ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter	**of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions**
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes, Mr Andrew Molloy, Mr Tom Powell and Ms Danielle Kelly
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	3 November 2020

TRANSCRIPT OF PROCEEDINGS

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(Opening waiata and karakia)

CHAIR: Āta mārie, tēnei te mihi ki ā koutou katoa,tēnā koutou katoa. Tēnā koe, Mr Mount, and good morning to you Solicitor-General.

A. Tena koutou.

UNA RUSTOM JAGOSE
QUESTIONED BY MR MOUNT

Q. Solicitor-General, tēnā koe.

A. Tena koe.

Q. As you might imagine, I have quite a number of questions to ask on behalf of the Commission and I'm sure, like me, you would welcome any questions from the Commissioners directly as points arise.

I will generally try to keep my questions as short as I can but I'm going to start with a long question and the reason for that is I want to try to summarise what the Commissioners have heard over quite a long time in private sessions and in a public forum, such as this public hearing, and to offer you the opportunity to respond on behalf of the Crown in an overall way. Rest assured we will come back to the detail over the next day or two.

Broadly, what the Commissioners have heard, is that the claimant group is diverse but many of the claimants include some of our most vulnerable people, many of them Māori.

As a group, they have been people in care of our State and in that situation they have found themselves to be the victims of crime, sexual assaults, physical assaults and other serious deficiencies in care.

At some points in their lives, they have turned to the State looking for some form of redress for what has happened to them because, for many, the impact of the abuse they suffered and neglect has been extremely serious in their lives.

Many have told us that there have been some positives about their experience and, indeed, that they have had very high expectations of the Crown, that it would respond with integrity, that it would admit mistakes where they have been made and that the Crown would want to put right the serious harm that has been done. But in very large numbers, people have told the Commissioners that they have struggled. They have struggled first to understand, in a coherent way, what the Crown's processes will be and, indeed, they've often found seemingly inconsistent or even arbitrary processes.

When they have asked for information, including information about their own documents, files, the records of their lives, they have struggled.

And for those who have chosen, as is their right, to file a lawsuit against the Crown, often with those high expectations that I mentioned, what they have found has been long delay, a highly legalistic response from the Crown, the use of what they perceive to be technical defences, an aggressive stance, sometimes aggressive questioning in a courtroom situation, or what have seemed to be strategic or tactical decisions by the Crown in the way that the litigation process has played out.

They have met virtually no culturally informed response and their perception has been, including from the Crown Law Office, that the general attitude has been one of disbelief, a starting point that their complaint is incorrect, exaggerated, perhaps false. And a perception that the Crown has been focused on itself, focused on what it would describe as legal risk or civil liability, the possibility that the Crown might have to pay money.

And at the end of the process where many of them have been left, has been with offers that to them have seemed like take it or leave it offers. And for many, they have told us that they had little choice but to accept those offers because the Crown's conduct of the litigation essentially ruled out the courts as a reasonable option for them to turn to.

And the result of all of that has been some very angry people with very dim views of the Crown, and specifically the Crown Law Office and the calls which ultimately, in part, have led to this Royal Commission.

So, that in a nutshell is the narrative that has been heard by this Royal Commission and, as I say, I want to offer you as Solicitor-General the opportunity to respond in a global way, if you wish, to that.

A. Kia ora, Mr Mount, thank you. Tena koutou, Commissioners. If I can address Mr Mount's nutshell narrative to the Commissioners direct. It touches on a number of the matters that we have engaged in already yesterday and I have already acknowledged, and acknowledge again, the pain and suffering that we've heard, through this Inquiry primarily but also through our conduct in the Crown Law Office of the litigation, and I just want to acknowledge that. The anger that Mr Mount just mentioned at the end there, I acknowledge that too.

I do want to point out that my appearance in the Inquiry is about the litigation and the matters that the Solicitor-General can speak to. And, as in the exchange with Commissioner Erueti yesterday, the Crown unhelpfully is said as one thing but is multifaceted and must speak as one but some of the questions or the comments from Mr Mount earlier might also need to be put to other parts of the Crown, for example the emphasis that many of the survivors have been victims of crime, of course that part of the Crown that deals with that is not the Solicitor-General of the

Crown Office, but the Police. I don't mean that as an excuse but just to say there are other avenues to get the full Crown answer to this question.

And I acknowledge and I hear it very strongly that what survivors are looking for and have been looking for is redress from the State to address the impact that the State had on them, often as children, not always, but the impact that the State has had on them.

And I come to the point quite readily that I addressed the Commissioners about yesterday, is that when we are at the point that litigation is the vehicle, it is ill-suited to deliver what survivors want. That's not to say that it never will provide redress that addresses the impact, but its very nature is adversarial, not inquisitorial. A contest between parties who can't agree, being put to a third person to determine, by its very nature, delivers up these features that are, and I understand it and I see it, are hard.

Mr Mount mentioned the challenges about understanding the process and that the claimants find it difficult to navigate the processes. I think the Crown has been working to that end, but can do more about explaining and making it clear what processes are available.

The litigation process is murky to people outside it and challenging, and I hope that survivors who choose the litigation model do that clear eyed about what it will require of them because I don't doubt for a moment that it is challenging to stand in front of strangers and tell of your most intimate story from which a great vulnerability comes.

The system of litigation can deal with those things to some extent. We get better at that, although I must say not in civil litigation and certainly not in these cases, the last one as we know having been heard in 2008 and 2009, I think. There was no different method put in place for the hearing of that evidence. Maybe that's something to explore.

Certainly, the litigation system in the criminal law has moved along, as I think I've already addressed.

And I was struck by Mr Mount's comment that survivors find it difficult in relation to their records. I think there might be two parts for my comment on that.

One is that I understand that there's been frustration in the delays in getting records and also a frustration in the record appearing - yes, appearing with deletions or redactions in order to protect privacy of other people referred to in the record. Those are frustrations that we can perhaps do better with, although sometimes the passage of time means the record might not be as good as it should be.

But I also get the sense that just receiving the record itself might be very challenging for people who for decades have not seen what is said about them, so they have their own traumatic experience that they want to and need to obtain redress in, and then a further process is gone through in which they get to see how they have been referred to in a public record. And I can understand that that is challenging but it brings me back to a question about wanting - I absolutely understand wanting redress from the State to address the impact that the State has had on you. We don't yet have a process that I am aware of that starts that process in a way that sort of begins in a more therapeutic or empathic fashion because, as lawyers, the time-honoured approach of saying "Here are all the materials about you or relevant to your case" is actually, I understand, very challenging. And so, I keep coming to this point and it's not to excuse it but to say litigation, the way we do it, maybe that needs to be turned on its head. But the way that this system of civil law in New Zealand does litigation starts that way, with a statement and the records that the parties say are relevant to that record. Very

challenging and should that be done through lawyers? Should that be done through other professionals?

The question for you, if I may, about how do we start that process off?

Anyway, I'll keep going, if I may.

So, we can do better about helping people understand what the processes are that are available to them, so that they can make choices and clear eyed choices about what might be required of them in each of those processes.

Mr Mount mentioned that the experience is of a highly legalistic response and I acknowledge that that is so. That is so when the first approach is also a legal one, as I mentioned in my evidence yesterday, back in the early 2000s or perhaps 1990s we, the Crown Law Office, was receiving files, so the first thing we knew was a filed claim. It's a step in the legal process and so the next step was the legal step as well.

We have changed that process, to the point where it is no longer required that people who want to engage with the Crown on a redress option have to file claims in order to enter the informal processes, nor with the stopping of the clock agreement that we have already discussed, even to preserve their litigation option, if that's what they want to take.

So, we have put in some places systems to ameliorate, you know, to listen the impact of those very legalistic responses but, again, of course, litigation is full of legalistic steps. I'm not saying that therefore they have to be brutal and unpleasant but at their core, they require a certain discipline and a certain set of standards of what is being said, what is being alleged, what does the defence say and why.

To that end, you know, there have been times where, you know, when I've looked through a lot of the record in preparation for this Inquiry, you see tone and - I mention

tone in one of my own letters yesterday - you see tone and language that is not on its face empathic and we see frustrations being expressed by lawyers with other lawyers. And I do want to draw the distinction between a frustration between lawyers in doing their work and being motivated by a lack of empathy for the person. I say that a distinction should be drawn, although I do understand it is hard for that to be seen on the record. But it's not about lawyers, this case shouldn't be about lawyers and how we feel about each other. It should be about providing opportunities for survivors to get redress from the State for the impact of the State on them.

But I just want to make the point about aggressiveness. It is often said that litigation is aggressive but the reverse of that or the opposite of that might be, well, I see that as saying but litigation steps can't be too passive because the matter, if it's going to litigation, you do need to elevate for the Court the areas in which the Court is going to need to determine a contest between two parties. That is hard to do in a passive way, but it is easy to do in a polite and respectful way.

And my ambition and my own professional experience tells me that Crown lawyers sometimes miss the mark but mostly hit the mark of empathy to the individual and politeness in expression. But aggressive as, sort of, angry and ugly, is not the right sort of way to put forceful steps in litigation. They can still be not passive and be polite.

I heard and I've already addressed yesterday the challenge or the criticism about technical defences and tactical decisions about the process. I don't know that I can say more than I said yesterday, that they are legitimate steps in litigation. Whether you call them tactics or steps in litigation, I don't think that's underlying a bad faith motive to take steps to defend claims.

I've already addressed defences that are said to be tactical that I say, particularly the limitation defences is the particular one that gets called out as a tactical defence, to say that it is a substantive policy laden reason, encouraging the balance between pursuing claims with due diligence, acknowledging that there are those exceptions that can be provided for, and not requiring defendants, particularly institutional defendants, having to answer for allegations that they can no longer defend themselves against through passage of time.

There is a strong policy rationale there, but I have also addressed the change in the law, where that balance has shifted in relation to sexual crimes and physical crimes. And there is work being done by the Ministry of Justice to think, have we got that right yet?

I heard from Mr Mount and I've heard it from the survivors too that we are yet to see a culturally informed response in the litigation, I accept that. The courts are, and the litigation process is, now starting to grapple with, in different parts of the law, the impact of the law on Māori, the tikanga and the role for New Zealand common law to develop consistent with tikanga. That is starting to happen.

In the informal processes, there has been more of an effort and doubtless more can be done to bring a better cultural understanding to the engagements with individuals and their whanau.

Coming to some particular points that I understood about the Crown Law Office. The feeling from survivors is that the starting point is that they aren't believed or the Crown Law Office or the Crown lawyers start from a position of disbelief. That isn't the case. There isn't a thinking or a mindset that we're starting from having to bat away wrong or made up allegations but that process does require a person to say "I say these 5 things", the defendant to say I

agree with them or disagree with them or I look at the record and I don't know what to say, we need to keep going further down the process.

It's always the process that sets up that view, so I understand it, that a claim is met by a defence and sometimes the defence will be that we don't know enough and we need to keep going through the process. But that is different from starting from at position of not believing. Rather, starting from a formal process that brings out, over time, litigation does move through its paces delivering different perspectives and agreed facts and challenged facts from when the parties begin. The case will be quite different usually by the time it gets into court, if it gets there.

Mr Mount mentioned the Crown focused on itself in relation to legal risk and civil liability and expenditure of money, and I accept that that has been, and is always, the Crown's view about what is our obligation here and what is our exposure? What should we do and how do we decide what resources should be - resources like money and people should be spent dealing with this issue, as opposed to other issues? That is a classic policy choice for governments and they stand or fall at the ballot box of course on how the public views those choices.

While Mr Mount put it as the Crown being focused on itself, I wouldn't accept that sort of very self, sort of, Crown centred view, but it is a natural way of executive government thinking about all of the matters that it deals with and where it wants to put its resources.

And finally, Mr Mount was addressing that at the end of the process people are often faced with what they perceive as take it or leave it offers of settlement and that the Crown's conduct rules out the courts as a reasonable option.

I addressed the first of those points yesterday. Perhaps we need to revisit this approach. The Crown's approach on

offering settlements has long been that we shouldn't make people get into a bargaining match with us. We will do our best to come up with the package of settlement offer that is thought to be fair, is thought to be consistent with others and is reasonable and make that as the offer, on the basis that there isn't sort of - we're not putting the survivor into a negotiation with the Crown. It was supposed to be a good thing, but I am hearing that it's being perceived differently.

But also, I observe that the Crown Resolution Strategy has expressly dealt with part of that to say if you have settled a matter and some aspect is not dealt with, the Crown is open to that being revisited. So, again, perhaps listening to some of that concern of take this and then that's it. But also, the proposition from Mr Mount that the Crown's conduct rules out the Courts as a reasonable option. The litigation steps don't do that. There are many things that say that the courts are not an easy option, litigation, as I've already mentioned, by its very nature, but also the legislative landscape that I covered yesterday, in particular ACC, the law of tort and what are the sorts of and positions on the person or the person's interests for which the law recognises some redress.

