages right through the document it goes into  
25 columns after this timeline and they are blue is Police response, yellow is complaint made  
26 to Police and the dates of those, pink is other agencies, pastel sort of orangey colour is  
27 significant events and the green is media reporting.
- 28 **Q.** Thank you. Then if we go over the page I thought it would be useful for the  
29 Commissioners if we step through what happened in the 1977 Police investigation since I  
30 understand you're going to be asked some questions about that by Counsel Assisting. Are  
31 you able to say whether there's anyone at Police who was involved in the 1977  
32 investigation who may be available to give evidence?
- 33 A. Not that I'm aware of.
- 34 **Q.** So you're working off the documentary record?



- 1 A. Yes.
- 2 **Q.** So if we look at this page, so just to illustrate how it works under the "Significant events"  
3 column, for instance, we've got at the top in 1969 Leeks obtained registration as a  
4 psychiatrist in New Zealand, and then down the bottom in 1972 the Lake Alice Child and  
5 Adolescent Unit was opened as an adjunct to and co-located with the former Lake Alice  
6 Psychiatric Hospital which housed mainly adult patients committed under the Mental  
7 Health Act. And then going across to the "Complaint to the Police" column, there was a  
8 complaint to the Police in January 1974 concerning indecent assaults?
- 9 A. That's correct.
- 10 **Q.** On other unit patients, and we see in the blue column the Police response, that in December  
11 1972 Nurse Paltridge was convicted of indecent assault on a boy under 16 years?
- 12 A. That's correct.
- 13 **Q.** And sentenced to six months in prison. And then there's a further Police investigation and  
14 prosecution underneath that?
- 15 A. That's correct.
- 16 **Q.** So then if we go over to page five, I wanted to step through the sequence of events in the  
17 1977 investigation. So the first event is in that central yellow column, complaint to the  
18 Police on 14 June 1977, there was the first complaint to the Police regarding ECT when  
19 Dr Mirams, who was the - I forget his exact title, Director of Mental Health at the  
20 Department of Health I think, sent a memorandum to the Commissioner of Police?
- 21 A. Yes, that's correct.
- 22 **Q.** So could you take us through that please, Superintendent. I think for the sake of everyone  
23 listening, if you read out what's in each column. So first of all, what was Dr Mirams'  
24 complaint?
- 25 A. So Dr Mirams sent a memo to the Commissioner of Police, the memo from Dr Mirams to  
26 the Commissioner of Police, asked Police to investigate complaints that staff have  
27 administered painful electric shocks without any medical direction or approval. The matter  
28 was being considered under section 112 of the Mental Health Act for patient's statement,  
29 and then there's two names, which have been redacted, who later withdrew the statement,  
30 also recommended interviewing - another redaction - who has been mentioned in recent  
31 media articles.
- 32 **Q.** Thank you, then if you go to the recent Police column and step us through what the Police  
33 response was?
- 34 A. So AC Thompson, who was the Commissioner at the time, has forwarded the information

1 to the Director Crime via memorandum directing that the investigation should be carried  
2 out by Detective Senior Sergeant Butler, Whanganui CIB. That was on 15 July 77. On 22  
3 July, Police received referrals from Dr Mirams of the two complaints about ECT treatment.  
4 On 24 July 77, Detective Senior Sergeant Butler visited Lake Alice, spoke to Pugmire, he'd  
5 viewed records for the following nurses, Fountain, Blackmore and Hunt during his visits.  
6 27 July(sic) 77, Detective Senior Sergeant Butler conducts an interview.

7 **Q.** You're saying July but -

8 **A.** Sorry, June, it's small writing on this.

9 **CHAIR:** If you look on the screen it's been highlighted, it might make it easier for you.

10 **A.** The mother of - deleted - wrote to Police saying her son was at Lake Alice at the time from  
11 media records. She understood Police were investigating allegations of mistreatment but  
12 she preferred him not to be interviewed if possible. This is referred to Dr Mirams by  
13 ACORD along with - deletion and deletion - complaints but parents did not want him  
14 interviewed so his complaint was not referred to Police. 29 June 77, Banks makes a  
15 statement to Wellington CIB complaining about his treatment at the unit. 6 July 77,  
16 Detective Senior Sergeant Butler interviews Dr Mirams.

17 **QUESTIONING BY MS FEINT CONTINUED:** Then we need to go over the page. I think you  
18 might have missed on that first page that the Police interviewed Dr Leeks at the end of  
19 June, his first interview. Now we're up to 7 July.

20 **A.** 7 July 77, Detective Senior Sergeant Butler conducts an interview. Again on 7 July 77,  
21 Napier Police interview - redacted. He had no recollection of any treatment other than  
22 being fed intravenously. 11 July 77, Detective Senior Sergeant Butler, the second interview  
23 with Leeks. In that interview Leeks is recorded as having said had given 12 to 16 boys  
24 ECT treatment or Aversion Therapy. Leeks undertook to provide detail of who had  
25 received such treatment and from whom as it would be recorded in the medical notes. This  
26 interview indicated that Leeks would also have authorised nursing staff to administer ECT  
27 to the head.

28 12 July 77. Detective Senior Sergeant Butler interviews two - redacted name -  
29 was the subject of a complaint of sexual offences against other boys who were patients at  
30 Lake Alice with him in late 1973 and early 1974. Two redactions - Banks - and another  
31 two redactions and another redaction - Whanganui CIB file 451/74. Redaction - disclosed  
32 that ECT treatment he had had, including the instance where the boys who had been victims  
33 of his sexual attacks, were told by Leeks to administer electric shock to him while  
34 conscious.

1                   On 13 July 77, Detective Senior Sergeant Butler interviews former Nurse Hunt.  
2                   On 13 July 77 Detective Senior Sergeant Butler interviews Nurse Blackmore. On 20 July  
3                   77, Detective Senior Sergeant Butler interviews Leeks a third time, receives docs about  
4                   Banks and patients given ECT and Aversion Therapy. At 26 July 77, Detective Senior  
5                   Sergeant Butler interviews - redacted.

6                   **Q.** And we go over the page to page seven.

7                   **A.** Again in the Police response 29 July 77, Detective Senior Sergeant Butler interviews staff  
8                   nurses, O'Connell, Stabb and Conlan. 10 August 77, Butler's first investigation report.  
9                   Detective Senior Sergeant Butler reports to the District Commander Whanganui with  
10                  conclusion that there is insufficient evidence to substantiate charges under section 112 of  
11                  the Mental Health Act 1969, having regard to the protection afforded to Leeks and staff  
12                  reporting to him under section 124 of the Act.

13                  On 18 August 77, there is a memo from the Director Crime, Churches, to Head of  
14                  Development and Operations at PNHQ - Police National Headquarters - supports the  
15                  decision not to prosecute and expresses the view that the treatment is not a matter of  
16                  criminal liability, but possible professional malpractice.

17                  12/9/77, Police legal opinion. Senior Sergeant Trendle recommends getting expert  
18                  medical opinion on whether - redacted - the - redacted - incident of being given electric  
19                  shocks by other boys would be considered standard medical practice. In respect of other  
20                  offences that might amount to ill treatment he thought there was not enough evidence to  
21                  support a prosecution at this stage.

22                  **Q.** Can you read from the - that extract from his opinion in the box to the left, if you follow the  
23                  arrow.

24                  **A.** Legal opinion from Senior Sergeant Trendle. The use of electroconvulsive therapy and  
25                  Faradic Aversion Therapy, even though they may not be universally accepted means of  
26                  treatment, do not by themselves constitute ill treatment. However, their use in certain  
27                  instances outlined in the file seem to me to lack merit to such an extent as to possibly  
28                  constitute an offence against section 112 of the Mental Health Act.

29                  **Q.** Then if we go back to the timeline, who is DC Walton?

30                  **A.** Deputy Commissioner.

31                  **Q.** What is his response?

32                  **A.** DC Walton says get medical opinion on the use of ECT. So DC Walton advises Director  
33                  Crime, indicates he is not satisfied with this conclusion. He directed to seek opinion of the  
34                  Director of Medical Services about the treatment and get a referral to a medical expert from

- 1 whom to obtain an opinion.
- 2 **Q.** So to summarise, when you said that Deputy Commissioner Walton was not satisfied with  
3 the conclusion, he was not satisfied with Butler's report that there was insufficient evidence  
4 to charge and therefore he directed that there be a medical opinion sought?
- 5 **A.** That's correct.
- 6 **Q.** All right. So I think it's helpful now if we go and look at the opinion from Senior Sergeant  
7 Trendle which is dated 12 September 1977 and it's NZP0000804. Have you got a copy of  
8 that with you Superintendent? Just wait for that to be brought up on the screen.
- 9 **A.** Yes, I have.
- 10 **Q.** I'm going to refer you to the summary at paragraphs 18 and 19. Just before we go there, on  
11 the screen can we just bring out the heading of the document please, the top of page one.  
12 We can see that it's being sent to the Head of Development and Operations at Police  
13 National Headquarters, concerning allegations of ill treatment by staff at Lake Alice  
14 Hospital and it's dated 12 September 1977?
- 15 **A.** That's correct.
- 16 **Q.** If we go to the very end we can see the author is Neville Trendle who is in the legal section  
17 of Police?
- 18 **A.** Yes.
- 19 **Q.** Thank you. Then if we can go to paragraph 18. It's only two paragraphs, I might just get  
20 you to read out the summary in full please.
- 21 **A.** "The allegations of various boys recorded in this file all stem from measures instituted for  
22 their treatment and control by Dr Leeks and his para-professional staff at the adolescent  
23 unit of Lake Alice Hospital. So that bona fide innovation had no traditional means of  
24 treatment are not unnecessarily suppressed, public policy requires that the allegations be  
25 carefully evaluated. Though there is a vast area between treatment prescribed by the  
26 Mental Health Act 1969 and ill treatment which is proscribed, officials at institutions  
27 nevertheless do not have an absolute carte blanche. The use of electroconvulsive therapy  
28 and Faradic Aversion Therapy, even though they may not be universally accepted means of  
29 treatment, do not by themselves constitute ill treatment. However, their use in certain  
30 instances outlined in this file seem to me to lack merit to such an extent as to possibly  
31 constitute an offence against section 112 of the Mental Health Act."
- 32 **Q.** Then paragraph 19?
- 33 **A.** "There would not appear to be sufficient evidence to further consider the first two instances  
34 referred to, though Detective Senior Sergeant Butler might wish to review this. As to the

1 incident involving - redaction - particularly because of the sensitive nature of this whole  
2 investigation, I think further inquiry should be made. I am not in a position to suggest who  
3 the appropriate experts might be, but what is required is the professional judgment of the  
4 way treatment was administered to GRO-B. If this judgment (based on Dr Leeks' position  
5 as it was in 1974) is that his procedures were so outrageous as to be quite beyond bona fide  
6 medical opinion at the time, consideration will have to be given to the charge under the  
7 mental Health Act. If it is the professional view of those seen that the treatment in this case  
8 was unreasonable and unprofessional (but no more) the matter may well be resolved  
9 internally as Detective Senior Sergeant Butler indicates."