And so, the courts as a reasonable option is a proposition that, you know, I invite the Commissioners to think about, as I'm sure you will, to help with this question, help everyone with this question about is the court a reasonable option? Is that really the answer to this hard question facing us and facing society, that we must face, about survivors who are wanting, demanding and fighting for something that helps them relieve the impact that the State has had on them.

The courts might not be the reasonable option and I accept that at the beginning of this sort of narrative, late 1990s, it was really the only one we had and so I'm not

critical at all that some claims were filed to test those waters. There are different options in place.

I think you'll see from the Crown's Resolution Strategy that the Crown is open to thinking about what other methods and other things, other professionals need to be put into this mix in order to work out redress options that work, that provide the therapeutic and - I feel like therapeutic sounds condescending but the meaningful redress option that is being sought.

And I have to hear it, that a very dim view has been formed, as Mr Mount said, of the Crown Law Office, and I am responsible for that. And in my approach to these things, I see my colleagues actually working hard and diligently with considerable empathy for individuals' experiences but I understand that that gets hidden from those individuals through a process which looks very hard and uncompromising, and it probably doesn't mean much to the survivors to say that I hear that and I am committed to, and have always been, and work with a whole lot of other people also committed to an empathy for people in society for whatever reason who aren't as privileged as we are. We see that and that is certainly part of our professional practice as lawyers.

Just can I make one more point before I come back to Mr Mount. Lawyers themselves have changed over years about how we deal with each other. I mean, over the last few years we've come to some pretty grim revelations about ourselves, about how we speak with each other, how we work with each other. I think that is changing. That better politeness between lawyers, rather than aggressive dashed off letters that are "you're wrong and I'm right". I think we're seeing less than that, I hope we do. I think as people we need to do better there and that is a shift in our profession too that might be relevant to this Inquiry.

Thank you.

Q. As I say, we have a couple of days at least set aside now to go through many of those points. It may be helpful for me to say that the broad structure of the questions will be in four parts.

Firstly, to look at the way that the Crown has conducted historic abuse litigation.

Secondly, to look at the Crown's approach to policy and strategic questions at a high level.

Thirdly, the Crown's approach to Treaty and human rights questions and perhaps a broader view of the rule of law.

And then finally, the future.

And it's perhaps also worth emphasising that while all Inquiries have a backwards looking function, as well as a forward perspective, even the backwards looking material which we will go over in a lot of detail looking at documents and so on, even that at its core is not purely backwards looking. We will always be looking for opportunities that this can be done better, if that makes sense.

I should also say that as we encounter policy questions for the future, which inevitably we will, this Inquiry will have further processes next year and coming months that will revisit many of these policy questions. And so, I realise some of them will be too big for us to get to the bottom of them in this forum but just to reassure you that we will be able to come back to many of them.

And perhaps lastly in this extended preamble, there are some other topics that we will be coming back to next year. They, of course, include the Lake Alice Child and Adolescent Unit, there will be a whole hearing on that topic next year, so we will talk about Lake Alice today and tomorrow, it's very relevant to this topic, but in fact it's so important we will be coming back to it.

The first topic then is the way the Crown has conducted historic litigation. And to set the scene for this,

yesterday you said, I think quite rightly, if I may, that there are high expectations on the Crown and that you embrace those high expectations in terms of the Crown's conduct.

You mentioned the review by Miriam Dean and David Cochrane in 2012 and I just wanted to put that up on the screen. We have Ms Wills in the area there with you and she will help you find hard copies of all these documents to turn to, so that if you want to see the broader context you can but I'm sure you will remember this document, a review in February 2012 of the Crown Law Office?

A. I do.

Q. If we turn over to page 27 of the electronic document, there is the section, see the heading, "Being a model litigant", if we just zoom in on that. You will see the reviewers noting 6.12, "It is generally accepted that the government and its lawyers should behave as "model litigants".

And they explain that that meant observing notions of fair play and not to win at all costs but rather ensuring that justice is done.

Would you accept that as a reasonable summary of a model litigant concept?

A. I agree, I think I said yesterday that at its broadest, the sort of most agreed version of what is a model litigant is that idea of fair play.

I think the idea of ensuring justice is done and not winning at all costs actually is something that sort of sounds more readily, at least to my ear, in the idea of Crown lawyers as criminal prosecutors because there is a very strong principle in criminal law to that the role of the prosecutor isn't to win. The role of the prosecutor is to make sure it is the court who has all the right material in order to find, convict or otherwise, the defendant in front of them.

And that paragraph from the Dean Review has always struck me as referring to that very serious obligations on the Crown as the prosecutor but I can accept that the Crown as a civil litigator also has to behave fairly, as I've already acknowledged. And winning isn't really - and winning at all costs isn't really sort of the language that I would use to describe defending a claim and testing the evidence and testing the law as it applies to the facts. That's more about defending a claim consistent with the law and instructions. So, I don't recognise civil litigation in that phrase.

As you will see, it goes on at 6.13 or is it 6.14, specifically about the criminal prosecution function.

Q. Yes, I think it's 6.14, talking about the criminal law but 6.13 certainly does refer to a reported perception that Crown Law at that time, 2012, did not always adhere to the model litigant model and the reviewers wanted the Office to know that there was a perception that sometimes the Crown Law Office is driven too much by the wish to win. Of course, it's recorded that Crown Law rejected that criticism.

Did you, at Crown Law at the time, perceive that concern that there was too much of a wish to win?

A. I don't now remember what I thought at the time, so I can't quite answer except as I have today, which is to say I don't think it is the right characterisation to say driven too much by the wish to win when a desire is, if we're instructed to defend, to defend the matter and to have the law apply to the facts as we think the law should apply.

And I am probably doing exactly what the Crown Law Office did, as recorded in 6.13. It is not a perspective that I share about how the Crown Law Office lawyers or the Crown's lawyers go about its role.

Q. Today, if you perceived within the office a sense that people did have a win at all costs approach to litigation, would you regard that as something of concern?
A. What do you mean by win at all costs? I mean, I would agree if that meant hide relevant material, just keep pressing on with the might of the Crown until you burn off a person with less money. Those are not model litigant practices, so I find "win at all costs" is a phrase that will mean different this thing to different people. As I've already said, the criticism that it would cost more to defend an individual case than it would be to pay the person a of money, I don't think that is a win at all costs concept, so you might want to unpack what that expression means.
Q. Perhaps we're best to look at specific instances as we go through the questions.
If we move over to the next page of this document, the recommendation from the review at 6.17, the third bullet, was a recommendation to publish a model litigant guideline similar to Australian policies.
A. Mm.
Q. I think it was about a year and a half before the Attorney-General values on litigation was published and I think you established yesterday that the Attorney-General's values document was the response to this litigation; is that right?
A. Yes.
Q. Were you involved in, or aware of the process that led to the Attorney-General's values document?
A. I certainly would have been aware of the process, yes. I doubtless would have had a role in it as well, although I am not sure I recall precisely what that was but at that time I would have had a senior role in the Office.
Q. We'll go to the document in a moment but one thing I want to ask immediately is why the words "model litigant" don't appear at all in that document? Words are important to

lawyers and it does leap out that there was a specific recommendation to publish a model litigant guideline but the words 'model litigant' dropped away; do you know why that was?

A. I don't remember. I remember that there was discussion about this is more about values, rather than sort of precise rules. Maybe that encouraged that view. I don't remember. I'm happy to find out. I mean, if that is - the material will be in the office somewhere that takes us through this process, so I can come back through counsel, if that's useful.

Q. If you do turn up any information, by all means, thank you. The recommendation on the screen was specifically to publish a guideline similar to Australian policies, and so it may be helpful if we can look at the Commonwealth Litigant Obligation, which is document MSC1103. This is the most recent version, obviously it was updated after the Dean Cochrane review. Ms Wills may be able to find that for you, it is a document which came into the hard copy collection a little later. It's a very short document, so it's probably sufficient for you to see it on the screen.

If we can go to the second page of the document, and perhaps if we zoom in on the top half of the page. If we could just perhaps note some of the obligations in the Australian document. They include at 2(b), there's an obligation to pay legitimate claims without litigation, including partial settlements or interim payments, where it's clear that liability is add least as much as the amount to be paid.

2(d), a positive obligation to endeavour to avoid, to prevent and to limit the scope of legal proceedings wherever possible.

If we go down to 2(g), not to rely on technical defences unless interests would be prejudiced by that requirement.

Perhaps go back up slightly at 2(e)(iii), again a positive obligation to monitor the progress of litigation and to use methods appropriate to resolve it, including settlement offers or ADR.

If we go across the page to 2(i), in the top half of the page, an obligation to apologise where its lawyers have acted wrongfully or improperly.

And if we go across the page again to the last page, two more pages on, 5.2, we see a positive obligation to ensure the representatives participate fully and effectively in alternative dispute resolution.

I've rattled off a lot of these provisions, but I wanted just to check with you, would it be your view that all of those obligations are sufficiently captured in our New Zealand Attorney-General values document?

A. Have you got this document there? I am going to need to go back to each of the ones that you've highlighted. I did say yesterday that I thought they were pretty much, much of a muchness, the values and the model litigant values. I can go through each of the points that you mentioned and match them and review the values again now, if that's useful but perhaps it isn't.

Q. I don't think we need to do the specific comparison to that level of detail but was there anything in the document, the Australian document, that would raise your eyebrows in terms of what the obligations on the Crown should be?

A. It slightly brings me back to the point I was making yesterday to the Commissioners, not that my eyebrows will raise, but rather how individuals' perspective on have I, the Crown lawyer, behaved like that or have I not. It is just so a matter of perspective about whether this is a technical defence, this is a substantive defence or you should be settling with me, versus we still need to test the evidence. And it is hard to simply agree that, yes, these

are the standards and they will never be deviated from because everyone's perspective on them is so different.

CHAIR: But as a starting point, I think the question was more general; is there anything in there that would look foreign to us if they were adopted as part of the New Zealand model litigant standards, just on the face of them?

A. I don't think so in particular. I mean -

CHAIR: I think you're hampered. You don't have a copy of the document, is that right?

A. Thank you.

CHAIR: Are we able to provide Ms Jagose with that?

MR MOUNT: A copy of the Australian document?

CHAIR: Yes.

A. It is in this material somewhere, I know that because I've seen it.

MR MOUNT:

Q. Because it was one that was added relatively late, I don't have a page number, I'm sorry, but it is only about a couple of pages long.

CHAIR: I think somebody has gone rushing off to photocopy it.

MR MOUNT:

Q. While we're doing that, perhaps if we can go back a page. In your evidence, you refer to Note 4. I just want to zoom in on Notes 2 and 3 of the Australian document. So, Note 2 is a requirement to act with complete proprietary, fairly and in accordance with the highest professional standards.

And Note 3 talks about requiring more than merely acting honestly and in accordance with the law.

Would you agree that the concept in both of those Notes is that the obligation on the Crown should be higher than -

A. Yes.

Q. - the baseline obligation of lawyers?

A. Crown lawyers should be held to a very high standard, I agree with that. In fact, we see that, if I may, just on Note 3 in particular, we see Crown behaving in that way, conceding things that aren't in issue, pointing out in respect of lay litigants steps that they might need to take or errors that they have made, even to the Crown's disadvantage. I mean, the Crown is known for having and meeting that higher standard.

Q. Yes. And in fairness to you, yesterday you did refer to Note 4, so we should zoom in on that as well, where we see that it doesn't, this obligation of being a model litigant does not prevent the Crown from acting firmly and properly to protect interests and does not preclude all legitimate steps being taken to pursue or defend claims. That's what you referred to yesterday, I take it you'd agree with that?

A. I do, and yesterday I gave some examples of where we failed to meet that high standard. I think my examples yesterday were what was the prejudice really in a further adjournment. I can see that now, what was the prejudice. So, there are examples of us not meeting - that I've already addressed, not meeting that standard. But as a general proposition, it's in Note 4 that the, sort of, different people's perspective comes to bear, isn't it? And it's wide and Note 4 is the clarifying point, as I said yesterday, I think, in the Australian courts and the Law Reform Commission have also taken this point about, yes, the Crown or Commonwealth is a behemoth, I think the Criminal Court says, we expect and require them to act fairly but they don't have to, I think the expression was, have one hand tied behind their backs. It's that perspective that I'm trying to emphasise that needs to be brought to bear.

Q. We might do a couple of side by side comparisons, we're going to try this on screen. One would be to compare on the page we're on, Notes 2 and 3 of the Australian document,

with paragraph 2 of the New Zealand Attorney-General's values.

So, Notes 2 and 3 on the left-hand side we've just looked at and agreed the concept here is that the Crown will reach a standard higher than what's expected of, if you like, ordinary or other litigants.