10 **Q.** Thank you. I think that name should have been redacted, Madam Chair, in that paragraph.

11 **CHAIR:** Yes, steps are being taken I think.

12 **QUESTIONING BY MS FEINT CONTINUED:** Thank you. Now if we go to the medical  
13 opinion that was sought and that is NZP0000791. We can see on the cover sheet,  
14 Superintendent, that the author is doctor DG McLachlan and he's sending a letter dated 28  
15 December 1977?

16 **A.** That's correct.

17 **Q.** To the Deputy Commissioner of New Zealand Police?

18 **A.** Yes.

19 **Q.** And it indicates that he's a medical doctor and a member of the - a fellow of the Australian  
20 and New Zealand College of Psychiatrists?

21 **A.** That's correct.

22 **Q.** And he says on that cover page that he's done a report on this topic, it's taken him almost  
23 three months, but the documentary research and study of the literature took him much  
24 longer than he anticipated. And he's returning the Police file on the subject which had been  
25 loaned to him?

26 **A.** That's correct.

27 **Q.** Then if we go over to the first page of the report please. Could you just read the first two  
28 paragraphs to set out what his report covers please?

29 **A.** "On 28 September I attended a briefing at National Police headquarters by the Deputy  
30 Commissioner Mr RJ Walton on the disclosures of the Inquiry to date on possible ill  
31 treatment of patients at Lake Alice Hospital within the meaning of section 112 Mental  
32 Health Act 1969. Later with Detective Chief Inspector Mitten and Detective Senior  
33 Sergeant Butler, who were also present at the briefing, I had further discussion in detail on

1 the facts and events that had been disclosed by inquiries, and the substance of statements  
2 made by staff, ex-staff and patients.

3 Since then I have studied carefully and repeatedly all the records and information  
4 provided for me. I have also reviewed extensively the literature relevant to those particular  
5 issues. As a result, I have formed a definite opinion on the whole situation relating to Lake  
6 Alice. Though I now present this report in a condensed form and shall deal with selected  
7 issues under the - I will deal with selected issues under the following headings, it must be  
8 remembered that I have considered all the facts presented to me in coming to an opinion."

9 **Q.** Thank you, it's quite a long opinion so we won't read the whole thing, but if I could just  
10 take you to some of the key conclusions. If we go down to the bottom of page two. It's  
11 quite hard to read, isn't it, it's quite faded.

12 **A.** Yes.

13 **CHAIR:** Do you want the whole of para two to be highlighted?

14 **MS FEINT:** No, just the bottom half a dozen lines please.

15 **CHAIR:** Starting "Medical staff"?

16 **QUESTIONING BY MS FEINT CONTINUED:** Yes. If you could start reading from, you see  
17 where it says "ECT modified" on the fourth line there?

18 **A.** Yes. "ECT modified by anaesthetic and relaxant was not regularly used, as is desirable, but  
19 that does not amount to ill treatment. It is well recognised that the accompanying injections  
20 modifying treatment lessen the therapeutic benefit."

21 **Q.** And then if we go to the top paragraph of page three.

22 **A.** "And I have many times, as a last resort in problem cases and with suitable safeguards,  
23 used unmodified or straight ECT to initiate improvements when the unusual - sorry, when  
24 the usual modified ECT was ineffective. There are many patients who would never get  
25 well without this. Unmodified ECT should not be used routinely, but it is justified in  
26 difficult and problem patients when all other methods have failed."

27 **Q.** Then if we go to the top of page four please. If you can just read out that, those first two  
28 sentences please?

29 **A.** "Electrotonus or faradic stimulation use as the aversion stimulus used in behaviour  
30 conditioning is more controversial. As applied to the thigh, knee or leg it would not be  
31 painful, but would be at least uncomfortable because of the involuntary muscle contractions  
32 produced, but that is the intention of the method."

33 **Q.** Then at the bottom of that same paragraph if you read out the last two sentences please,  
34 starting "Only a minority"?

1 A. The last two sentences?

2 **CHAIR:** Yes, on the screen.

3 A. Sorry. "Only a minority of psychiatrists have endorsed the method without reservation and  
4 it has largely been left in the hands of ancillary staff, mainly psychologists, to practise this  
5 technique. Nevertheless, it was in 1973, and to a lesser extent still is, an accepted method  
6 of treating behaviour disorders."

7 **QUESTIONING BY MS FEINT CONTINUED:** And then if we go to page six, paragraph five,  
8 last sentence in paragraph five.

9 A. "I have studied carefully the summaries of case histories of individual patients and I have  
10 no disagreement with the choice of treatment used; in particular where ECT was used, it  
11 was justified by the psychotic (depressive or schizoid) features present in patients where  
12 chemotherapy and other treatments had failed."

13 **Q.** And then if we just finally go over to page eight please, the final paragraph on the page.

14 A. "From all my reading and investigation of these patients at Lake Alice, I can find no  
15 confirmation of the suggestion that any activity by doctors or other staff was undertaken  
16 with other than genuine therapeutic intent. The only really questionable situation arose  
17 over - redacted - and this I have dealt with in detail. I can find nothing to support charges  
18 of unethical or unprofessional conduct, however badly judged or unwise it may have been  
19 in one instance, and nothing to support ill treatment of patients in terms of section 112,  
20 Mental Health Act 1969. Further, I do not consider there is any evidence that any person  
21 acting in bad faith or without reasonable care (section 124) as would have to be proven in  
22 any interlocutory proceedings."

23 **Q.** Then finally just the first two - yeah, if we go to the final paragraph please, paragraph eight.

24 A. Starting with "In summary"?

25 **Q.** "In summary".

26 A. "In summary, it is my opinion that the allegations against Dr Selwyn Leeks and the staff at  
27 the adolescent unit, Lake Alice Hospital, have not been substantiated. Though unorthodox  
28 methods of treatment were used, there was precedent for this and it could not be regarded  
29 as improperly motivated or unprofessional. In my view, it does not come within the  
30 criminal provisions of section 112 Mental Health Act 1969. The procedures then used as  
31 part of a total therapeutic regime were rather a measure of desperation at the failure of all  
32 else in very complex and - in a very complex and difficult situation. Since 1974 the whole  
33 approach to care and treatment at the unit has changed, the methods used earlier are no  
34 longer applied, and there is now nothing to justify criticism. Consequently, I have no

- 1 suggestion to offer for amendment to the present management and treatment of patients.  
2 I recommend that no further action be taken."
- 3 **Q.** Thank you very much, Superintendent, for reading all that out. I asked you to read large  
4 extracts of that because the Dr McLachlan is fairly emphatic, is he not, that there's nothing  
5 to see here?
- 6 **A.** Very.
- 7 **Q.** And it's a matter of record that on receipt of that opinion the Police decided they had  
8 insufficient evidence to lay charges against Dr Leeks?
- 9 **A.** Yes, clearly we were guided very strongly by that opinion.
- 10 **Q.** And in your professional opinion as an investigator of many years standing, do you think -  
11 how would you describe the Police response?
- 12 **A.** Regardless of what the investigators thought, it would be very difficult to go against that  
13 strength of expert evidence.
- 14 **Q.** Thank you. So I think we can set that aside now and I just had a couple more questions  
15 before we finish. Yesterday you presented to the Commission a statement on behalf of the  
16 New Zealand Police in which you conceded that Police did not accord sufficient priority  
17 and resources to the investigation of allegations of criminal offending in that 2002 to 2010  
18 period. Are you able to tell me please first of all who made the decision to make that  
19 concession, and secondly I'd invite you to explain why that decision was made.
- 20 **A.** The decision was made by the Commissioner and the Executive of the New Zealand Police  
21 after consideration and looking at what had been done over those years and some of the  
22 things that I mentioned yesterday, and because of those facts and supporting, that Police  
23 recognised what that has done to these survivors.
- 24 **Q.** And to be clear, the Police are saying that there's an institutional failing here and you're not  
25 pointing the blame or saying that any individuals are necessarily at fault?
- 26 **A.** That's correct.
- 27 **Q.** I suppose this is inviting you to speculate, but do you think having - how would devoting  
28 more resources to the investigation have changed that investigation?
- 29 **A.** It is somewhat speculation, but with any investigation if you have further resources to  
30 widen the scope in the early stages, there is of course a chance that that will lead you down  
31 different paths of widening that investigation.
- 32 **Q.** Thank you. I think in closing your evidence-in-chief I was going to invite you to read  
33 paragraph nine of your brief, "Concluding comments", because you do explain the position  
34 of Police to the survivors. Can you please start at paragraph 9.1.



1 A. "Concluding comments. Although the scope of my evidence is primarily directed at  
2 generic discussion of Police policy and practise, there are some comments I wish to make at  
3 this point on behalf of New Zealand Police to acknowledge the survivors of the events of  
4 Lake Alice. In making these comments I am mindful of the reopened Police investigation  
5 into Lake Alice and the limitations that places on my ability to comment on some aspects of  
6 the file.

7 The investigations into Lake Alice have been unusual in a number of respects.  
8 Lake Alice has been subject to significant scrutiny through a number of investigations and  
9 inquiries and has been the subject of a civil claim against the Crown which produced a  
10 large number of formal statements of evidence by survivors and resulted in the Crown  
11 settling with the plaintiffs. The allegations concerning treatments including ECT and  
12 Aversion Therapy relate to a set of facts involving technical psychiatric evidence and a  
13 pattern of alleged offending not commonly seen by Police. The above factors all have  
14 contributed to the investigations having features that are not typical for an investigator,  
15 particularly in the context of Police - in that context Police policies will provide a  
16 framework to the investigator but not a set of prescriptive rules.

17 With the benefit of hindsight, New Zealand Police in 2021 look back on the  
18 investigations conducted between 2002 and 2010 with regret. We wish now we had  
19 managed to reach a decision sooner in that investigation. Like all people reporting serious  
20 offending to Police, that has significantly impacted their lives. The survivors of Lake Alice  
21 would have benefitted from receiving a decision sooner. I acknowledge that delays in  
22 Police decision-making in the context of this type of offending can be very difficult for  
23 victims and I apologise to them on behalf of Police.

24 I also acknowledge the difficulty that the decision in 2010 not to lay criminal  
25 charges would have undoubtedly presented for at least some of the survivors of the events  
26 of Lake Alice. Police prosecution decisions are based on a number of factors which include  
27 considering the defences a defendant would have available to them that would reduce the  
28 likelihood of being able to achieve a criminal conviction. It is not unusual for Police to  
29 believe a complainant but still not be in a position to lay charges. Such decisions are often  
30 very difficult for investigators, however it does not mean a case has not been properly  
31 investigated or that the offending has not been treated seriously by Police.

32 Decisions about whether or not to lay charges often involve weighing a range of  
33 complex and competing factors. Police are required to consider the prosecution guidelines  
34 I discussed above, reasonable prospects of conviction and the public interest.

1 I acknowledge, however, that for any victim, including the survivors of Lake Alice, the  
2 decision not to lay charges may make them feel that Police did not believe them, or that  
3 Police is content to let someone get away with their offending. On behalf of New Zealand  
4 Police, I acknowledge how difficult that can be for those who have come to Police in the  
5 hope of seeing a prosecution and conviction in response to traumatic events that have  
6 occurred in their lives."

7 **Q.** Thank you very much, Superintendent. Is there anything else you wish to say before I turn  
8 you over to my friend?

9 **A.** That's fine thank you.

10 **Q.** Thank you very much. I understand that Counsel Assisting the Commission will now have  
11 questions for you.

12 **CHAIR:** Yes.

13 **QUESTIONING BY MS R THOMAS:** Good afternoon Detective Superintendent Fitzgerald.

14 You've just read the final paragraphs of your brief of evidence that was filed with the  
15 Commission earlier this year where you've outlined the Police regret the time it took to  
16 reach a decision in the 2000s and yesterday on behalf of the Police you went further and  
17 apologised for that delay as a failing.

18 **A.** That's right.

19 **Q.** In addition to delay, your apology also stated that not all allegations were thoroughly  
20 investigated. Can you expand for us please what you mean by that comment in the  
21 apology?

22 **A.** That was in relation to the timeframe and some of the statements not being included at the  
23 start of that inquiry.

24 **Q.** I'll just re-read that sentence, I think it said "This resulted in unacceptable delays in the  
25 investigation and meant that not all allegations were thoroughly investigated." So are you  
26 saying it's because of the delay that -

27 **A.** Delays, yes.

28 **Q.** Sorry, can you just explain that further to me?

29 **A.** The delay in thoroughly investigating those complaints.

30 **Q.** So you've said not all allegations were thoroughly investigated in that timeframe. Does that  
31 mean that some of them were thoroughly investigated or...

32 **A.** Yes, I think you've heard in relation to what the charges that were put before or  
33 recommended for charging.

34 **Q.** So the charges that Mr Burgess said there may be a prima facie case in relation to seven -

1 A. That's correct.

2 Q. - of the survivors, the Police position is that those seven cases were thoroughly  
3 investigated?

4 A. They were investigated, yes.

5 Q. I'd like to ask you some questions about the standards and policies that you refer to in your  
6 brief. Initially at paragraph 3.2 of your brief you've said that the Police policy and  
7 procedure sets out a baseline and the national standard below which investigations should  
8 not fall. Can I just confirm with you, is that like a minimum standard?

9 A. The standard of best practice, yes.

10 Q. I'd now like to put up some documents please and the first one is NZP0026569. If you  
11 could turn to paragraphs 10.1 and 10.2.

12 **CHAIR:** Could you just orientate us please about that document?

13 **QUESTIONING BY MS R THOMAS CONTINUED:** Yes I will. Just to confirm this is a  
14 Police policy document setting out policies under the adult sexual assault investigation  
15 policy from 2003; is that correct?

16 A. That's correct.

17 Q. And these two paragraphs cover the policies relating to historical complaints. I'll just read  
18 these into the record.

19 10.1 "Given that reports of adult sexual assault can be made to the Police some  
20 years after the incident, the Police response to such complaints will take into consideration  
21 factors such as:

22 Choice made by the victim, evidence offered by the victim, availability of other  
23 evidence, availability of witnesses, legal precedents, the offender's response and likelihood  
24 of continued offending.

25 10.2 Consultation with the victim is a priority throughout the investigation  
26 process and decisions must be made in consultation with the victim and the coordinator of  
27 adult sexual assault investigations."

28 Just to confirm, Detective Superintendent, that was the Police policy that was in  
29 place as of 2003?

30 A. Yes.

31 Q. And if we now bring up the next document please, NZP0026568. This is again a document  
32 Police policy but it's the adult sexual investigation guidelines of 2009, is that -

33 A. That's correct.

34 Q. Correct - and if we could turn to the - call out the historical complaints paragraph. I'll just

1 read that into the record.

2 "Sexual assault reports may be made to Police years after the incident.  
3 Investigators should consider these factors when deciding what response Police will take.  
4 The victim's ability to clearly recall events, the ability for this to be corroborated, the  
5 availability of other evidence and witnesses, the victim's current circumstances and  
6 well-being, legal precedents (consult legal section or the Crown Prosecutor where relevant),  
7 the offender's current situation (still alive, in firm, or overseas), the offender's known or  
8 likely response, the likelihood of further, continued or connected offending (past, present or  
9 future)."

10 Those were the documents of policy relevant to historical complaints in the 2000s,  
11 those two?

12 A. That's correct.

13 Q. Just to confirm the position that we heard yesterday in relation to Mr Reid, he held the file  
14 between 2002 to the beginning of 2006?

15 A. That's correct.

16 Q. He received 34 civil statements at the time that he held the file from Mr Grant Cameron.  
17 He did task a colleague to interview one survivor, and that was Hake Halo?

18 A. That's correct.

19 Q. But the Police don't have a record of that interview with Mr Halo. That was the position we  
20 heard about yesterday from Mr Reid. Just in terms of the position with Mr Burgess who  
21 gave evidence today, he confirmed that by the time he held the file, 2006 to 2010, there  
22 were 41 complainants from the Lake Alice Child and Adolescent Unit and no evidential  
23 interviews were done with those complainants while he held the file; is that correct?

24 A. As I understand it from yesterday, yes.

25 Q. And this morning, in fact Mr Burgess accepted in his evidence that thorough investigative  
26 interviews might have clarified some of the evidence. Did you hear that this morning?

27 A. Yes, I did.

28 Q. Detective Superintendent, I acknowledge that those investigative decisions are not ones that  
29 you made, but in your role as the Director of Criminal Investigation Branch, do you accept  
30 that the decision to not evidentially interview any of the 41 individuals who wanted to  
31 complain to the Police fell below the national standards of the Police policies that existed in  
32 the 2000s?

33 A. As you've heard and as I would acknowledge, yes, that would have assisted. It does need to  
34 be taken into context that there were statements available from those people through other

1 means, it has to be put into context that there was complaints and statements.

2 **Q.** Yes.

3 **A.** They were the scoping part of the investigation. So I'm agreeing with you, but there is  
4 context to that.

5 **Q.** So it would have assisted to have those Police evidential interviews as well?

6 **A.** Could have, yes, absolutely.

7 **Q.** And would have therefore complied with the policies we've just gone through?

8 **A.** That's correct.

9 **CHAIR:** Can I ask you, Superintendent, how usual is it in your experience for the Police to rely  
10 on statements that are non-evidential; solely rely upon them?

11 **A.** It doesn't, you know, it's a very unusual case to have those, so it's not something we - any of  
12 us have much experience of.

13 **Q.** So it's unusual that you'd have a case where you've got pre-existing statements from, say,  
14 civil proceedings?

15 **A.** Very unusual, yes, especially to that extent and that number.

16 **Q.** But in general, do you have a position on how appropriate it is to rely just on those, even in  
17 the scoping phase?

18 **A.** Obviously it's better to have a full interview done by our experts, but in the scoping phase,  
19 considering what I outlined earlier about re-traumatising contact, all those things, in the  
20 early stages of the scoping phase, reasonable, yes.

21 **Q.** Thank you.

22 **QUESTIONING BY MS R THOMAS CONTINUED:** I'd now like to ask to put up another  
23 document, but just before I do, it is a document which the Commission has received as part  
24 of its request and it's a document dated August 2018, which I understand was before your  
25 time in terms of overseeing this investigation. So I'd like the document ending 1302 to be  
26 brought up please. Just to give this document some context and background, it is an email  
27 that has been sent from within the Police, Detective Inspector Kirby, who was the Manager  
28 of the Adult Sexual Assault and Child Protection Team at Police National Headquarters.  
29 Somewhere in there it says it's a no surprises e-mail that's been sent to Senior Sergeant Tim  
30 Anderson and then further on to the Assistant Commissioner Richard Chambers.