Paragraph 2 of the New Zealand document, as you can see, talks about a standard of fairness and integrity as befits the Crown.

The question is, from your perspective, does the New Zealand document, in your view, sufficiently capture the idea that the Crown ought to reach a standard higher than that of other litigants?

A. From my way of looking at it, it does because it calls on that, what is the standard of fairness and integrity that befits the Crown? That is recognising the Crown has a different, I mean it goes, it harks back to that perhaps old and a bit more forgotten view that the Crown is there to protect and serve its subjects, which is language we don't really talk about anymore of course but it's reflecting as befits the Crown. To me, that is saying a higher standard than the private litigant.

Q. Perhaps if we just do one more side by side comparison. If we stay on the first page of the New Zealand document on the right-hand side and zoom in on paragraphs 1 and 2 on the right-hand side. I am sorry actually on the right-hand side if we go to 5.1. On the left-hand side, if we go to the Australian paragraphs 1 and 2, so that's on the previous page. 1 and 2 of the Australian document, if we could squeeze this onto our screen. The Australian document at the top begins with the emphasis of behaving as a model litigant and then goes through to explain what model litigant means in the various ways that we've been through.

New Zealand in contrast at 5.1, the first point about what the Crown will do, is that the Crown will take and

defend litigation in accordance with the Rule of Law, ensuring the government is able to pursue its objectives and responsibilities lawfully and effectively.

The question is whether in New Zealand our document, by emphasising the document pursuing objectives effectively, there is a change of emphasis in the New Zealand document towards the Crown being able to litigate effectively, as opposed to an emphasis on this higher elevated standard that we see in the Australian document.

A. Is the question, is there a difference?

Q. Yes, a difference in emphasis?

A. Well, it's expressed differently but I know that's not the question you're asking me, sorry.

I find it hard to answer this question, again because in the values paper 5.1 is one of a number of things which include be fair and objective, consider early resolution, don't take unfair advantage of an unrepresented or impecunious opponent. It sort of pulls out, I would say more expressly, maybe the Australian document does it too, but it's pulling out more expressly that idea about fairly handlings claims and litigation, dealing with them promptly. I see them here too, not just in the paragraphs you're comparing.

Q. The Commissioners will need to form their own view of the documents and I realise there's quite a lot of technical detail here and it's not easy to cover in this forum. Can I ask you this, you've said that you are not aware of any reason that the Crown backed off the model litigant language. Would there be any reason now to shy away from that language 'model litigant'?

A. I mean personally, I don't know that there is. I would rather see the reasons why it went down the Attorney-General's values. If that was a matter that the Attorney-General, I don't know, them self was particularly keen on. That is something we would want to test with the

Attorney-General now. It is a bit hard to answer that question, but I hear you, what's the difference, when I say there isn't really one.

Q. As I say, perhaps the best way to make some of this concrete would be to go through some of the cases and see some of the steps taken and we might come back to some of these documents.

A. May I say something, I hope it's clear in my answers that none of this is to say we should step aside from this high standard. I hope my evidence yesterday was clear that I am committed to those high standards and that is the standard we should be held to and sometimes we will not meet it. I don't want to quibble about language to be seen as stepping away from what I said yesterday.

Q. In order to test the criticism that has been made, what I want to do is focus on three cases as examples and we'll go through it in a bit of detail, I'm sorry.

One was a case that did settle with a financial statement. One is where there was no agreed settlement through the litigation process. And one went to trial.

And the first is one of the Lake Alice claims, in fact I think the first that was filed in Court, and that was Ms McInroe's case. And of course that case was dealt with before you came to Crown Law, I believe?

A. Yes.

Q. Or largely before you came to Crown Law. And, as I say, we will come back to many of the other cases involving Lake Alice but in case there could be any doubt about the human impact of the way that Crown Law has approached litigation cases, what I wanted to do was start with Ms McInroe's evidence itself about how she felt about Crown Law after the nine-year litigation experience.

I don't know whether you have had a chance to see her evidence at the time she gave it?

A. I did. I said yesterday that I read her evidence in advance and I watched her evidence that she gave, yes.
Q. Well, for those who may have missed it, we do have the ability to replay part of her evidence. And so, this segment was from the 24th of September into the record, it was at the transcript page 183. This is Ms McInroe's description of her experience of the Crown at the end of that process.
(Segment of evidence of Ms McInroe played).
The background, as you know, to Ms McInroe's claim was that it was filed in 1994 and her legal team over the years included highly competent counsel, I think three of whom became Judges, Judge Cunningham, Justice Duffy and Justice Robert Chambers, one of our most eminent jurists. She was represented by highly competent counsel who I think we can assume knew absolutely how to conduct civil litigation to the most effective extent but still it took nine years for that claim to be resolved. Are you able to say anything on behalf of Crown Law before we move into some of the detail as to how that could be that such a well-represented claim could take nine years?
A. All I can say to that, is that I heard Ms McInroe's evidence when she gave it and just now. I hear the impact that that process has had on her and I acknowledge her today and I hear the pain in it, the revisiting of the pain in it. Crown Law accepted that there were unavoidable delays in that litigation.
Q. I think you said unavoidable?
A. I beg your pardon, I have written avoidable but I've read out the wrong word. Avoidable delays, it has recognised those avoidable delays and I don't know that I can say much more, except that this is a case where there were delays that shouldn't have happened.

Q. Just stepping through it perhaps. Yesterday, what you said, I think, about Lake Alice, was that this was a case where "the proof was right there in the file"?
A. Yes.
Q. I think were your words. So, would it not have been apparent to Crown Law right from the beginning that this was a meritorious claim?
A. I just don't know enough about the 1994 starting of this case to answer that question. I can say though, that the Government's response when it looked at the record was to accept that the record showed the assaults and the problem. I just don't know enough about it to say was that material before everybody in 1994? I'm not saying it wasn't, I just can't answer it.
Q. If it is the case that the proof was there in the file, is there any reason that Crown Law could not have simply reached that conclusion from the very start of the process?
A. The conclusion that was reached was to say let's not - sorry, I don't mean to disrespect Ms McInroe by talking about a different kind of point in the process and I will come back to this question.

What happened later, is that the Government decided it would take a different approach, so it wouldn't address the matter through litigation. And I suppose all I can say is that, for whatever reason, and I'm not defending it as good reason, for whatever reason that didn't happen in the very first claim that was filed.

Would the material have shown that there was the same proof? I just can't answer it. I think I need to be able to answer it and perhaps that's something that we can come back to at some point. I mean, I don't know if the Inquiry has seen all of that record but I haven't. I'm not trying to duck that question. It's a good and hard question to be asked. I would rather look at the record and answer it.

Q. Certainly, when an independent or somewhat independent person, Sir Rodney Gallen, looked at Lake Alice and spoke to the claimants, he was left in no doubt that they were telling the truth. Again, it leads to the obvious question, if there are documents at the time and when this is looked at by an independent person there's a clear view that this is a meritorious claim, how could it be that that is not recognised for so long? Your answer may be the same.
A. I don't know. You know, it's right that that is questioned, how can it be? But I can't answer it.
Q. As you say, the government decided to take a different path with Lake Alice and we'll come back to this no doubt but just while we're here, it is perhaps worth looking at the advice that went up to Cabinet on Lake Alice in 2000. This is document tab ending in 31. This is a document from fifth May 2000. Just looking at the front page to orient ourselves, again this was before you came to Crown Law, so you're obviously having to work from the documents, like everyone else.

If we turn over to the fifth page, paragraphs 9 and 10, we see Cabinet being told about the background to Lake Alice. And yesterday you mentioned the Commission of Inquiry I think and the Ombudsman's report. And we see in paragraph 10 that in 1977 the Chief Ombudsman had identified serious defects at Lake Alice.

I don't mean to keep asking you the same question in different ways but if there had been serious defects identified in 1977, should that not have been taken into account by Crown Law in the mid-1990s when Ms McInroe's claim was filed? There had been known concerns about Lake Alice since the 1970s.
A. I can't disagree with that proposition.
Q. If we go over the page to paragraph 15, there was a summary of the facts given to Cabinet. I need to be very conscious as we put things on the screen that some of our sight

impaired people need things to be read out but sometimes I'll do that in a summary way, if I may.

But Cabinet has told in 2000 that the file material collated indicated a series of facts that would not be difficult to prove and there are a series of deficiencies at Lake Alice that are set out. The legal basis not clear, people who didn't have mental disorders but rather had behavioural problems, limited control, those sorts of things. And I take it that these are the facts that again could have been available to the Crown in the mid '90s had proper inquiry been made?

A. I presume so because, as this paper records, as you touched on, there was a 1977 Commission of Inquiry, so assume from that there would have been sufficient factual findings.

Q. If we turn over to paragraphs 37 and 38, a key factor it seems in the advice that went to government in 2000 was that the government might want to take a moral view, rather than a strictly legal view.

If we look at paragraph 37, it says, "The Government may also wish to consider whether, given the circumstances, there is a moral obligation to redress the situation, regardless of the fact that the law is unclear"?

A. Mm.

Q. And in 38 it's noted, advisers, whether legal, policy, advisers read the statements, they had a reaction that morally and ethically there should be an alternative to litigation that should be pursued.

That exercise of asking when a claim comes in, whether there might be a moral or ethical obligation to resolve, clearly wasn't done by Crown Law in 1994?

A. I agree that wasn't done.

Q. Is that something that's done now?

A. Yes, I think so. I don't mean to say "think so". Yes, that is done, in that what is routinely done, as any piece of

litigation comes in, is an assessment of what does this tell us? How do we need to respond to it?

And invariably, that will be done in concert with our colleagues in the Department that relevantly holds the matter.

And if there are points at which either the record slows or someone knows or somehow we already know that what is said is either proven or true or that on the basis the law gives them relief, that is the assessment that we make at the beginning. It might be put in a, sort of, legalistic frame but litigation planning is about what does it tell us, what do we know, what are the next steps? That sort of engagement that we have with our colleagues and departments which provides them an opportunity to say our records show this or yes, we know about that from last year and so on.

So, that question about regardless of the form should we be doing something different, either accepting facts or engaging in settlement negotiations direct, that should and does happen.

Q. Is it now done in part explicitly with that broader question of what would be the right moral response, putting aside the strict legal position?

A. No, I would say the first engagement with these questions will also be about what result will the law deliver? And it might be that the question as to whether or not regardless of the result the law delivers, is there some other answer that is wanted to be pursued, will come up in those engagements with the Department more likely because it is, Crown Law's role is to say this is what the law is or is likely to be, in engaging with the instructing department, to use that slightly shorthand phrase, about how they want to now address this question. So, both of those things come into the mix but they don't necessarily come out of the Crown Law Office.

Q. We'll come back to that question, I'm sure. If we can just go back in the document to paragraphs 19-21?

CHAIR: Before you do, Mr Mount, do you mind just having that open again? The second paragraph that was shown up, sorry I should have intervened a little bit earlier. This is about the advisers who formed the view that alternative litigation should be avoided on the basis of morally and ethically. I'm just interested to know, in in your experience, how common is that in response to a civil claim, in your experience? Is that an unusual thing to encounter?

A. It's not unusual to think, not just in the face of litigation but about this as the law, what it would provide or allow for, and then another question might be, and should that be the step that's taken? In that, I'm more thinking about - I'm not thinking about historical claims litigation there. I'm just thinking about in a general way that is not an unusual thing to be surfaced.

CHAIR: To weigh up the moral and ethical or -

A. That question about should you, rather than must you or can you, that is not an unusual in my experience matter to be raised.

In the face of a litigation action, you know a claim being brought, as I say, I think the Crown Law Office's function is to say this is what the law tells us about this case. But it is also very common to see within the wider Crown, sometimes in Crown Law but more in discussions with the wider Crown, an enthusiasm or a tendency to think, well, should we defend that or should we try and settle that?

I'm not certain that it would be put on an ethics basis but that's its underlying thinking, bringing that to historical claims. I mean, you've seen the Cabinet papers coming more to this from meritorious to sort of moral, that is very much now reflected in the thinking there.

CHAIR: It just struck me as something that might be unusual but you say it's not - is it unusual - you say it's unusual now, do you think it's unusual in the past?

A. I think we've got more attuned to the idea that there is a bigger question than what might the law deliver?

CHAIR: Thank you. Sorry to interrupt, Mr Mount.

MR MOUNT:

Q. We were going back to paragraphs 19-21 and there's a reference under the heading to "Technical Defences" to four defences that would be open to the Crown, the Limitation Act, immunity under the Mental Health Act at the time, ACC and vicarious liability principles.

I take it, you've been pretty clear that you don't agree that the label "technical defences" is fair?