31 **A.** Detective Superintendent Tim Anderson.

32 **Q.** Sorry, thank you. I'd like to turn to the issues identified section of this email and highlight  
33 or call out issue one. I'll just read this into the record:

34 "It seems Police have not actually spoken to most of the victims personally but have

1 used unsigned statements obtained from civil court. These statements are not to the detail  
2 or done in the way Police statements would be taken. Certainly it appears no consideration  
3 has been made to evidentially interview the victims who have disclosed sexual abuse."

4 Detective Superintendent, do you have any comment in relation to that issue that  
5 has been outlined in that email

6 A. No, that's a review done by one of our experts and that's a fair comment he's made. Again,  
7 there is the context to the scoping part of the investigation and legal advice, but that's a fair  
8 comment made at that point.

9 Q. Thank you. If we could bring out issue two. "Medical notes and records have been  
10 obtained for most of the victims, however it seems very little further investigation has been  
11 done to corroborate the allegations."

12 In relation to that issue, Detective Superintendent, do you have any comment?

13 A. It's not my report, but it's the view of one of our experts who's reviewing the file.

14 Q. Do you have any comment in relation to the words there that little further investigation has  
15 been done to corroborate allegations?

16 A. Again, it's not my e-mail so I'm not sure what that comment's based on or how much is  
17 taken into account.

18 Q. Are you in a position where you could comment on, from your knowledge, whether there  
19 was any further investigation that had been done to corroborate the allegations?

20 A. I think you've heard this morning from Malcolm Burgess in relation to what he did.

21 Q. If we move on to the third issue that's raised in this email. "Under today's standards there  
22 has not been a quality investigation conducted particularly of the sexual allegations."

23 In your role, Detective Superintendent, do you have any comment about that issue  
24 being identified?

25 A. No, again, that's done by one of our experts reviewing the file, that's his comment.

26 Q. Do you have any comment in response to this?

27 A. All I can say is on his review of the file, that's what he says.

28 Q. Number four, if we could bring that one up. "When legal opinions were sought it was only  
29 in relation to the physical abuse." Do you have any comment in relation to that issue  
30 outlined?

31 A. Again, that's his review of the file, that was what the legal - and we've heard this morning  
32 what the legal opinion was sought on.

33 Q. Do you have any comment yourself, though, in response to that?

34 A. In what way? To comment on, the file or -

- 1 **Q.** From your knowledge of the file and the comment made here that it was limited to - the  
2 legal opinion was only sought in relation to physical abuse?
- 3 **A.** Well, that's the fact, yes.
- 4 **Q.** If we move to number five. This is obviously the author's own opinion here, but it states,  
5 "In my view if the Police response to these allegations is the subject to close scrutiny there  
6 will be strong criticism." What is your position in relation to that?
- 7 **A.** Again, it's the reviewer's opinion on the file and certainly from an adult sexual assault  
8 specialist team, that's their view.
- 9 **Q.** Are you prepared to give us your view on that comment and your opinion?
- 10 **A.** My view is that the comment is correct, however it has to be taken into context of where  
11 the scoping investigation got to before legal advice.
- 12 **Q.** So the comment made by the Detective Inspector I think was the manager of the adult  
13 sexual assault -
- 14 **A.** That's correct.
- 15 **Q.** - team for New Zealand. It's correct coming from him and his expertise?
- 16 **A.** Yes.
- 17 **Q.** And his assessment?
- 18 **A.** Yes.
- 19 **Q.** I'd like to turn now, pull that document down, to -
- 20 **CHAIR:** Can I just ask just for clarification about that. This document was received before you  
21 took over the - became in charge of the investigation.
- 22 **A.** That's correct, yes.
- 23 **Q.** Thank you.
- 24 **QUESTIONING BY MS R THOMAS CONTINUED:** If I can also offer some extra  
25 clarification. The email was - the file was pulled out at Police National Headquarters in  
26 response to an OIA request and reviewed by Detective Inspector -
- 27 **CHAIR:** That answers my next question, why was it commissioned, and it's in response to an  
28 Official Information Act request?
- 29 **QUESTIONING BY MS R THOMAS CONTINUED:** Correct, and Detective Inspector Kirby  
30 undertook that review.
- 31 At paragraph 4.5 of your brief to the Commission, you've talked about the initial  
32 phase of an investigation and the contextual fact-finding part of that. You've said that the  
33 whole circumstances of the matter have to be considered, every available fact must be  
34 considered. And then at paragraph 4.7 you've gone on to say there is a risk of bias and of

1 poor investigation when investigations are conducted without the entire factual picture.  
2 The factual ground work is absolutely essential to a good investigation.

3 I'd now like to put up a document please which is from the United Nations decision  
4 in the case concerning Mr Zentveld. If we could turn to paragraph 9.4 which is at the  
5 bottom. If you could just highlight the very last sentence of para 9.4 starting with - if you  
6 could bring that out. I'll just read the last part of that where it says:

7 "The authorities of the State party made no consistent efforts to establish the facts of  
8 such a - then if you turn to the next page - sensitive historical issue involving the abuse of  
9 children in State care. They have also failed to expressly acknowledge and qualify the  
10 alleged treatment inflicted on the complainant."

11 What is the police's position on this criticism made in this UNCAT decision?

12 A. The UNCAT report in relation to New Zealand Inc response is one part of that. The Police  
13 position is that we, as I've said, have apologised for the failings up until 2010, and we now  
14 have opened up a full reinvestigation.

15 Q. As I read the apology, it specifies certain things that the Police have apologised for, such as  
16 delay, not giving sufficient priority and resource to the case. But it doesn't, for example,  
17 specify an apology for not fully establishing the facts which is effectively the criticism  
18 made here. Do you accept that the 2000 Police investigation did not fully establish the  
19 facts at that time?

20 A. I accept that if the investigation had been widened, certainly one of those factors if the legal  
21 advice was different and the investigation had been widened, then absolutely there would  
22 have been a wider scope and more facts found in the investigation.

23 Q. Prior to the legal advice that was sought at the end of that period, it was actually back in  
24 2006 when the decision to limit the scope was made, so do you accept that that was the  
25 time when a different decision would have more fully established the facts, that Police  
26 decision in 2006 rather than the legal advice?

27 A. Yes, that's correct, a different decision may have resulted in that. But again, in context of  
28 the scoping part of the investigation, you have to start somewhere, but you're correct that a  
29 different decision to resource it immediately and widen it, you're correct.

30 Q. Thank you, you can bring that one down. There's been quite a few questions in relation to  
31 the sexual allegations that were before the Police in the 2000 investigation. Mr Burgess  
32 confirmed he had received 41 complaints of individuals who wanted to complain and he  
33 accepted yesterday - this is at page 759 lines eight to nine of the transcript - that there was  
34 severe allegations of sexual assault of varying kinds. What do you say today on behalf of



1 the New Zealand Police about the Police decision not to investigate those sexual  
2 allegations?

3 A. As I've said in the apology, we apologised for investigations that weren't done correctly  
4 through that time. As part of that, that includes a number of those. I think you heard from  
5 Mr Burgess his reasons for why that didn't occur. Certainly as I've said in my apology  
6 yesterday.

7 **Q.** Just on that in terms of the apology, it specifically acknowledges Paraldehyde as a  
8 punishment that should have been included in the scope from 1977 to 2010, but the Police  
9 apology is silent on the topic of sexual offending. Does the Police now accept any failings  
10 in terms of its 2002 to 2010 investigation into the sexual allegations?

11 A. Each one of those investigations will have to be gone through on its merit and that's  
12 different to the overall apology of what's occurred. Each one of those files would have to  
13 be reviewed now on its merit.

14 **Q.** This Police apology states that the Police did not give sufficient priority to the  
15 investigation, and that led to the delay, eight years. From your own experience, have you  
16 ever led an investigation that has taken eight years to reach a decision?

17 A. No, I haven't.

18 **Q.** It was discussed with Mr Burgess this morning that there were various documents on the  
19 time where there were comments made such as this is not a priority, I'm just doing this on a  
20 part-time basis and comments along those lines. We've been provided with a brief of  
21 evidence from Professor Mike Rowe to the Commission and I'd like to bring up a paragraph  
22 from his brief. Just to set some context here, Professor Mike Rowe is a professor of  
23 criminology and he has provided a witness statement to the Royal Commission. At  
24 paragraph 18, if we could just call that out please. I'll read this one into the record:

25 "In New Zealand such specialist investigation of this kind was not developed, in  
26 relation to child or adult sexual assault investigation, until the 21st century. Many of the  
27 features of those specialist services reflect the problems that existed prior to this time,  
28 including the period covered by the Royal Commission. Key features include that only  
29 officers accredited through high level specialist training can lead abuse-related inquiries  
30 and that such investigations are subject to enhanced management oversight. This oversight  
31 includes more stringent processes such that senior police officers must authorise the  
32 discontinuation of investigations, which is intended to make it less likely that officers will  
33 cease work when those in positions of authority in institutions under investigation  
34 effectively block inquiries (as the international experience demonstrates was a common

1 problem historically). The organisation and practise of abuse-related investigations is  
2 enhanced through the use of case investigation plans reviewed by supervisory officers.  
3 Specialist officers are ring-fenced to such investigations in the way that generalist  
4 detectives are not and there is a limit on the number of cases that can be assigned to officers  
5 as 'open' investigations. This is intended to prevent previous poor practice such that cases  
6 could be ongoing in name only since the volume of work assigned to staff might be too  
7 great for an active investigation to be meaningfully in train."

8 Detective Superintendent, do you have any comment on Professor Rowe's evidence  
9 about the changes that were implemented in the New Zealand Police in the early 2000s to  
10 ensure that files could not be left as ongoing in name only and the changes that were made?

11 A. Only what I've stated by policy that there is national oversight of those files for that  
12 purpose.

13 Q. And there is this enhanced management plan to limit the number of cases that can be  
14 assigned to an individual officer?

15 A. That's right.

16 Q. If those improvements, as outlined by Professor Rowe, were made in the 2000s in  
17 New Zealand, are you able to explain how this Lake Alice investigation was able to  
18 continue for eight years without priority and resources?

19 A. As I've said, we've apologised for the resources that weren't applied, for not applying  
20 priority and resources. Again, there's slight context and difference to the type of  
21 investigation this was to what's being referred to here. I can say no more than the apology  
22 I said yesterday.

23 **CHAIR:** Can I be clear, Superintendent, was this - in 2009 was this a specialist investigation of  
24 the type that Professor Rowe's talking about?

25 A. Not the initial scoping of the investigation wasn't, so the investigation was held by  
26 Detective Superintendent Burgess.

27 Q. No, sorry, I misframed the question. The question is, standing back and looking at the  
28 subject matter of that investigation, did that fall within the category of a specialist  
29 investigation that Professor Rowe's talking about?

30 A. Yes, if the investigation had been conducted and the scope widened and people interviewed  
31 and gone - it would have gone into that category.

32 Q. So when does it get categorised as a specialist investigation?

33 A. It's categorised for what the offence is, so technically it goes under there, but because of the  
34 scope of this investigation to start with, it was treated and held by the Detective

- 1 Superintendent.
- 2 **Q.** So it's not the fact of the type of allegation that's made that makes it a specialist  
3 investigation, it comes in and says child sex offence, for example, regardless of whether it's  
4 been scoped or not?
- 5 A. Yes, that code will dictate that it's that special offence.
- 6 **Q.** So why didn't that happen in this case?
- 7 A. Sorry, I can't answer that.
- 8 **Q.** So - okay, do you think it should have been, looking back?
- 9 A. Looking back going by policy that's exactly what should have happened.
- 10 **Q.** But it slipped through the net?
- 11 A. Yes.
- 12 **Q.** Thank you.
- 13 **QUESTIONING BY MS R THOMAS CONTINUED:** How do the Police today, 2021, ensure  
14 that significant delay in historic investigations do not occur?
- 15 A. With national oversight of files that make sure that we have a consistent approach and with  
16 reporting up. So now by policy of the national oversight and the audit, any similar type  
17 offending has that oversight from both my position and the Assistant Commissioner Crime.
- 18 **Q.** I'm now going to ask you some questions in relation to the 1977 Police file and my friend  
19 has gone through an overview with you already in terms of the Police sequence of events  
20 document. But I'd like to ask you some questions at just a very basic level.
- 21 On any investigation where there are the following three factors, number one, an  
22 allegation from a complainant of wrongdoing, number two, the allegation being accepted or  
23 admitted by a defendant, and number three, expert evidence supporting a prosecution, in  
24 that hypothetical scenario, would you agree ordinarily a prosecution would be pursued?
- 25 A. Well, in those very basic terms you've outlined, yes.
- 26 **Q.** So when we look at the documents from the 1977 Police investigation, we have a document  
27 which I'd like to bring up now which is from Dr Mirams. This is NZP0000795. You can  
28 see it's document dated 19 May 1977. Dr Mirams is the Director of the Division of Mental  
29 Health in New Zealand?
- 30 A. Yes.
- 31 **Q.** If you could bring out please paragraph seven. I'll read out this paragraph for the record:  
32 "It is my present opinion that should it be established any member of the nursing  
33 staff has administered shocks of whatever nature to a patient at Lake Alice, this would  
34 constitute an offence in terms of section 112 of the Mental Health Act and it might be most

1 appropriately dealt with by laying an information with the Police. Whether or not sufficient  
2 evidence will emerge to justify this step is still uncertain."

3 So that is a piece of evidence from Dr Mirams, the Director of the Division of  
4 Mental Health and I'd now like to bring up the next document please, which is ending  
5 332003. This is a document dated June 1977. It relates to a complainant, Mr Banks, and if  
6 we could turn to page two paragraph one.

7 **CHAIR:** This is a formal Police statement is it?

8 **QUESTIONING BY MS R THOMAS CONTINUED:** Yes. I'll just read out some of the part of  
9 this big paragraph here, it states:

10 "I also received what I know as Aversion Therapy or treatment which is the  
11 machine administering shocks through the electrodes which are placed on your thigh of  
12 either leg. This was given to me in the medical room downstairs in Villa 11 which is a  
13 room between the entrance hall and the dining room. This was normally given to me by  
14 Steven Hunt who was the charge nurse and I think also Terry Conlan. I don't know how  
15 many times it was done but it was fairly often. This aversion treatment on the legs as far as  
16 I am concerned was straight out punishment for doing things that I shouldn't have done."

17 Thank you. And if I could now bring up the third document which is document  
18 ending 0767. If you could bring out the - this is an interview between the Detective Butler  
19 with the staff nurse Mr Hunt in 1977. I'll just read into the record what Mr Hunt says:

20 "Mr DD was on a course of ECT by Dr Leeks. I think because of his extreme  
21 psychotic behaviour at times. To my knowledge Mr DD, on Dr Leeks' instructions, was on  
22 occasions given Aversion Therapy (in Dr Leeks absence) mainly for his putting the boot  
23 into one of the other patient boys. It was administered by myself and other senior nursing  
24 staff in the downstairs medical room of Villa 11 which was where the ECT machine was  
25 kept. Electrodes were clamped across the leg below the knee. It would invariably only be  
26 for a tenth of a second. In each case the boy patient was told beforehand the reason why he  
27 was getting the treatment."

28 Thank you, you can pull that down. So based on those three documents there is an  
29 allegation of a complaint from Mr Banks. There is an interview between the detective and  
30 Mr Hunt, the alleged perpetrator, where he accepts that he did give the shocks in the way  
31 alleged by Mr Banks, and the first document I pulled up was from the Director of the  
32 Division of Mental Health saying that if any nurse had administered any shocks in whatever  
33 nature to a patient then that would constitute an offence under that section 112. And yet in  
34 1977 the Police did not file any charges.

1 I understand from the evidence that you've given today it's because the Police relied  
2 on the opinion of Dr McLachlan, is that correct, from your review of the records?

3 A. That's correct.

4 **Q.** And as a result of relying on that opinion decided not to file any charges. I'd just like to  
5 bring up a paragraph from Dr McLachlan's opinion that was not raised before when you  
6 went through that document. If you could bring that one up on the screen, document  
7 ending 0791. If we could turn to page six paragraph one and bring out - it's hard to see, but  
8 to bring out, it starts with the words "It would be appropriate" thank you. I'll just read this  
9 into the record. This is Dr McLachlan's opinion:

10 "It would be appropriate in this connection to comment on Dr Leeks personally as  
11 I know of him. He has been well regarded by psychiatric colleagues and has been accepted  
12 as a psychiatrist with special training, interest and ability in the management and treatment  
13 of young people. On many occasions he has been invited to address medical gatherings on  
14 aspects of his work, and this reflects his standing. Colleagues who know him much better  
15 than I do accept him as a man who is compassionate, concerned for his patients, and  
16 working diligently for their well-being. It would be entirely out of character for him to  
17 undertake the sort of ill motivated practises that are alleged.

18 At the time of these alleged events, he was undoubtedly confronted with a heavy  
19 workload and unable to devote the amount of time and degree of supervision to the  
20 adolescent unit at Lake Alice Hospital that its importance warranted. In fact, he frequently  
21 attended in his own time the better to help his patients. There was no possibility of  
22 additional medical assistance beyond that intermittently available and already used."

23 You can pull that one down thank you. Detective Superintendent Fitzgerald, we all  
24 know that intrinsic to the concept of expert evidence it needs to be impartial and objective.  
25 Do you have any comment in relation to that paragraph I've just read from Dr McLachlan  
26 in terms of his objectivity and impartiality?

27 A. No, I agree that it has to be impartial. My only comment would be you have to judge it in  
28 the context of the 1970s and what was thought of as doctors, what was thought of as correct  
29 by expert evidence. The questioning of doctors - you can't judge that expert opinion in  
30 2021, you have to go back in context to the 1970s. Of course I agree with the  
31 independence, but you have to put it in context.

32 **CHAIR:** So do you think it was acceptable, even in 77, for an expert opinion to be influenced by  
33 personal views of somebody's standing, professional standing?

34 A. No, I don't think it's acceptable, but my comment is that in 1970, the questioning of

1 specialist doctors was not what it is today, and for us to take that on face value would not  
2 be unusual in those times. It's a completely different lens today than 1970.

3 **Q.** No, undoubtedly, completely different lens, yes.

4 **A.** Yes.

5 **CHAIR:** Ms Thomas, we'll need to take a short break at some stage, I'll leave it to you to decide  
6 when it's a time.

7 **MS R THOMAS:** I think now would be a good time to have - would you like a 10 minute break?

8 **CHAIR:** We'll take a 10 minute break.

9 **Adjournment from 3.35 pm to 3.50 pm**

10 **QUESTIONING BY MS R THOMAS CONTINUED:** I'm now going to ask some questions in  
11 relation to 2010. On 22 March 2010 Mr Burgess wrote to the Assistant Commissioner of  
12 investigations recommending that the Lake Alice Child and Adolescent Unit file be filed as  
13 there was insufficient evidence to successfully prosecute a charge of wilful cruelty to a  
14 child. Now on 24 March, so two days later, 24 March 2010 there was a document that I'd  
15 now like to put up on the screen which is a Crown Law document of that date. If you could  
16 turn to paragraph 32.

17 I'll just put this document in context. It is a document where the Crown Health  
18 Financing Agency and the Ministry of Health have been asked to brief the Ministry of  
19 Justice for the Government response to the United Nations Committee Against Torture  
20 about allegations of torture in historical claims. I will read into the record what this  
21 document from Crown Law says at paragraph 32.1:

22 "First, the Lake Alice claimants' allegations that they were subjected to improper  
23 treatment could be verified from the contemporaneous medical records. The records  
24 showed that Dr Leeks was practising a form of Aversion Therapy, using the ECT machine,  
25 that was indefensible even for its time (the 1970s). In the current claims, the allegations are  
26 contested."