A. That's right, yes.

Q. But for better or worse, that is how they were described to Cabinet in 2000?

A. Mm.

Q. And it was pointed out that a question the Government would have to grapple with was whether, if it went down a negotiation or ADR, Alternative Dispute Resolution Process, the Crown would not rely on those technical defences. In the way the Government thinks, is that often a fork in the road, if you like? If you head down the legal route, then these defences will be regarded as not technical but just the rules of the game? But if you go down the ADR route, put aside the technical defences and we'll just look at what's right, or is that oversimplifying?

A. I can't say what the Government thinks, that is too amorphous a concept to respond to. But I can say that in practice, well if I bring it particularly to historical claims because that is where we see the most obvious choice or I think you said fork in the road, that in informal processes, I think it is what this document is saying. In

an ADR process, you still have these defences but they're not barriers to informally resolving the matter. And then, as this says, if you go to Court, then that needs to be determined as to whether or not those defences are taken up. Although interestingly, Accident Compensation isn't a defence. So, it's interesting it's said to be a defence at all in paragraph 19, it isn't a defence, it's part of the legal framework that a Court has to deal with. But anyway, that's a slightly separate point.

So, it is showing at paragraph 21 that familiar ADR, we won't stand on the bars that we might choose to stand on in litigation. And of course, in historical claims we've seen the government strategy since about 2003 or 2004 forming that conclusion in court, defend if that is the appropriate step.

Q. We'll come back to this fork in the road, if you like, and the way that the Lake Alice case was overall dealt with. I am particularly wanting to focus on Ms McInroe's case at the moment.

And just while they are on the screen, if we go through the list of steps that Crown Law took in Ms McInroe's case.

One of them was to ask the Court to strike out her claim, ask the Court to dismiss her claim, based on those differences, correct, the Limitation Act, the Mental Health Act and whether or not we call them defence but also based on ACC. So, that is a thing that Crown Law did?

A. Is that a question, sorry? I know there was a strike out application. I am not familiar with its detail.

Q. Would you take it from me that it was on the basis of the Limitation Act -

A. Was ACC, was that part of it? Were these pre - 1974?

Q. We are coming up to the break, I can show you.

A. Sorry, I don't mean to be difficult, I just haven't seen the document.

Q. But perhaps if we look at the overall response of Crown Law. The very first thing that Crown Law did not do was to make an early acknowledgment of the permits of her case. So, there was not that early assessment by the Office to identify this as a case that ought to be settled; is that fair to say?
A. I'm going to have to take it from you if that is the case. One thing I would say to that is, assuming that the Crown Law Office, as it doesn't today, wasn't even then acting on its own, it would have been taking some - it would have been working with others, presumably the Ministry of Health, to come to that view. So, I don't know, and I would have to examine the file as to whether there was any advice about the exposure or the merits. And I see that in that Cabinet Paper that you took me to just before, there is advice coming from both the health stream and the legal stream, as I read it, about the factual merits.
Q. Six-years later, of course?
A. Yeah, my point is I don't know if that same advice is on the file.

MR MOUNT: All right. I can see that it's time for a morning adjournment, if that's suitable to the Commissioners?

CHAIR: Yes, it is, if that suits you, that's fine. We will take 15 minutes.

Hearing adjourned from 11.31 a.m. until 11.45 a.m.

CHAIR: Yes, Mr Mount.

MR MOUNT:

Q. I just want to make sure that we haven't lost the sense of the chronology for the McInroe case. We know it was filed in 1994, then take it from me, Madam Solicitor, if you're in doubt, that it was the late '90s, about '99, that a group claim was filed by Mr Cameron on behalf of a large number of Lake Alice survivors, and it was the group claim that was the main focus of the Cabinet advice in 2000 that we were looking at.

A. Yes.

Q. What Ms McInroe explained to us in her evidence, was that she was not aware of the parallel settlement process that came out of that 2000 Cabinet advice where the group claim was settled first; do you remember that being part of her evidence?

A. Mm.

Q. And, indeed, one of her complaints is that she was kept in the dark about the group claim and, whereas Sir Robert Chambers, her lawyer, had always said to Ms McInroe that she should try to settle first because of the seriousness of her claim, she was dismayed to find that there had been a settlement with the group before a settlement with her; do you remember all of that evidence?

A. I do, I mean I remember the evidence, yes.

Q. And that fed in, no doubt, to her evidence which was at paragraph 97 of her statement where she talked about prolonged trauma caused by strategic intentional delay and compensation protection tactics from the Crown, which she described as appalling and indefensible; if you remember her evidence on that?

A. Mm.

Q. Now, I think you said you haven't had an opportunity to go back over the file for the McInroe litigation; is that right?

A. I haven't done that, yes. But can I clarify one point? Just before the break, we were talking about would the Crown Law Office have taken a sort of holistic view to this file, and I was just looking back at my own evidence in the break and it reminded me to just repeat that in those early days, I think referred to it as it was ordinary just to get the file, just to start working on it, as what did the law tell us. I think one of your propositions was, would that have been what Crown Law did when Ms McInroe's claim was filed? And I think it's probably yes, that would have been a very legally focused question about what does the law tell us here and advice to the Ministry, I'm assuming of Health, I think that's probably the right assumption, about what we saw the law to be.

Q. And so just to put it squarely, we always come along to these Inquiries with perfect hindsight vision. With that vision and what we now know about the strong merits of the claim, did the process miscarry in some way if that initial assessment by the Crown of the claim missed the strong moral case to settle swiftly?

A. It feels to me that the point at which the process can be criticised for having misfired, is the point at which Government took a different solution to a different set of people without involving Ms McInroe in that. That feels to me like a point at which the process misfires, yeah.

Q. Which is the point we had a moment ago?

A. Yes.

Q. Are you not willing to entertain the idea that there was a failure right out of the blocks when the strength of Ms McInroe's claim was apparently missed by those handling her file in the mid '90s?

A. No, I can accept too, that that was a failure or an opportunity missed to do something different with it, yes.

Q. What Ms McInroe described was I think what you would say are essentially the orthodox steps of civil litigation, an

application to strike out and the Crown very much wanting to take up the defences that were labelled technical defences in the Cabinet Paper, accepting that you dispute that label.

Is it possible to defend those ordinary orthodox litigation steps in a case factually as strong as this one?

A. With the benefit from today, no. And I said yesterday, I don't want to defend everything as if everything has been fine. And you mentioned 2020 vision earlier, I mean with the hindsight, rather than the year, and I think as long as we can learn from that, maybe that's too late and too light a point to make. I have no objection to learning things and doing them differently. So, I can accept that if from 1970s we understood, we the broader system understood that there was a problem, why was that not brought to bear in either the instructions to Crown Law or the Crown's view of this case?

Q. And why do you think that was?

A. I don't know. In today's language, we might say a failure to be survivor focused. It might have been just the orthodoxy of here comes a claim, this is what we do with claims.

Q. There are many more specific criticisms Ms McInroe made very articulately about the process. I think I can leave many of them to the counsel who will address the Commissioners in closing but thinking about how the world could be better, can we think about an alternative way that the case could have been handled, beginning of course with the recognition that this was a case that needed to be prioritised and progressed without delay? I take it that's a reasonable ulterior option?

A. Yes, and the delays, they're unexplainable.

Q. An early assessment of merits, another obvious step that could be taken. And, in fairness to the Crown, for a case like this, expert advice might well be needed from an expert

psychiatrist to understand the basis of the claim; I'm sure you would agree?
A. Yes, I mean, and that is a feature of today, that there are other professional experts involved, yes.
Q. And with hindsight, that could have been dealt with much faster and more sensitively than it was dealt with? You will remember Ms McInroe's evidence that she was required to attend at the Mason Clinic in Auckland?
A. Yes.
Q. A forensic psychiatric facility, and the level of distress that caused her?
A. And I readily agree that could have been done differently.
Q. In a case like this where you have a litigant claimant for whom this litigation so clearly would be personally important to them, would it be possible for Crown Law to provide regular updates to the claimant about the progress of their claim?
A. Well, regular progress updates should be to the lawyer in the first instance, as you know.
Q. Through the lawyer, yes.
A. You can't communicate directly with the plaintiff. Yes, it is possible to provide updates.
Q. Ms McInroe described I think being left for long periods of time, sometimes years.
A. Mm.
Q. Even after attending a mediation, which she described vividly being an extremely difficult situation, she was seated face-to-face with Dr Leeks. And then there was simply no update after that for a very long time. Would it be possible for the Crown to identify cases like this as requiring systematic and regular updates through counsel so people are not left in the dark?
A. I would say not only is it possible, we should do that.
Q. Those regular updates, if made systematic, could even be triggers for Crown Law, I suppose, to check in with the

conduct of the case within the Office if there were a monthly update, something like that, presumably that could help Crown Law to notice that discovery hasn't been provided or a Statement of Defence is late, things which occurred in that case?

A. Yes, although the case management process would deliver that too.

Q. Should help, yes.

A. Defence being late, you should expect a call from the registry. You know, these things, I don't know why, maybe they just didn't happen in Ms McInroe's - in the time of her case but today's case management gives plenty of those pointers to things need to be done.

Q. Would it be possible for Crown Law to develop a more sensitive approach to intimate personal items like a diary which Ms McInroe had to turn over to Crown Law and you will remember her evidence about how distressing it was to have it returned with post-it notes all over it, no idea who had read it, why, over what period of time. Would it be possible to have a protocol in place to limit the number of people who deal with sensitive items like that and to be much more transparent about how those items are dealt with?

A. Your question is, is it possible? Yes, of course it's possible. And I was going to respond in a similar way to say that it is not only possible but it should be expected that everybody, whether it's Crown's lawyers or whether it's the Crown's other employees and departments, are sensitive to the fact that they have got someone's lives in their hands. And while the litigation is a slightly more sterile process, we should not lose sight of the fact that we've got people's lives in our hands.

As to a protocol, maybe that's the answer. Anyway, a protocol is a bit hard to agree to now because we don't know what its terms are.

Q. It is an idea worth considering?

A. But as a proposition, that is a sensitivity that should be expected of Crown's lawyers and all Crown employees.
Q. We will come back to Lake Alice and the comments of the United Nations before the end of this process but in Ms McInroe's claim it would have become clear at some stage, perhaps early on, that there could be a criminal element to Dr Leeks' conduct. Would it be a good idea for the Crown to have a process where it would support a claimant in a situation like that to make a Police complaint and to make sure that the criminal law works as it should?
A. I'm pausing because this is a point of great contention. A current great point of contention as between the Crown and Cooper Legal in respect of many survivors. So, can you unpick further what that might look like because, as I said yesterday, there's great anxiety about civil claims - there is today great anxiety about civil claims revealing criminal conduct that might not be dealt with or might be dealt with improperly in the civil claim, in periling any criminal investigation. So, that is something we are highly conscious of. Sorry, can I ask you to ask your question again?
Q. Of course. Could the Crown have a way to offer support to claimants so that those who choose to make a Police complaint or to trigger a criminal process, those who choose to do that of their own will, know that they will be supported through that by the Crown in its overall sense?
A. Sorry to be pausing again, I'm finding the question too big because the Crown in its big emanation supports victims, supports people making complaints to the Police, supports victims through processes of either bringing a complaint or being a witness in Court. So, the Crown proper, the victims' rights act and so on. There is a measure of support around people to bring allegations to the Police. But are you asking me in the civil litigation process, is

there a way for people to be supported in that? Is that where you are sort of headed on this question?

Q. Yes and I hate repeating saying we will come back to the topic because we will in relation to Mr Wiffin but the relationship between civil and criminal processes. So far as Ms McInroe is concerned, obviously her experience was a very personal and very sensitive one?

A. Yes.

Q. One where turning up to the front counter of a Police Station somewhere might not be an obvious thing to do but Crown Law has a very close relationship with the Police and a close relationship with other agencies. Could Crown Law thoughtfully identify cases where it could offer to a claimant a pathway to make a criminal complaint in a sensitive way so that they have a pathway that enables them to consider that realistically?

A. In the case that we're talking about, in the matter we're talking about, as you've put it yourself, Ms McInroe was represented by some of our finest jurists. It would have been, I think it would have been a strange step for the Crown's lawyers to say do you need help to go to the Police? I think that risks being condescending. So, I'm concerned that, I mean, your proposition is a reasonable one, if people want to go to the Police shouldn't they be able to, and I agree that they should. When represented people are bringing civil litigation claims, is it the Crown's lawyers, I feel like it would be misinterpreted as a very condescending thing to say, "Do you know you can go to the Police?" That might be coloured by my own experience of this highly contentious point between Cooper Legal and the Crown about how do we get these allegations to the Police? I think you're pointing out a different view, why not help those who want to go to the Police, go to the Police. And to that end, it is possible, indeed desirable, for the Crown side, and I say it like that because it isn't just lawyers

who make these decisions, it is also in large measure ministries and departments who indicate which way things should go and which way things should go. But it is, of course, possible for that to be something that is said to the plaintiff's lawyer, "We're concerned here" or "We've got three of these, this matter should be dealt with by Police before the civil process".