27 So with this report from the lawyers for the Government, Crown Law dated 24  
28 March 2010, and Mr Burgess' report two days earlier where he has summarised Aversion  
29 Therapy, which we've seen earlier today up on the screen, as delivering electric shocks to  
30 part parts of a child's body such as their genitals for behaviour such as masturbating, was an  
31 Aversion Therapy treatment; verses this document here which says the record showed that  
32 Dr Leeks was practising a form of Aversion Therapy using the ECT machine that was  
33 indefensible even for its time the 1970s.

34 Do you, Detective Superintendent Fitzgerald, have any comment on those two

- 1 different assessments of the evidence, one from the New Zealand Police and one from the  
2 New Zealand Government written within two days of each other?
- 3 A. Just clarify for me what difference you're referring to?
- 4 **Q.** The difference in that Mr Burgess' report, his summary in relation to Aversion Therapy was  
5 that delivering of electric shocks to parts of a child's body such as their genitals for  
6 behaviour such as masturbating was an Aversion Therapy treatment versus the document  
7 here that says Aversion Therapy using the ECT machine was indefensible even for its time?
- 8 A. Are you referring to the word "treatment" in Mr Burgess' report or - I'm not sure what  
9 you're asking.
- 10 **Q.** Just a general assessment that he gives - I can bring it up, but it was the two paragraphs  
11 we've had up on the screen earlier this morning, he gives a summary of - based on the  
12 Police evidence and file at the time, and he's providing that summary to the legal opinion  
13 writer outlining the Police assessment of the facts and stating that this was Aversion  
14 Therapy.
- 15 A. I'm not sure if that's applying words on the therapy. But I mean you're talking about  
16 Mr Burgess saying that he believed there was evidential sufficiency of the charging, that's  
17 the report you're referring to?
- 18 **Q.** It is the report that he provided to Mr Ian McArthur to request a legal opinion and in that  
19 report he summarised over two paragraphs, based on the evidence on the Police file, a  
20 summary of Aversion Therapy, in his words effectively because he would say things, where  
21 it's stated, electric shocks would be given to a child's body such as their genitals for  
22 behaviour such as masturbation, as Aversion Therapy. So it was his summary of the  
23 therapy and I'm asking whether you have any comment on that assessment in comparison to  
24 the paragraph on the screen?
- 25 A. If I'm right with what you're asking me, my reading of Mr Burgess' report, if you're saying  
26 he's justifying it as therapy, that's not my reading of his report at all, so I'm not sure what  
27 you're referring to.
- 28 **Q.** Perhaps I'll just get his report to confirm. This is Mr Burgess' report where he has stated:  
29 "The third treatment which appears in the notes is what has since been  
30 characterised as Aversion Therapy. It appears this is referred to in the nursing notes as  
31 ECT, Ectonus or Ectonus Therapy. This apparently entailed the ECT machine being used  
32 on a different setting to the setting that would be used to deliver ECT. It involved the  
33 patient receiving an electric shock at a lower level of electric current as a means of  
34 modifying behaviour."

1           Then it goes on to say: "The location in which the electric shock was delivered  
2 during these treatments was apparently determined by the sort of behaviour that led to the  
3 application of the electrodes in the first instance. For example, boys who ran away might  
4 expect to have the electrodes applied to their legs, boys who were caught masturbating or  
5 offended in a sexual fashion could expect to have the electrodes attached to their penis or  
6 their testicles, and boys who were fighting might expect to have the electrodes attached to  
7 their shoulders. These applications of electric shocks are not recorded in the ECT notes but  
8 are often referred to in the nursing notes."

9           So that is the summary that I was referring to in terms of Mr Burgess' report in  
10 March 2010, a summary of Aversion Therapy in his report, and I'm asking whether you  
11 have any comment on that summary in comparison to the quote in the other document  
12 which was the Crown Law document, where they say Aversion Therapy, using the  
13 machine, was indefensible at the time.

14 A. Well, my only comment can be that you have to take this as a summary of some of the  
15 report of what Mr Burgess has outlined. He is in no way, I don't want to speak for  
16 Mr Burgess, but my reading of his report, he is not justifying this treatment, if that's what  
17 you're referring to, in that there's a difference two days later. My reading of his report is far  
18 from that.

19 Q. He's not saying that it's indefensible, though, is he?

20 A. Not in this paragraph, but then he goes on to say that he would like to charge. So I'm not -

21 Q. I haven't read anywhere in his report that he says that the Aversion Therapy was  
22 indefensible for its time.

23 A. No, but I think you're taking a passage out of a summary of a report without the context of  
24 the whole report. If you're somehow implying that Mr Burgess is justifying this, that's not  
25 what my take of his report at all.

26 Q. So are you saying that Mr Burgess did conclude that what was going on was indefensible?

27 A. I'm saying that I think you need to read what he has said in relation to believing there was  
28 enough to charge, to put it into context.

29 Q. I'd now like to move on to the 19 May 2010 where the New Zealand Government officials  
30 appeared at UNCAT. This was an opportunity for the New Zealand Government to  
31 respond to the fifth periodic report which had come out in June 2009. So the New Zealand  
32 State party said, this is in 19 May 2010, that the Government is committed to investigating  
33 allegations of torture and ill treatment, and I'll just summarise it, it's a lengthy paragraph,  
34 but they went on to say:



1 "Such allegations can be pursued against the Government or individuals through  
2 criminal complaint to the New Zealand Police, and through a range of other more  
3 specialised options."

4 So that is what the New Zealand State party are saying at UNCAT in May 2010.  
5 And eight weeks prior to that Mr Burgess has written to the Assistant Commissioner to say  
6 that no charges would be pursued. Are you able to reconcile those two positions?

7 A. No, sorry, I'm not sure what the knowledge was of the person who prepared the report for  
8 UNCAT.

9 Q. Are you aware of whether the New Zealand Police were part of the briefing process to that  
10 UNCAT trip?

11 A. No, I'm not.

12 Q. At paragraph 12.1 of the Police statutory declaration which was filed with the Commission  
13 in December last year, the Police have said: "The Police has a role in assisting the Ministry  
14 of Justice to draft State party responses by providing relevant information to Ministry of  
15 Justice officials."

16 Are you able to comment on why it would seem that the New Zealand officials at  
17 UNCAT in May 2010 had not been assisted by the Police and not been informed of the  
18 Police decision not to prosecute?

19 A. No, sorry, it's not something I have any knowledge of.

20 Q. I'm just going to move on now to 2013 actually, which - just moving through the timeline  
21 from 2010 to 2020. In November of 2013 a Detective Constable of the New Zealand Police  
22 conducted the first evidential interview with a complainant from Lake Alice. This  
23 complainant had come forward to the Police in 2013 with some evidence of what they had  
24 observed and what they described as torture. The report from that evidential interview was  
25 sent to Mr Burgess who was then the Assistant Commissioner and he made a decision that  
26 the case would not be reopened, stating that it was not new evidence and it had already  
27 been dealt with.

28 So this was the first evidential interview of a complainant by the Police in 2013  
29 and the Police chose not to pursue that line of inquiry. Do you have any comment in  
30 relation to that moment in time with the Police and their investigation into Lake Alice?

31 A. No, I would need a lot more detail and a very detailed look before I could comment on that.

32 Q. June 2015 is when the concluding observations of the sixth periodic report of New Zealand  
33 at UNCAT came out, so those observations said to New Zealand that the Committee notes  
34 that the State party - so New Zealand - failed to investigate or hold any individual

1 accountable for the nearly 200 allegations of torture and ill treatment against minors at  
2 Lake Alice Hospital. The observations went on to conclude that the State party should  
3 conduct prompt, impartial and thorough investigations into all allegations of ill treatment in  
4 prisons and healthcare institutions and prosecute persons suspected of ill treatment.

5 So in those documents UNCAT are making observations to the New Zealand  
6 Government in 2015. Are you able to assist us with who at the New Zealand Police would  
7 be briefed about this type of information from UNCAT?

8 A. Well, no, I can't say categorically, I can only give you what I believe would have happened,  
9 so I can't refer to that exact date or time or what would have happened.

10 Q. Just in general, or even today, if something like that was to come out of UNCAT, who at  
11 the New Zealand Police would be responsible?

12 A. I would - my understanding would be that it would be at least at the Deputy Commissioner  
13 level briefing.

14 Q. So the criticism made of New Zealand in that 2015 report that the State party had failed to  
15 hold any individual to account, is it your understanding that that type of criticism ought to  
16 be raised at the Deputy Commissioner level within the Police?

17 A. It's only my opinion that that's probably where it would have been raised, yes.

18 Q. To make them aware of this international criticism?

19 A. [Nods].

20 Q. And you may or not be able to answer this, but were you aware whether that did happen in  
21 this case?

22 A. No, I have no idea.

23 **CHAIR:** Superintendent, do you know if there's any formal process for dealing with situations  
24 like this where New Zealand as a State is responding, is there any arrangement with the  
25 Government in general with the Police about cooperation or information sharing?

26 A. My understanding of New Zealand Inc is that there's three prongs to it, Justice dealing with  
27 that to start with, then it would come to Police for comment.

28 Q. So first it goes to Ministry of Justice?

29 A. Then it would come to us for our comment is my understanding.

30 Q. That is how it should work?

31 A. Yes.

32 Q. And I take it from your answers that you don't know whether it did happen in this case?

33 A. No, sorry, I wasn't involved at this time.

34 Q. Thank you.

1 **QUESTIONING BY MS R THOMAS CONTINUED:** Just moving through the timeline now  
2 on to 2018, in 2018 Sharyn Collis came to the Police and was evidentially interviewed at  
3 that time, and do you accept, however, she initially, via her lawyer, submitted her statement  
4 to the Police in 2002 and it was 16 years later, 2018, when she was first evidentially  
5 interviewed?

6 A. Correct.

7 **Q.** November 2018, I think it's Detective Senior Sergeant Tebbutt was in e-mail  
8 correspondence with the complainant at that time and told the complainant that the Police  
9 would not be investigating his(sic) allegation in relation to Lake Alice which was an  
10 allegation of ECT on the genitals, because that had already been investigated by  
11 Mr Burgess. But then by February 2019, Detective Senior Sergeant Tebbutt e-mailed the  
12 same complainant and said the Police would now take an evidential statement from that  
13 complainant about ECT on the genitals. Are you able to make any comment on this change  
14 of position between the end of 2018 and 2019?

15 A. The only comment I could make is that we started a full investigation in 2019.

16 **Q.** 2019?

17 A. Yeah - 2020, sorry.

18 **Q.** So just before 2020, so we're still in September 2019, the Police received an updated  
19 opinion from Professor Garry Walters?

20 A. [Nods].

21 **Q.** I'd just like that to be put up on the screen please. I just will call out the bit that starts with  
22 "I can confirm." He stated "I can confirm - I'll just read this into the record:

23 "I can confirm that it remains my opinion that applying electrodes on the genitalia  
24 of children as a form of Aversion Therapy was not an accepted medical practice in the  
25 1970s and is not an accepted medical practice now and that in no way could this be justified  
26 as medical treatment."

27 So the Police received this updated opinion in September 2019. Did the Police  
28 consider opening a full investigation on receipt of this?

29 A. I wasn't in New Zealand then. I was working for New Zealand Police in Australia, so my  
30 knowledge of it now is that they were undertaking an investigation, yes.

31 **Q.** And then the next moment in time is 23 January 2020 when the UNCAT decision of  
32 Mr Zentveld is published and I'd like to pull out paragraph 9.9 of that decision please. I'll  
33 just read into the record:

34 "In light of the above, the Committee considers that the State party's failure to

1 conduct an effective investigation into the circumstances surrounding the acts of torture and  
2 ill treatment suffered by the complainant while he was at the Child and Adolescent Unit of  
3 Lake Alice Psychiatric Hospital is incompatible with the State party's obligations under  
4 articles 12, 13 and 14 of the Convention to ensure that the competent authorities proceed to  
5 a prompt and impartial investigation wherever there is reasonable ground to believe that an  
6 act of torture and/or ill treatment has been committed."

7 Detective Superintendent, in light of the matters I've just gone through with you  
8 over the period of 2010 to 2020, what was the catalyst for New Zealand Police to  
9 commence a full and detailed investigation into Lake Alice?

10 A. Well, going back a step, when I took over as the Director Criminal Investigations I was  
11 briefed on an investigation that was underway. Detective Superintendent Tim Anderson,  
12 Detective Inspector Dave Cooper had started an investigation. So it was already underway.  
13 When I was briefed, it was clear to me that the victims of Lake Alice deserved a full  
14 investigation with no stone left unturned and that's what we started and we are still doing.

15 Q. Thank you. If we could take that document down and put up please the apology that you  
16 read out yesterday on behalf of New Zealand Police. Focusing on the part of this apology  
17 here where you've said:

18 "The Police are committed to assessing policy and how national investigations are  
19 resourced and are committed to ensuring that this not happen again."

20 Can you tell us please what does the New Zealand Police mean by "commit to  
21 ensuring that this not happen again"?

22 A. What we mean by that is that we commit the resources needed, as I've said, and prioritise  
23 investigations to ensure that these delays don't happen again.

24 Q. Are you able to comment on whether the Police are committed as a crime prevention  
25 organisation to ensuring the offending against children in State care does not happen again?

26 A. Of course we're committed to crime prevention. Especially vulnerable people.

27 Q. Is the New Zealand Police committed to ensuring the Police failure to thoroughly  
28 investigate and file charges for historic complaints of physical, sexual abuse against  
29 children does not happen again?

30 A. As I've said, we are committed to ensuring those time delays don't happen again.

31 Q. You've noted here that the Police are committed to assessing policy. Can you tell us what  
32 policy you are assessing currently in relation to this apology?

33 A. We've started looking at national investigation policy in relation to mass allegations and  
34 how they're responded to, and how they are resourced.

1 **CHAIR:** Can you tell me, Superintendent, whether it's in the mind of the Police in such instances  
2 where it appears that there's a mass allegation, and these can be incremental, that the Police  
3 would make proactive steps to advertise the fact that you're investigating and call for  
4 people to come forward?

5 A. In most cases that will happen unless there's a reason not to. There's investigations  
6 underway now where that is absolutely happening as we speak, so yeah.

7 **Q.** Thank you. So that survivors out there who might not over otherwise know can be alerted.

8 A. Absolutely, yes.

9 **Q.** Thank you.

10 **QUESTIONING BY MS R THOMAS CONTINUED:** This apology that you've given of Police  
11 failings, where do you say the causes of those failings come from? Are they just from  
12 policy and resourcing or anything else?

13 A. As I've stated, prioritising and resourcing would have taken the investigations further in a  
14 timely manner.

15 **Q.** Is it just a policy issue or is it also a culture issue that might need to be addressed, in terms  
16 of what you've noted here in this apology? You've said here the Police are committed to  
17 assessing policy. My question is, do you think the Police also may need to assess culture  
18 within the Police?

19 A. What culture are you referring to?

20 **Q.** We've heard today in the questions that were asked of Mr Burgess that looking through the  
21 documents on this file there were significant focus on credibility of the survivors, for  
22 example, there were comments made under such a heading that they were disadvantaged or  
23 come from dysfunctional families, backgrounds, or comments along the fact that  
24 difficulties investigating this file were compounded because these people had psychiatric  
25 illnesses. So those types of comments. Are you able to make any comment in relation to  
26 that being a culture problem within the Police or not?

27 A. I am. Mr Burgess, I don't want to talk for him, he answered the question in relation to facts.  
28 What I can tell you is that my team and every investigator I know that works for me would  
29 in no way pass judgment on someone because of what they'd been through, far from it. We  
30 have full empathy for every victim of Lake Alice. And in no way would we - documenting  
31 those facts does not take away the empathy Police have for victims in any way. So  
32 I completely disagree that we have a culture, we have a very victim-focused culture and a  
33 dedicated team of people who absolutely empathise with everything that's happened to  
34 those victims.

1 **Q.** We have heard evidence in the course of this hearing over the last two weeks from  
2 survivors who said that they approached front counters of Police Stations at various times  
3 over the last decades wanting to make a complaint and they were effectively fobbed off,  
4 that was their words, as not being credible or because of gang connections they weren't  
5 listened to. Now I acknowledge it's noted in your brief of evidence that since 2017 the  
6 Police have implemented training for all front counter staff in terms of adult sexual assault  
7 training. Are you able to tell us whether the Police is in the process of improving  
8 engagement with vulnerable complainants or witnesses in any other ways or has done so  
9 already?

10 **A.** Certainly the training and the training standards are in place and have been in place for  
11 some time. It's really difficult for me to comment on individual cases that you refer to. I'm  
12 not going to sit here and say we're perfect and everybody turning up at a station - I'd be  
13 very disappointed if someone turned up with serious allegations in recent times and that  
14 occurred, very disappointed and it would be dealt with. But it's certainly not a culture.

15 **Q.** Just one final question, Detective Superintendent. On reflection now, do the Police have  
16 any other comment on the reasons why not all of the serious allegations of sexual  
17 offending, physical assaults and torture for children were thoroughly investigated?

18 **A.** No.

19 **Q.** Thank you. If you just remain there, I think Ms Joychild has some questions.

20 **CHAIR:** Thank you Ms Joychild.

21 **QUESTIONING BY MS JOYCHILD:** Good afternoon Superintendent. My name's Frances  
22 Joychild, I'm counsel for the survivors. I've just got a couple of questions to ask you. In  
23 your just most recent - one of the recent answers to a question you said that a new  
24 investigation was actually opened in 2019; is that correct?

25 **A.** Investigation had started before I returned in 2020, yes.

26 **Q.** This was another Police investigation to the one that Mr Burgess closed off?

27 **A.** That's correct.

28 **Q.** And then the UNCAT came along and is that when you got involved in it, after the UNCAT  
29 decision?

30 **A.** I got involved when I took over the position of Director of Criminal Investigations.

31 **Q.** Right, that was in January 2020?

32 **A.** February.

33 **Q.** February. I think, Superintendent, I've spoken to you once, but I get lots of reports from  
34 my clients who speak to you as well. And there has been constant hope that this

1 investigation will be completed in a much more timely way. At one stage Counsel  
2 understood it was going to be completed in about mid-last year. And then - but it's going  
3 on and on and on. So we're now in the really disappointing situation for our clients that we  
4 don't have an outcome before the Royal Commission. Were you concerned to try and get a  
5 decision before the Royal Commission sat?

6 A. They're both completely separate, but I share your concern and the delay is something my  
7 team and I have tried everything we can to get it to a conclusion. There is a number of  
8 reasons in relation to the investigation that has to be done properly, and unfortunately it has  
9 taken longer than we all wanted. So I share the frustration of the victims, but I can assure  
10 you that the team is dedicated to doing this and doing it right. Unfortunately that's taken  
11 longer than we hoped.

12 Q. This week, of course, clients rang me on Wednesday evening because the Police were  
13 starting to call people to tell them that a decision is imminent and you have said that  
14 yourself. Can you tell us what the decision is?

15 A. No.

16 Q. Why not?

17 A. Because the decision hasn't been finalised yet and it would not be appropriate for me, even  
18 if it had, to say it now.

19 Q. Why wouldn't it be appropriate?

20 A. Because we want to inform the victims in person when that final decision is reached.

21 Q. Mr Zentveld yesterday said in his evidence that he would like the Police to tell the Royal  
22 Commission the decision. It's obviously enormous - it creates enormous anxiety for the  
23 survivors the longer they wait for it.

24 A. I absolutely agree and as I've said, we're going as quick as we can and we hope that in early  
25 July we'll have the answer.