But, as I say, I'm a bit tentative about that, given its controversy.

Q. A model that exists are this Inquiry, is that survivors who talked to the Royal Commission about their experience in the civil sense are made aware that there is a specific Police liaison process, so that survivors who choose to go to the Police have a pathway open to them.

The intention of that is to give survivors options, to make sure that those who choose to do that can do so as easily as possible, and the Royal Commission will co-operate to the extent it can with any decision by a survivor to go to the Police.

The impression I had from Ms McInroe's evidence, that's a million miles away from her experience with Crown Law. That there was no connection between the civil litigation process identifying her as someone who might have a good reason to go through a Police process as well, and certainly no support for that.

And so, the question is just whether the Crown could think about better ways to connect those two systems?

A. Well, as I've already addressed and I think others will have, we are neck deep in trying to work out a way to do that with the survivors who have currently got claims, trying to work out a way that will be agreed to for some things to be put through the criminal process or for at least Police to look at that. But that did not happen in Ms McInroe's case, I agree with you that it didn't happen.

Q. If, as you said yesterday, the abuse at Lake Alice was there to be seen on the file, it must have been either obvious or open to those dealing with the file to realise early on there could be many others with legitimate claims. To your knowledge, was there ever a proactive effort by the Crown to find the other Lake Alice survivors and to make sure they would be aware of their rights?

A. I don't know enough to answer that question. I thought that there had been because there were two rounds, if that's the right word, of Gallen J's process. I thought there had been but I'm not sure, I'm not certain.

CHAIR: Just to be clear, Mr Mount, were you talking about the later process or were you talking at the time that Ms McInroe filed her claim?

MR MOUNT: Yes, I was thinking about the '90s, before the group settlement process.

Q. It certainly doesn't seem there was any proactive step taken in the '90s, was there?

A. I don't know. I was answering the question in relation to the process that followed, yes.

Q. Just stepping back for a moment, the overall management of the McInroe claim does seem to have fallen short in a whole series of ways; is that fair to say?

A. Yes.

Q. There was an apology to Ms McInroe which we have as a document 96070 are the last numbers. It's up on the screen now. You can probably zoom in a bit to make it a bit easier to read.

It is a very short apology, two paragraphs. I won't read it out but, in your view, did this apology sufficiently meet the deficiencies that we've talked about Crown Law's management of the case?

A. No. I heard Ms McInroe's response to this apology and I obviously have looked at the apology. As an apology, it is woefully inadequate. It indicates that the apology is being

given because it has to be and it doesn't say what it is that is regretted, nor express any empathy or regret, actual regret, for what is said to be accepted as failings from the Crown Law Office. So, as an apology, I agree with Ms McInroe, it is inadequate, extremely inadequate.

Q. Putting together that large list of deficiencies, to your knowledge did Crown Law ever go through a process of self-examination over this file, an internal review, anything of that sort?

A. Not to my knowledge, and I would say at the time not as common practice either. Whereas, today's practice is to debrief, how did that go, what did we learn? That's more of an end step process in litigation.

Q. I appreciate that much of the McInroe case was before you were at Crown Law and it may be difficult for you to answer but how could it be that the case that has gone off the rails in this way did not result in some thoughtful self-examination by Crown Law?

A. Well, I think that, in a broad sense, it has happened because of what happened next in the Lake Alice. I mean, this isn't a Crown Law led proposal. But that examination of the Crown's side treatment and conduct and responses, the evolution that the Inquiry has heard about that I've described, is coming from learning from and listening to the criticisms that have been made.

Q. There hasn't been a systematic attempt to understand what went wrong with McInroe though, has there?

A. No, I don't think there has.

Q. And without this Royal Commission, the chances are there never would have been a systematic review?

A. That's true, yes.

Q. Even with this Royal Commission, there hasn't been a systematic review. Can people be confident that Crown Law looking ahead will implement a more deliberate process of

review when it's identified the cases have fallen short of a standard that ought to be expected?

A. People should be confident that Crown Law listens to criticism and will review its own conduct in light of criticism. One thing I think this Inquiry, or at least the Crown's evidence in this Inquiry is showing, is that we don't always agree with the criticisms that are levelled at different parts of the process. It's difficult to review in that context.

But this Inquiry is the system saying we want what has happened in the past to be examined so that we learn, not just how to deal with redress, but how to stop damaging our kids in care. I mean, this is the systemic review of what this country has done for too many years and it will include the litigation process.

Q. Would it help though for Crown Law itself to have a more systematic approach to review so that it doesn't depend on a Royal Commission of Inquiry coming along?

A. Well, as I mentioned, the discipline of reviewing litigation does occur. There isn't a process by which people who are dissatisfied with the outcome of litigation can bring their grievance with the law to bear back at the Crown Law Office and I don't think that the system works like that either. I think the place for that - this is an example. We can think of different examples where people say we are satisfied with the way in which a legal process will deliver us what it will deliver us. The place to say that to is the elected Government. They are the ones who are able to change both how things are dealt with and/or promote changes to policy or law.

Q. With the McInroe case though, the specific criticisms went directly to the handling of the case by Crown Law?

A. Yes.

Q. And those criticisms were made publicly and vocally and articulately. Yet, it seems that there hasn't been still

any process at Crown Law to try and face up to those internally and say, well, what have we learnt? That seems like a deficiency?

A. I disagree strongly with that proposition. As I said already to the Inquiry, I am here willingly and not subpoenaed to appear in front of this Inquiry. I am in charge of the Crown Law Office, I am in charge of the Crown's litigation. I have been entirely open with this Inquiry. We will learn from this Inquiry. That is the method by which we will review it because it will be too easy to say to you, "Yeah, we'll review that file". Much harder to say, "Somebody else look and tell us what might we have done differently and how can we learn".

Q. If we turn to the second example that we will work through, Keith Wiffin's case.

A. Yes.

Q. I think you said that you had a particular role with Mr Wiffin's file?

A. Yes.

Q. What was that role?

A. I was the Crown Counsel, I might have been a Team Manager by then, but I was the lawyer representing the Department, the Crown, in that case.

Q. His claim was filed in April 2006 and the Crown offer to settle claim in your letter of April 2009, so we're talking about a three-year period, if that sounds right?

A. Yes.

Q. The claim itself was clearly serious, allegations of sexual offending against an 11-year-old boy, together with physical abuse of an 11-year-old boy. I just want to make sure I understand the framework that was in place by the time Crown Law came to offer to settle.

By the time of that settlement offer in April 2009, I think the applicable legal strategy was the 2008 Crown Litigation Strategy; if that sounds right?

A. That is probably right. The 2009 strategy probably wasn't very different from the 2008, in any event, so yes, that will be right.
Q. We might just put it up. This is CAB ending in four and if we go to page 12 of the document. In fact, if we go to page two of the document, I'm sorry. The bullet points at the top half of the page, we're told there was a three-pronged strategy that had been recommended to Cabinet in 2008.
The first, we've heard this before of course, agencies seek to resolve early and directly. And secondly, settlement will be considered for any meritorious claim. That was the applicable framework at the time?
A. Yes.
Q. And I think in your statement you talk about this framework in paragraph 9.2 of your main brief. We should be able to put it on the screen, it's on page 20. Apparently we can't put this on the screen but you will have a copy of your brief with you, I think?
A. Yes.
Q. You will have paragraph 9.2 of your brief where you talk about this Litigation Strategy and the second point, as you said in your brief, that you can see on the screen, was that settlement would be considered for any meritorious claim.
But in your brief, you went on to say in brackets "that is putting to one side available defences and investigating allegations to a standard less than absolute proof."
Was that correct, that was the 2008 strategy?
A. Yes.
Q. So, it's a focus on meritorious claims, putting to one side available defences. And certainly -
A. Putting aside available defences in an attempt to settling the claim, yes.
Q. In an attempt to settle.
A. Yes.

Q. And certainly, the concept of meritorious claim becomes very important at that stage and understanding what is a meritorious claim. After your 2009 letter, the April letter, the Sir Rodney Gallen did a review of the MSD process and he certainly focused on this concept of a meritorious claim and expressed some views about that which we can look at. This is the document CAB ending 14. You will see on the front page, this is a November 2009 review by Sir Rodney.

And if we go through to page four of the document, from paragraph 14 he again refers to that same three-pronged approach we have just seen and it's the endeavour to settle meritorious claims.

Down at the bottom of the page, paragraph 20, he goes through the judicial process of trying to interpret what could Cabinet have meant by meritorious claims. And he offered the view in 2009, that clearly, as he perceived it, there was a degree of sympathy towards claimants whose allegations had basis of fact. And if we go across the page to the next page, perhaps if we just zoom in on the page overall top half, we can see in 21 he's going through that process that the Judge might. In paragraph 21, he says there's a significant factor which points to a conclusion it was the intention of the government that claims where appropriate should be met with a degree of sympathy.

And he talks about Crown Law advice and limitation and so on.

But at the end of 21 he says, "Nevertheless, reference was made to the settlement of meritorious claims".

And in 22 he says that he thinks the direction to settle meritorious claims can only be interpreted as a direction that the overall justice of the claim, having regard to the circumstances, needed to be taken into account.

Was that a reasonable interpretation by Sir Rodney of what that 2008 strategy was getting at with the direction to settle meritorious claims?

A. As I think I said yesterday, the idea of meritorious, which did shift over time, but I think it was what I would say in relation to what Sir Rodney is picking up on, is a view that this informal settlement process will result or should result in some response to the survivor, reflecting both their needs and what happened to them, but that it wasn't - this is my own addition, not what I think Rodney is saying, it isn't a proxy for compensatory damages in the court. So, the decision was not to put aside all of those matters and try and be a proxy for what the court would say if it had determined the matter. It was an informal process in which the individual's needs were to be attempted to from the Crown side, met in a settlement offer, sorry in a settlement process.

Q. When we look at 23, we see Sir Rodney's view that, "In determining whether a claim is meritorious, it is a question of fact" and he says has to take into account fairness, including those against whom allegations are being made, so fairness to the accused staff member as well. But he's very much emphasising the factual Inquiry and references to moral entitlement in paragraph 23, as contrasted with legal rights.

So, perhaps echoes there of the Lake Alice view, that we look at the morality, we don't strictly look at the legal rights when deciding something is a meritorious claim.

Perhaps if we go over the page to 29, he says in his second sentence, "The acceptance by the Cabinet Policy Committee that meritorious claims might be considered is at least a suggestion that at the political level the justice of the situation might prevail over legalities" and he goes on to say MSD's Committee has been influenced by that view.

Is that a reasonable interpretation by Sir Rodney of the 2008 direction to settle meritorious claims?

A. That was his approach, that was his view of it and it is a reasonable one, yes. I mean, it's his view that then fed into MSD's revision of its informal process.

Q. So, if that is right, at the time that the settlement offer is made to Mr Wiffin in 2009, is it fair to say that the question should be or rather that his claim should have been treated as a meritorious claim if it had factual merit, putting to one side the Limitation Act, ACC, any of those legal questions?

A. As I recall, and I don't have it open yet in front of me, the letter to Cooper Legal about Mr Wiffin's claim that had the settlement proposal in it, indicated that there were matters of fact that were to be contested, so it wasn't a case that was agreed or accepted.

Q. Just coming back to the framework though, is it correct that under the policy in place at the time, Mr Wiffin's claim should have been treated as meritorious if there was factual substance to it, putting aside the legal defences?

A. Well, apart from what I know about Mr Wiffin's claim and how that was viewed at MSD, I accept your point that the framework was where things should, in the justice office, be settled that don't stand on defences.

Q. Yes. And the way that was expressed in the policy was, and indeed in your own brief, we will have this category of meritorious claims, right?

A. Mm.

Q. And we know a meritorious claim is one where there's factual substance to it, putting to one side the Limitation Act and those sorts of things?

A. Yes, sorry, yes.

Q. So, going back to the claim, the sexual abuse component of Mr Wiffin's claim was an allegation that a man called Alan Moncreif-Wright had sexually abused him?

A. Yes.
Q. There was a physical abuse component to the claim and that was a series of allegations that two staff members at Epuni, Mr Chandler and Mr Weinberg, had physically assaulted him. What I want to test with you, and we will do it carefully, maybe even painstakingly through the documents, I want to test whether Mr Wiffin's claim should have been identified as a meritorious claim promptly after it was filed by reference to what was known by the Crown, certainly within the first year and a half or so after the claim was filed. But at a general level, would you agree with the proposition this was clearly a meritorious claim?
A. Well, I do agree with that because of the fact that MSD wanted to settle the claim. They viewed it as a meritorious claim.
Q. Indeed, Mr Young gave evidence, as you know?
A. Mm.
Q. And what he told us, among other things, we have the transcript 18, this is in volume 11, page 750, we will put this on the screen, page 59 of transcript 18, from line 12, Mr Young's evidence was that "the Senior Advisor" looking at his claim "I don't think disputed in any significant way Mr Wiffin's account". So, we know from internally within MSD, that there was a senior advisor allocated, she reviewed it and she didn't dispute Mr Wiffin's account.
When did you first become aware of that? That a senior advisor at MSD considered Mr Wiffin's claim or didn't dispute his claim?
A. Well, it's hard to now remember, so I only can go from the record, but the record in respect of the things that I did shows that I was instructed that there had been an investigation and that some of the allegations would be contested. So, they don't fit together, those two bits of the evidence.

Q. How could it be that a Senior Advisor at MSD forms the view that she doesn't dispute Mr Wiffin's account, but you don't know that?
A. I don't know how that can be because, as you know, lawyers take their instructions from the person or the Agency that is doing the process, the investigation. So, there's been a failure there. As I say, these two things, they can't sit together.
Q. Mr Young's evidence went even a little bit further, so if we go to page 76 of the transcript file, a couple of pages on, 752 of the bundle, lines 13-14, there's even stronger pursue, that is the senior advisor's view, was that the abuse was likely, "likely occurred as Mr Wiffin described".

It certainly was expressed to us in this Inquiry under oath there's an affirmative decision by MSD that, yes, it's likely that Mr Wiffin was sexually abused by an employee of the Crown. Are you saying that you did not have that view communicated to you?
A. I can only go from the record because I cannot remember but the record doesn't refer to the sexual assault. The record that I am referring to refers to the physical assaults. It said we've investigated, you might need to bring up, I'm sure you're coming to that letter, it says something to the effect of this matter has been investigated, some matters will be disputed. So, some physical allegations were not accepted as true.

That letter also says setting aside whether or not the sexual assaults occurred and then addresses the limitation question about the claim in the Court. So, that letter doesn't say either way on the sexual assaults what the Ministry knew.

If the Ministry had said "We accept that that did happen, we would like to settle with Mr Wiffin", I imagine that's why they were instructing us to make a settlement offer.

Q. Would you accept that from the outside it is bewildering to be told on the one hand that a Senior Advisor forms a view that it's likely it was correct that there was an 11-year-old boy sexually abused but the Senior Lawyer dealing with the file doesn't have that clearly communicated by any process?
A. Yes. I mean, as Garth's own evidence says, he was dissatisfied with that process. So, where that went, I don't know what happened. I can't see into that process to see how that happened. And as I understand, Garth Young's evidence to then say he used Justice Gallen's process as an opportunity to, within the Ministry, review that conclusion. Because these feel like questions to me for the Ministry about where did it - if it's gone wrong, where did it go wrong, because I can't see into that process.
Q. Yes. My question for you really is, how could it be that you didn't know, as you're handling the file for the Crown, that there's a view been MSD? That seems like a system question. How could the lawyer not know that this is a view of MSD?
A. Well, the process that has been described variously to the Inquiry shows that as these processes developed, the informal processes did develop within the Agencies with a more traditional instruction to Crown Law about how to respond. And I think that that is shown, when I think about the evidence that is before the Inquiry on Mr Wiffin's file, by that drafted settlement offer going back to MSD to say, what do you think? Here's the draft, I say, what do you think? And to answer your question, how is it that the Ministry didn't say, hang on, that's not what we think; I don't know the answer.
Q. I don't want to labour the point, but we have another insight into MSD's analysis of this, albeit after the fact. A memo to the Deputy Chief Executive in July 2010. This is MSD2569, page 538 of the bundle.

This is an internal MSD document. It's probably one that you didn't see at the time, unless you do recall seeing it?
A. I may well have but I don't now recall.
Q. And we know, of course, if we turn over to page two, paragraph 12 of the memo gives the summary of Mr Wiffin's claim. If we have a look at 12, "as we know there are a number of allegations but the most significant is the one of sexual assault by Mr Wright"?
A. Yes.
Q. Paragraph 14, even by 2010, allegations haven't been put to Mr Wright but if we go across the page to paragraph 16, we can see the factors which MSD is saying by this stage, this is what they think, perhaps an offer should be made. So, a credible account of events from Mr Wiffin, was at Epuni at the same time as Mr Wright, Mr Wright has convictions for sexual assault a year after Mr Wiffin was in the home, and Mr Wiffin was an 11-year-old who was vulnerable by virtue of age and development and so on, and also MSD's assessment of Epuni as a place and also Mr Wright.

So, all of those factors, when MSD takes a harder look at the case, if we go to paragraph 18, lead MSD to say, "On balance, it is more likely than not that Mr Wiffin was sexually assaulted".

My question is, all of those factors were there to be assessed certainly within the first year, year and a half of Mr Wiffin's claim?
A. Yes.
Q. There's nothing new in any of that. From your perspective as the lawyer running the case, was there ever a point where someone, either at Crown Law or MSD, said, "Actually, this is a meritorious claim measured against the Crown policy and so we need to pull it out of the regular litigation mode and deal with it as a meritorious claim"?
A. I don't recall the detail and I can only go off what I see in the record but the fact that there were engagements,

direct engagements with Mr Wiffin with MSD, perhaps even more than one direct meeting, I think possibly two meetings, and the fact that his claim was being investigated and a settlement offer was being made, suggests that the Ministry did form a view that it was meritorious but it seemed to, only in 2010, form the view that now is here on the screen, that actually this case is more like these other cases for which a comparable settlement offer would be different. That appears to be a delay or a failed process that doesn't right itself until possibly too late but certainly until 2010.

Q. I don't of course suggest that you were the only lawyer working on this, but it was your case from the perspective of you being the Senior Lawyer dealing with this?

A. I was the Senior Lawyer, yes.

Q. Can you tell us at what point in the management of the case does it first get identified as a meritorious case? We don't need to know dates and times, but we have a three-year lifetime from filed to your letter. At what point roughly in those three years does the light bulb go off that this is a meritorious case, this is an 11-year-old who, with hindsight, more likely than not was sexually assaulted, by the Crown?

A. To directly answer your question, I don't know, I don't know when that moment came. Because these processes are separate, I don't know how I could have known either.

Q. Could you have known with a simple examination of the facts?

A. Do you mean could I have known?

Q. Could the Crown have known?

A. I'm not sure.

Q. Okay. We'll step through it carefully.

A. Mm.

Q. We focused of course on the sexual allegation. There was also a physical dimension to the abuse, and that's Mr Chandler and Mr Weinberg. And you will recall from the

allegation that it was said that Mr Wiffin had been slapped and punched by these two employees of Epuni, that he was beaten by other boys and the staff members essentially let that happen, that he was emotionally and verbally abused by staff, so those were the core allegations against Chandler and Weinberg.

As we know, both Mr Chandler and Mr Weinberg gave evidence for the Crown in the White case and I just want to look at the findings that were made by the Judge about those two staff, if I may.

This is document Witness ending 9016, in current volumes, it's volume ten. It is the White judgment, November 2007, so this has come out within 18 months of Mr Wiffin's claim being filed.

If we turn over to page 303 of the bundle, paragraph 214, we see the findings of the High Court Judge, this is page 75 of the pdf, I think.

So, if we maybe zoom in on the top half of the document. 214, I'll try to summarise this for those who have sight impairment.

The Judge says that he heard a number of witnesses and their accounts of the institution's culture, that is the culture at Epuni, were remarkably similar.

215, we see it was a deeply troubled institution by 1972. The staff turnover was high.

Down at 216, towards the bottom of 216 we see that house masters and attendants were insufficiently supervised and too few in number.

Go across the page to 218, the Judge again refers to the fact that he's heard a lot of witnesses who were former residents at Epuni, as well as these two individuals, Mr Chandler and Mr Weinberg, the Judge says he accepts much of the evidence of the former residents.

In particular halfway through that paragraph you will see the Judge finds these residents did not collude to make up their evidence.

And the bottom half of that paragraph, just where the cursor is at the moment, the Judge says that he preferred the evidence of the former residents in many respects to that of Messrs Weinberg and Chandler and another. So, a direct credibility finding that the residents could be preferred over Chandler and Weinberg.

If we go down to the next paragraph, at the bottom of this page, second half of that paragraph, "The evidence established that house masters were not in the habit of reporting their own or their colleagues' infringements of procedures, so often these things wouldn't be written down. Much of the violence was covert".

The Judge talks about staff violence that took the form of slaps, cuffs to the head, knees to the side, kicks to the bottom that might not leave visible marks and there was a powerful no no-narking culture, so the boys knew they would get in trouble if they complained.

Across the page, there's reference to the kingpin culture. Top of the page, "The kingpin enforced his authority by favours and intimidation. He was generally the largest boy in the institution at the time and his followers imposed their will on new boys..."

Across the page, at 224, up the top of the page, we see that "Paul White got an initiation beating and was regularly subjected to violence and bullying". On that occasion, sorry of Earl's initiation beating, Mr Chandler was there and did intervene to stop that.

But at 225, we see that house masters must have been aware of initiation beatings and it's more likely than not that Mr Chandler did see these beatings.

226-227, the Judge accepted Mr Weinberg had dragged Paul by the ears, so direct findings against both Chandler and

Weinberg, and also that Mr Chandler had slapped Earl and slapped and punched as well.

And then at 227, we see that the plaintiffs witnessed similar violence against other boys, and also derogatory or abusive language of a sort that conveyed the message that the boys were useless or had no prospects.

So, in terms of Mr Wiffin's allegations against those same two staff of the Crown, Chandler and Weinberg, there was certainly material by late 2007 that could have allowed the Crown to identify this as a claim with substance; is that fair to say?

A. Yes.

Q. With due diligence by the Crown, should it have been you had a pile of meritorious claims but should it have been squarely identified as a meritorious claim early on in the process, certainly by the end of 2007?

A. It could have been and should have been, yes, on the basis of those findings. But whether it was, is a question I am not sure I know the answer to, although I wonder whether we were still in a position of - actually possibly still the position we are in today - of that distance where lawyers were still thinking about what's the legal framework and the question about what about the factual framework wasn't being thought about by those lawyers. I am not saying that was the right thing, I'm just trying to think about that was the time. And those factual questions were being decided elsewhere. Now, that's a very - that is a too separate way to think about them. Even in 2008-2009, those matters should have been able to come together in an analysis, yep.

Q. I want to start going through now some of the other pieces of information that would have fed into that factual analysis had it been done carefully.

And the first is CRL ending 27711. This is an email November 2006, so about six months after Mr Wiffin's claim was filed, from Mr Young at MSD to someone at Crown Law. Mr

Young is reporting on an interview with someone but talks specifically about Mr Moncreif-Wright having "slipped up" and sexually abused some boys.

So, we can see from the file that within six months of Mr Wiffin's claim being filed, Crown Law is told that Moncreif-Wright, it appears, had sexually abused boys at Epuni?

A. Mm.

Q. Do you know whether you knew that when reviewing Mr Wiffin's file or when you first learnt of that fact?

A. Well, I can say I should have known because we had the material. I mean, this material is about preparing for the White trial.

Q. Correct.

A. But we had the material, we had the information. Whether I did know, I actually don't know the answer to that but that doesn't sort of matter because I should have known. Institutionally, we knew this detail at the time, yes.

Q. Yes. And there really isn't any good reason why that information would not be available to Crown Law?

A. No.

MR MOUNT: That may be a convenient moment.

CHAIR: Yes, I think it will. We will take the lunch adjournment and come back again at 2.15.

Hearing adjourned from 1.00 p.m. until 2.15 p.m.

MR MOUNT:

Q. We were talking about whether Mr Wiffin's claim should have been identified as a meritorious claim in light of information that was on Crown Law's broader file, Mr Wiffin's file.

A. Mm-Mmm.

Q. I just want to take a step back for a moment, if I may, and go to your brief at para 2.8 where you talk about the first steps when a litigation file comes in. So, if we go to your brief, 2.8, you say that the starting point when a new file claim comes in, is to consider it and advise the relevant department on the law and on any likely liability so they can decide how to respond.

And, clearly, Crown Law must advise on the law?

A. Yes.

Q. Thinking about that period for Mr Wiffin's claim, 2006-2009, tell us about the process to understand the facts, as opposed to the law? Was that something done right at the start of the claim? How did it work?

A. I'm pausing because I'm just trying to remember. It probably would be quite similar in that respect about facts and law as to the current process, which would include collating material about the file, going back to Agency files to look for information that was relevant, of course, through the discovery process that occurs, and in that way a narrative of the facts comes together. These days, we would expect there to be other material that was also immediately at issue, what we know about institutions and so on. I don't know that, I mean I don't remember, I don't know if that was quite so defined as it is today, historical claims. So,

understanding of the facts and the law would be iterative, I think, still then.