26 Q. Okay, well just one last question, and it's not meant to be insulting, but it has to be asked,  
27 and that is, are the New Zealand Police playing the Commission by not giving this - I mean  
28 really we're two weeks out when you are going to make the decision, why couldn't it have  
29 been made two weeks earlier?

30 A. I'm pleased it wasn't supposed to be insulting. Absolutely not, this is an investigation  
31 where we've got the victims at heart and we are trying our best to tell them as soon as  
32 possible. What's happening amount the submission is absolutely important but the  
33 investigation stands on its own.

34 Q. It does have the great misfortune that there can be no scrutiny of this investigation by the

1 Commission, can there?

2 A. The investigation will stand in its own scrutiny in time.

3 Q. It would be unfortunate if we had to have another inquiry into the investigation, it would  
4 have been good if it all could have been wrapped up in one for the survivors.

5 A. As I've said, they're completely different entities, we run an investigation based on facts  
6 and making sure we do it right. We can't run an investigation and have it early to have an  
7 answer to the Commission, unfortunately that's not the way it works.

8 Q. Thank you, I've got no further questions.

9 CHAIR: Ms Thomas or perhaps Mr Molloy, would you like to comment on the ability of the  
10 Inquiry to continue to look into matters once the hearing is over?

11 MR MOLLOY: Ma'am, I think we probably need to take - we would have to look at that  
12 carefully. I see no reason why it couldn't, given that the Inquiry is ongoing. I take  
13 Detective Superintendent's Fitzgerald's point, he's got his investigation to run, but I don't  
14 see that that precludes us looking at it at a later date should it become appropriate to do so.

15 CHAIR: Yes, I think the point being that although this is a public hearing and a very important  
16 one, and that it will end probably next Tuesday, it does not mark the end of the  
17 investigation. That continues on, including looking at material that is coming in as we  
18 speak, as well as historic material. So that's just a matter of reassurance for people that  
19 think that come Tuesday it's all over. I think you'd agree, Mr Molloy, that it is not.

20 MR MOLLOY: Absolutely, ma'am, we made that point very clear at the beginning that this is a  
21 snapshot of our Inquiry, it's not the beginning or the end of it.

22 CHAIR: Yes, thank you. Ms Feint.

23 MS FEINT: Thank you, I just have a few questions in re-examination.

24 CHAIR: Yes.

25 QUESTIONING BY MS FEINT CONTINUED: First of all, Superintendent, just to pick up on  
26 the thread of that last conversation, are the Police willing to cooperate if the Commission  
27 does have further questions for the Police once your investigation is completed?

28 A. Absolutely.

29 Q. Thank you. Can I please ask if the wizards running Relativity can bring up Detective  
30 Superintendent Burgess' report of 14 September 2009, it's NZP000308. Just while we wait  
31 for that, in the afternoon adjournment, Madam Chair, I had a call from Ms Hughes QC and  
32 she said that she had been instructed by Detective Superintendent Lawrence Reid to correct  
33 an error in the record, and that is the date at which he got the file within New Zealand  
34 Police, and I don't anticipate that's a controversial point because it is in the document



1 record.

2 **CHAIR:** I don't have his brief of evidence with me at this moment, so -

3 **QUESTIONING BY MS FEINT CONTINUED:** He doesn't mention the exact date in his brief,  
4 but - perhaps I could ask the Superintendent first if he knows off the top of his head what  
5 date that was?

6 A. I don't I'm sorry.

7 **Q.** All right, I have been sent a letter that is on the record and I don't think we need to go there  
8 unless you want me to, but it's the letter -

9 **CHAIR:** Is this a critical matter that needs to be dealt with at this moment or can it be dealt with  
10 afterwards by talking to counsel?

11 **MS FEINT:** I could just simply read it into the record if you're happy with that, it's just -

12 **CHAIR:** Who's the letter from?

13 **MS FEINT:** It's from Superintendent Graham Emery to the Deputy Commissioner Long, and it's  
14 dated 25 March 2003 indicating that he's going to transfer the file to Detective  
15 Superintendent Larry Reid to head the investigation. And the document number for  
16 relativity is NZP0000065. I don't think we need to bring that document up.

17 **CHAIR:** It's coming anyway. So the point of Ms Hughes' instructions is what?

18 **MS FEINT:** I understand from what she said that at some point in the questioning today it was  
19 put that Detective Superintendent Reid got the file in 2002 and he has pointed out that no,  
20 he got the file in March 2003.

21 **CHAIR:** Okay, all right, I don't think anyone's going to die in the ditch over that. Let's record that  
22 for the record and we can move on.

23 **MS FEINT:** Indeed.

24 **CHAIR:** Unless you've got any objection Superintendent?

25 A. No.

26 **Q.** Do you know anything at all about this?

27 A. No.

28 **Q.** Yes, I thought not.

29 **QUESTIONING BY MS FEINT CONTINUED:** If we could go back to that document I had  
30 asked to be put up, which has now disappeared. So this is, to orientate everyone, this is the  
31 report that Detective Superintendent Burgess sent to Mr McArthur when he was seeking the  
32 legal opinion, and Superintendent, you were asked a number of questions by Ms Thomas  
33 about the difference between what Mr Burgess said in his report and what UNCAT said  
34 concerning the fact that what had happened could be never justified as Aversion Therapy.

1 **CHAIR:** UNCAT or Crown Law Office?

2 **MS FEINT:** Sorry, my apologies, I've written it down as UNCAT but I'm told it was Crown Law.

3 **CHAIR:** You've elevated the office somewhat.

4 **MS FEINT:** Indeed. My notes get more ragged as the afternoon goes on.

5 **CHAIR:** Indeed.

6 **QUESTIONING BY MS FEINT CONTINUED:** If we could go to page seven please and can  
7 we highlight the paragraph under the heading "The law" halfway down the page. So I'll  
8 just read into the record what it says:

9 "The application of ECT treatment in its unmodified form as a punishment and/or  
10 the application of electric shocks as some form of Aversion Therapy appears to justify  
11 consideration of charges pursuant to sections 195 or 197 of the Crimes Act 1961 and/or the  
12 Crimes of Torture Act 1989. It seems clear from public comment, and his response to  
13 earlier inquiries, that Dr Leeks will claim that the application of these treatments was done  
14 on medical grounds or as a form of Aversion Therapy."

15 So my question, Superintendent, is having read that paragraph, does that inform you  
16 as to why Mr Burgess was referring to Aversion Therapy as a possible treatment?

17 A. It puts into context why he summarised what Aversion Therapy is, yes.

18 **Q.** And why would he refer to potential defences that Dr Leeks may bring?

19 A. They're very live matters in relation to this type of inquiry where he may have a defence.

20 **Q.** Thank you. And then just for the sake of completeness, because we haven't seen this  
21 conclusion in the hearing, if we go to the conclusions on the final page please. And  
22 Superintendent Burgess says at number one:

23 "Based on the complainants' accounts there is prima facie evidence that 31 of the 41  
24 complainants were punished by the application of ECT Or Aversion Therapy."

25 Then he says in paragraph three:

26 "Notwithstanding that conservative approach there is evidence in seven cases that  
27 goes beyond prima facie that is considered capable of supporting a charge or charges on the  
28 basis of evidential sufficiency."

29 So what's your understanding of what he's saying there, Mr Burgess - I mean, sorry,  
30 Superintendent Fitzgerald?

31 A. My reading of that report is fairly clear, that Mr Burgess is very strong in the fact that there  
32 is evidential sufficiency for those cases.

33 **Q.** Thank you. And then Ms Thomas asked you a number of questions about whether you  
34 thought Detective Superintendent Burgess had thoroughly investigated those seven charges

1 and she also put to you that he hadn't fully investigated all the facts. So my question is, if  
2 his recommendation to lay charges had been endorsed by the legal advice, what would have  
3 been the next steps to bring the charges to prosecution?

4 A. I have no doubt, and from reading reports from Mr Burgess, where on a number of  
5 occasions he says further investigation will be required. And had that been accepted and a  
6 prosecution started, there would have been a significant investigation, including the  
7 interviewing of all those - reinterviewing the complainants.

8 Q. And if further allegations or facts come to light that might support further charges as part of  
9 that additional investigation, would it be possible for Police to lay additional charges at a  
10 later point?

11 A. Yes.

12 Q. Thank you very much for your evidence, Superintendent, I have no further questions.

13 CHAIR: Thank you. Somebody mentioned that it was Friday afternoon and it is and it's been a  
14 long week, but it's important for us as Commissioners to thank you, Superintendent. You  
15 came into this at a relatively late stage in the nearly 50 years of its history, but I think all  
16 survivors are happy at least that it is being properly investigated, and according to you it is  
17 being properly investigated, and that is at least some progress. Everybody awaits the  
18 outcome with much interest.

19 I'm grateful to you for your indication that should the Inquiry need to get more  
20 information from you and the New Zealand Police that you'd be willing to cooperate and  
21 that's nothing more than we would expect, but I have to say that that is gratefully received  
22 today. Thank you for your evidence, dry as it was, it turned out to be extremely  
23 interesting, and again, added another important piece to the jigsaw puzzle that we're putting  
24 together about this, so thank you very much indeed. Mr Molloy.

25 MR MOLLOY: Ma'am, I'll just add a very short coda to that. Detective Superintendent Fitzgerald has his  
26 own investigation to run, as do we. We've kept a distance, we've had limited contact. I would  
27 simply say that when I have made contact with him it's been cordial, it's been cooperative and it's  
28 been helpful and I think that's probably important for people to hear as well.

29 CHAIR: Absolutely, thank you for that, and I can say that from my experience, what little I have, I've seen  
30 quite a lot, the massive amount of documentation that's been provided has almost swamped the  
31 Commission and although it's uncomfortable, it's been gratefully received so thank you for that. E  
32 pa, haere mai.

33 **Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei**

34 **Hearing adjourned at 4.37 pm to Monday, 28 June 2021 at 10 am**