Q. You've identified in 2.8 that an early step is to prepare a Statement of Defence, and you explained to the Commissioners earlier how that works, a plaintiff will say these 25 things happened, the defendant has to decide out of those 25 which ones do we accept are correct, in which case the plaintiff doesn't have to prove them.

That's a very early process where the Crown has to decide what are we going to agree is correct.

I'm wanting to understand how seriously Crown Law took the obligation to think about the facts from the start of the claim coming in during this period?

A. When you say how seriously do you think about the facts, it would be a matter of passing the claim to the Agency that knows and asking them how they would respond. They might say we don't know yet, we don't know enough, in which case there is a form of pleading that allows that to be said. So, I consider that could be taking that seriously.

Q. It relates of course to the evidence given to the Commissioners that MSD's internal view at some point during this process was that Mr Wiffin's allegations were more than likely true, and I don't mean to go over and over the same question, but when there is such a clear systemic requirement for a pleading, how could it be missed during that 3 year period that MSD's senior advisor thought Mr Wiffin was more than likely correct in what he was saying? I am just trying to understand how that occurred.

A. I don't know how that happens. Maybe one way, in this case, I have been reflecting on this over the break, maybe one way is that the process of investigating the claims got too separated from the process of processing or proceeding in the litigation stream because this was a case that was heading for trial, so that preparation for trial was also continuing. Those things perhaps became separated. I know

that Mr Young in giving evidence to this Inquiry said that that realisation came too late and the Ministry went back to the issue with Mr Wiffin. So, at some point wrongly, and in process terms a failure, those things seem to have become separated.

Q. We'll come back now to what Crown Law knew about Mr Wright, to understand the dots that were there to be joined, even if they weren't. If we can have MSD ending in 2353, page 197 of the bundle. An email internally within Crown Law from one Crown Law lawyer to a group of other lawyers, plus some MSD staff. In this email in July of 2007, so about a year and a bit after Mr Wiffin's claim was filed, the lawyers were reporting a discussion with an assistant manager at Epuni at the time. The second paragraph, there's reference specifically to Alan Wright who we know to be Alan Moncreif-Wright.

A. Mm.

Q. Again, we have on Crown Law's internal filing system a record that Crown Law had been told in '07 about Mr Wright sexually offending against boys at Epuni in the early 1970s.

Did you know about that at the time?

A. Well, I can only answer it the way I did before. Yes, institutionally we knew about that at the time. I now don't recall if I saw this note but I accept the criticism that institutionally we knew something about Mr Wright that we weren't applying to Mr Wiffin. That's not trying to excuse myself, I just don't recall.

Q. If we go to another document a few days later, July 2007, this is MSC ending in 634 which is on page 453 of the bundle.

If we come over to page 3, this is the 10th of July 2007?

A. Yes.

Q. And it's a fax to Crown Law from the Ministry of Justice. If we turn over to the next page, do we see that it is a

list of the criminal and traffic history for Alan Moncreif-Wright?

A. Yes.

Q. So, up until July of 2007, Crown Law has been told in two discussions with former staff members about Moncreif-Wright's sexual offending at Epuni, against Epuni boys, in the 1970s and then a few days later, in July 2007, the criminal and traffic history comes through to Crown Law. And scrolling down, we see the reference at the bottom to five sexual offences committed in 1970s with convictions entered in 1972.

In case there could have been any doubt from what former staff had remembered, by this time we have on the Crown Law file conclusive evidence of this offending in the 1970s?

A. Yes.

Q. Do you have any memory of seeing the conviction list or knowing about that?

A. I don't recall seeing it myself but I can only accept the proposition that you're putting, that it was known, it was known to the lawyers in the Crown Law Office, including myself, but I just don't remember it, that's why I'm giving that answer like that.

Q. There was more information available to MSD at the time, and if you can't recall being aware of what was on Crown Law's files I think I can predict what your answer might be about this but to be complete, Mr Wesley-Smith who at that stage was a journalist began asking questions about this topic in 2017 or thereabouts and Mr Young from MSD prepared some notes about what Mr Wesley-Smith might want to know about. And we have those notes as MSD ending in 2374. For those who are working on the hard copy bundles, pages 773-774.

CHAIR: What did you say the date was of this document?

MR MOUNT: This is a 2017 document.

CHAIR: Oh right.

MR MOUNT: It is referring to knowledge in 2007.

CHAIR: Thank you.

MR MOUNT:

Q. If we go down to the bottom half of the page, we can see these are notes about what was known about Mr Moncreif-Wright, talking about his staff file and so on.

If we go over the page to the next page up the top, the paragraph beginning, "In a 2007 interview of the manager of Epuni", there's recorded the statement, "I seem to suspect there may have been something happen there so he was transferred to us at Epuni".

Now, the significance of this, of course, is that we can see from the previous page what Mr Howe is talking about, is the transfer from Hamilton Boys' Home to Epuni in the early 1970s. Am I correct that the clear suggestion of this document, was that the manager at Epuni suspected something happened at Hamilton so that Moncreif-Wright was transferred to Epuni?

A. That's what that record shows, yes.

Q. And the suggestion being that this was known about in 2007. Now, the document is not clear about the something that happened at Hamilton, so we don't know that, but we see in the next paragraph that an historic abuse claimant did say that he was sexually abused by a Mr Wright in the Hamilton Boys' Home and that the claim was accepted by MSD?

A. Yes, that was a 2013 revelation, yes.

Q. Yes. So, as at 2007, what MSD appears to have known through its manager, former manager, Mr Howe, was a suspicion that there may have been something about Hamilton which led to a transfer to Epuni.

When was the first time that you became aware of that possibility that there had been something at Hamilton leading to a transfer to Epuni?

A. I don't know, until I read this document I don't know that I had ever understood that to be an issue but that's not to

say I didn't know or should have known. I just want to make a point that, I've said to the Inquiry I will come because I'm responsible for litigation and I take responsibility for the Crown's litigation steps, whether they were on the file that I ran or not. I'm not trying to duck when I say I can't remember. I just can't remember.

But also, I am trying to give evidence about how the Crown has and does conduct itself, rather than evidence of fact because I don't remember, it is too long ago.

So, I'm not ducking responsibility but trying to explain why I say I don't remember because I am responsible, now in this role in particular.

Q. Perhaps if I stay at that level of principle for a moment. If in 2007 MSD was alerted to a possibility of the transfer of someone from one boys' home to another potentially because of sexual misconduct at one and the offender is transferred to another home, clearly that would be an extremely serious possibility?

A. Yes, and knowing what we know now about transfers of people who were sexually assaulting children in homes and in faith-based institutions, that should be an alarm bell. I agree with you.

Q. Would it be your expectation now that any alarm bell like that would be acted on and pursued so that the Crown could understand if that in fact happened?

A. Yes, now and then. I mean, I'm not trying to excuse failings in a case where they are there to be identified. That should have been an alarm bell.

Q. There are no signs that we have seen that this possibility was in fact investigated by MSD at the time or since. I take it you are not aware of any?

A. I'm not and I'm thinking of Mr Garth Young's evidence to this Inquiry, as the point at which it is revealed, I suppose, that it seems that even Mr Young wasn't aware of what the investigator had uncovered and realises that an

error was made after Justice Gallen goes through the process.

Q. Do we end up at, at least this position, that on the face of it, and we've only got a very second-hand report but on the face of it, this is something that should have been investigated in 2007 to establish if, in fact, an offender had been transferred from one home to another?

A. Yes.

Q. We'll move now to November 2007, and the document witness 80011, page 226 of the hard copy bundle. We may not need to dwell on the document but it's a letter addressed to you dated the 8th of November 2007 from Cooper Legal asking for, second paragraph, "staff records and any other information MSD holds about staff members". We don't need to go there but one of the staff members in the letter is Alan Moncreif-Wright?

A. Yes.

Q. And we've seen from the documents we've just been through that certainly by that stage, November 2007, both MSD and indeed Crown Law had quite a lot of relevant information about Alan David Moncreif-Wright?

A. Yes. The answer to this request is in this material too, isn't it?

Q. It is, yes. The relevant information held at that time includes the conviction history obviously but also the two interviews with staff where it's said that the sexual offending on the criminal history was against the Epuni boys at the time.

So, on the face of it, that's extremely relevant information for Cooper Legal to be told in November 2007?

A. Yes.

Q. We can go to the response, it's witness 80012 at page 391, for those on hard copy. We'll just bring that up. It's a reply dated 20 February 2008, so three months or so after the request, from Mr Young to Cooper Legal.

And if we turn over to page 3 and zoom in on the bottom half of the page, Mr Young replies, "We have identified Alan David Moncreif-Wright. We have a staff file and staff cards. There's nothing in the file that relates to Mr Wiffin. Nor is there any information regarding allegations of physical or sexual abuse against Mr Moncreif-Wright".

I realise this is not your letter and I realise we can pass the language very carefully but before we get to that, the fundamentally clear response to the response from Cooper Legal, the information about Mr Moncreif-Wright's convictions, should have been disclosed?

A. Yes.

Q. And why wasn't it?

A. I don't know, I can't answer. It should have been. The information was available and the request was for that material. So, as an answer it is wrong or at least incomplete in a significant way, Mm.

Q. Mr Young said the same thing, he had no explanation. Is it appropriate for Crown Law to take some responsibility for what is a clear failure?

A. I'm happy to take responsibility but I'd rather it was specified as to what that was because otherwise, I think it's too easy just to say yes. I think it's important that we understand what it is that Crown Law should take responsibility for. So, I leave Mr Young with that letter.

Q. Right.

A. But it's clear that the two bits of litigation in our office weren't brought together with what we knew.

Q. And so, when Cooper Legal asked for information about Alan Moncreif-Wright and got a response essentially saying that there's nothing in the file that relates to him, the failure is that there is some failure to join the dots to identify the information held by Crown Law and to ensure that was disclosed?

A. Well actually and held by MSD.
Q. And MSD, correct.
A. Both agencies held that information and it wasn't provided.
Q. If we move forward now to May 2008, there's a request from Mr Wiffin to meet?
A. Yes.
Q. And this is document CRL ending in 6115, and the hard copy page 393. If we read from the bottom, again an email, it's a little hard to read but four lines down, the subject is an "ADR Meeting", and this is an email sent to Mr Young from Cooper Legal and it says, "Hi Garth, Keith Wiffin would like the opportunity to meet with you to try and resolve his claim and is offering to come to the office to do that".

Mr Young then, we can see in the line above, forwards that request to you and to someone else saying, "Are you happy to meet Mr Wiffin?" and then if we go to the top of the page we see your reply. But perhaps before we get to your reply, here we have in May 2008 a claimant asking to meet with a view to resolving their claim?
A. Yes.
Q. And I think we've agreed as a matter of fact, it was a meritorious claim?
A. Yes.
Q. And by that stage, May 2008, there was more than enough information available to both the Ministry and Crown Law to know it was a meritorious claim. Thinking about Crown Law's obligation to settle cases that are meritorious because, of course, Cabinet was told at about this time that the Litigation Strategy is to settle meritorious cases, a request for an ADR meeting should have been met with an enthusiastic response from Crown Law; is it fair to say?
A. It is quite unusual for the Crown lawyer to meet the individual claimant. I think I mentioned this yesterday, did I, at some point, that I've been to two or three such meetings.

Q. Yes.
A. It is quite unusual, it is quite an unusual sort of role for the lawyer to meet an individual. So, I think I quibble with your that it should be met with an - it should be met with an enthusiasm that if ADR works, let's try that, but I disagree that the individual Crown lawyers should attend such occasions. And, in fact, sorry can I go on with this? Yes, Cabinet says settle meritorious claims and if they can't settle and go to Court, then they should be defended. And I think what this case tells us, is that those lines were not very far apart. That we were preparing for trial in this process. Perhaps an even stronger reason why the strong lawyers shouldn't attend an ADR meeting, it actually might be too hard to take off the "I'm preparing for trial and defending this with what is required" to attend to the settlement probability.
Q. Perhaps if we put aside the word "enthusiastically" and just focus on Cabinet's direction to settle meritorious cases and what's factually available about Mr Wiffin's case, structurally a request from Mr Wiffin to meet and resolve should have been made with a realisation within Crown Law that the policy would require a genuine attempt to meet Mr Wiffin and resolve the case?
A. Yes, from the Crown side.
Q. From the Crown side?
A. Yes, indeed.
Q. To your point about the mindset of the lawyers preparing for trial and how the lawyers should think about this, I hear what you say but if the lawyers are preparing for trial, surely that is a time when the lawyers' heads are firmly grounded in the facts and so perhaps of all times, that might be a time when the lawyers could be expected to issue instructions to others in the office or to engage with the Department and say, "Mr Wiffin wants to meet. From what we

know about the file, he should be met and we should be looking to settle this because it's meritorious"?

A. Yes, I think Mr Wiffin was asking to meet with Mr Young who was wanting a lawyer to accompany him but I agree with your proposition, that it would be better if that had happened.

Q. Just looking at your response at the top of the screen which you can see, there are two points effectively. One most lawyers can understand which is a concern about workload. But secondly, there's a concern about strategy and, as you expressed it to Mr Young, a concern about whether really what's happening here is that Sonja Cooper Law is trying to continue a funding stream?

A. Mm.

Q. Given what you now know, I take it that you'd accept that that was not what was going on? This was a genuine request by Mr Wiffin, he wanted to settle his claim?

A. Yes.

Q. Can you talk the Commissioners through the thought process back in May 2008 where not the first response but the second response is, "What is Sonja Cooper up to here?"

A. Yes.

Q. How did that happen?

A. I don't know that I can talk you through the thought process with this distance but I can respond to that email which to take it at its face is asking do these meetings actually work? Or, this is not to justify this comment but to explain it, in the course of getting ready for these formal engagements, is something else happening here or do these ADRs work? I think that is what the words say. I don't specifically remember, you know, the thought process of sending off an email in response to another email some 12 hours or not, 12 hours since or maybe 24 since it was sent, just responding to my colleague do they work or is there something else afoot? I think that was indicating in the course of preparing for formal steps being taken in the

Court, that it might not have been a genuine offer to meet, which I've already just accepted it will have been. I've seen and heard from Mr Wiffin in this Inquiry, that certainly was his intention.

Q. One of the requirements in the Australian Model Litigant Policy you looked at earlier, is an obligation to ensure that Crown representatives participate fully and effectively in ADR, and a positive obligation to consider settlement, which I accept is there to be found to some degree in their general values.

The question is, would an explicit requirement to participate fully and effectively in ADR be helpful in a moment like this when you have a plaintiff asking for some form of ADR? Do you think an explicit requirement might be appropriate?

A. Possibly. I think the requirement to engage in informal settlement processes was real at the time and here is a failure to pick that up with the enthusiasm that you put to me we should have but I don't think having a separate written instruction is the answer. I mean, I just don't think that's - the suggestion was already there in the Crown's Litigation Strategy.

Q. We will come back to the relationship with Cooper Legal but while we've got this on the screen, am I right that there is something of a flavour here of suspicion or almost cynicism, in fact that's your own word?

A. As it's called, yes.

Q. About this really being Cooper Legal up to something? Can you give us an insight into what the relationship was at that point and how that might have affected judgement calls?

A. Yes. Just a small point of clarification, I think the law firm's name changed from Sonja Cooper Law to Cooper Legal which is why the full name is written there, it's about the firm.

I think yesterday I was clear, I hope I was, there was and is, perhaps was more than is, frustration with what we saw as a flood of claims being brought to the Court, that the law as it was and the defences that were available stood in the way of. That's not to resile from the point that Mr Mount has got me to, that there was material available that should have been used in this case but I think it is an example of frustration about what is going to happen with all of these claims in the Court that we could see are not going to realistically make it either numerically, like in actual content, sorry an actual number through the Court, but also in substance in terms of the ACC, limitation and so on that I've already addressed.

Q. Mr Wiffin talked about the meeting that eventually did happen I think a couple of months later in his statement which is document Witness 80001, page 6 of his statement, the hard copy is on page 684, paras 23 and 24.

You will see in paragraph 24 his impression was that someone from Crown Law was there, didn't say anything the whole time and effectively said, "I am only here because someone is sick" but that Mr Wiffin's hopes were raised by the meeting. I take it, there's no reason to doubt that Mr Wiffin went into this with a genuine hope that he was participating in an attempt to settle his grievance with the Crown?

A. Yes, I don't doubt that.

Q. If we can take that box down for a second.

If we look at paragraph 25 perhaps, Mr Wiffin explained he got a letter the next day, at the end of the paragraph, he tried to be positive, he had an expectation that the claim would be settled.

So, from Mr Wiffin's perspective, he has this meeting and he's optimistic that there will be settlement. What is happening back at Crown Law at that stage, in terms of a possible settlement, do you know?

A. No. I mean, I think what is happening at Crown Law is we are on the litigation track preparing possibly for a Limitation Act hearing. I am not sure of timing but that was one of the things that was being prepared for in the litigation stream, was an early hearing on the limitation defence.
Q. Just take that down and move over to document CRL 46103, page 439 of the bundle. So, we see this is in fact before the meeting, we see an internal memo within Crown Law referring to Mr Wiffin's claim. Certainly at that stage, if we look at the background paragraph, there is by that stage a joining of the dots within Crown Law that Mr Wright is a convicted sex offender. By this point, the penny has dropped, is it fair to say? That's a claim about a convicted sex offender.
There's nothing on the face of this memorandum to suggest that at this point those dots hadn't been joined. It's been approached as a meritorious claim that ought to be settled according to the policy; is that fair to say?
A. I don't see this memo as being that. Sorry, I might have misunderstood your question. This memo, are you saying does it recognise the meritorious claim and suggest that it should settle?
Q. That's right, that's not in the memo.
A. Oh, yes.
Q. There is reference to Mr Wright's convictions for sexual offending. So, by this stage, surely in Crown Law there's a realisation or ought to be a realisation that this is a meritorious case to settle?
A. There is a factual basis that it could settle on, yes.
Q. And when we look at this memo, instead of the case being presented in that way, here is a meritorious case and we've had a request for settlement. Instead of that, what we see when we look down the bottom half of the document, the proposal is first that the meeting with Mr Wiffin is delayed so that discovery can be assessed for limitation. So, really

specific consideration about that limitation defence. And secondly, a letter to Cooper Legal, really to put the onus back on Cooper Legal to explain why the case should be treated differently from White.

And so, the question is, at this stage is it fair to say that Crown Law really hasn't grappled with the meritorious nature of the claim?

A. Well, I think what this indicates or what many of these documents is indicating, is Crown Law's approach was preparing for steps in the litigation. I don't recall now when in time but there was a limitation hearing and this case was being progressed to trial but that is not to say that the Crown Agencies were not, at the same time, reviewing the material and thinking about settlement. In fact, that is what Mr Young's evidence I think tells us, that that was being examined so in another part of the Crown. Yes, this shows Crown Law preparing for trial. Also trial law, some other litigation hearing, yes.

Q. And if we go to MSD ending in 2399, the next page of the hard copy bundle, page 430, if we zoom in on the middle of the page, we have the Ministry recording its understanding of the meeting with Crown Counsel, not you. So, we can see the way it appears that the case is being thought about at that stage. The first piece of advice is that the limitations aspect is described as hopeless. And then we have some strategy advice.

And it's really the third point that I want to ask about. Do you see in paragraph 3, from line 2, "Make it clear that the basis of the meeting will not be with a view to settling the claim". On the face of it, would you agree that that is directly contrary to the Cabinet directions at that stage, to settle meritorious claims?

A. Yes because those directions invite everybody, including Crown lawyers, to try and settle claims where that's possible.

Q. And then the last two lines we see coming back to the idea that any letter needs to be carefully worded so that any other or agreement cannot be used to seek funding for an ADR process. On the face of it, is that Crown Law essentially wanting to make sure that the claimant can't have any legal, funded legal advice, to help settle the claim?
A. I don't actually know what that's saying. That's sort of parenthetical from the writer, oh yes, from a lawyer.
Q. I am assuming SJ is referring to Cooper Legal in some form?
A. Probably - yes, probably initials of one of her lawyers. I mean, I can only read like you can what that says, it does appear to be saying we need to be careful that this is not seen as an ADR process.
Q. And further, that we need to write our letters carefully so that Mr Wiffin can't have a funded lawyer assisting him in that process?
A. It doesn't say that but it is open to that, yes.
Q. It is a possible inference. If there's another interpretation, please say. Again, I come back to the question, how could it be that this is the understanding within the Crown when we have an explicit policy to settle meritorious cases when, on the face of it, it looks as if Crown Law is very much wanting to almost undermine a possible settlement of the case?
A. Well, as I've said, it's not consistent with the instructions that we had from government.
Q. Ms Aldred quite properly has asked me to highlight that when we looked at the Crown Litigation Strategy, that was a document dated the 16th of May 2008. So, when we looked material year at the statement "settlement will be considered for any meritorious claims", that was a 16 May 2008 document, so in fact only 10 days before this email. And then I imagine the formal Cabinet Policy Committee decision would have been a few days after that, I think Ms Aldred tells me 21 May.

But is it fair to say that the Cabinet policy document talking about settling meritorious claims didn't just emerge on the 16th of May but would have been the result of earlier work and so on within Crown Law? So, by mid 2008, is it fair to say that, at least in terms of Cabinet, Crown Law's advice is that settlement should be considered for meritorious cases?

A. Yes, have I said something different? I thought I had said that.

Q. I think you have and I think Ms Aldred just wanted me to point out that the actual Cabinet document was only 10 days before this. So, I think the point Ms Aldred would make is the policy to settle meritorious cases is hot off the press?

A. And your proposition is that financially it's not so different from earlier emanations, and to that I would say that's true although, as I think I addressed earlier, what was meritorious did move over time from is it meritorious because it's likely to achieve surmounting all the hurdles or is it morally or factually meritorious? And I'd say at this stage of the period, of sort of two decades, we're probably closer to what does the law tell us about whether it's likely to be successful or not?

Q. You can take that document down. A new aspect of the case to discuss, I don't know that we need this document on the screen, but we can see from correspondence between Crown Law and Mr Young that by August 2008 there's an address and phone number for Mr Moncreif-Wright?

A. Mm.

Q. But yet, no steps are taken to speak to him?

A. Yes.

Q. And I think you might have already said that you don't have an explanation for that?

A. That's yesterday, I addressed that sequence yesterday. Yes, that it was not an answer but an explanation, no a description of the facts that the file shows us, yes,

because the Police say, yes, you can talk to him and still he wasn't spoken to.
Q. Yes, that comes later but certainly, the Police do say that.
A. Mm.
Q. When Mr Wiffin gave evidence, he talked about eventually meeting himself with Mr Moncreif-Wright?
A. Mm.
Q. In a restorative justice process, and he talked about a 30 page document signed by Mr Moncreif-Wright, and what Mr Wiffin said was it was clear to him that no-one from the Ministry or any Government Agency had talked to Moncreif-Wright. No-one will ever know because Mr Moncreif-Wright is now deceased but quite apart from Mr Wiffin's case, is it fair to say that another reason to talk to Moncreif-Wright could be the possibility of other victims or other offending by him?
A. Yes.
Q. Was that lens ever applied?
A. I don't think it was, not by Crown Law. Whether the Police thought about it, and I don't know the answer to that, I can only speak for my office on that question. To my knowledge, that was not - sorry, it was considered, in fact. It was said to Mr Wiffin, "If you go to the Police, you might need to stay your civil claim and if we talk to him we might muck things up", we didn't say it like that "for any criminal process". And, as I said yesterday, the Police said, "No, please go ahead" and it didn't go ahead. So, I was wrong to say no thought was given to it but it was never done.
Q. To your knowledge, was that frame of reference ever used, the thought that not only do we have a meritorious case here from one claimant but there might be others out there?
A. Mm.
Q. And we have a broader responsibility perhaps to know more about Moncreif-Wright and what he was doing in Crown homes?
A. Do you mean by other people, other than Mr Wright?

Q. Yes, other than Mr Wiffin, yes.
A. Oh, sorry, yes. Well, I won't have the details but there are other historical cases where one set of allegations that the Ministry thinks either, yes, we know that's true or, yes, we think that's more likely true, does lead to them dealing with a number of cases in a similar vein. So, that does happen or has happened. I don't know the details to say how many or how often but that certainly has been a feature that I have been aware of, of not doing this thing that we've just talked about with Mr Wiffin and Mr Wright but actually collecting that information and using it for more than one.

And, of course, in the, we've already mentioned it, the difficulty of the Police referrals but it's that same better realisation that we have information that's credible, what do we do in order to make sure we protect current tamariki in care.

Q. I need to put this squarely because it has been raised by Mr Wiffin. You'll understand from his perspective that he has told the Commissioners of his struggle to understand why no-one ever spoke to Moncreif-Wright from Crown Law or MSD. And there is a clear inference from his evidence that he suspects that there was a tactical reason, that either MSD or Crown Law or both didn't speak to him because of a concern about the answer he might give.
A. Mm.
Q. What do you say to that?
A. Well, I say several things. It was incredibly brave of Mr Wiffin to take the matters into his own hands the way he did and to pursue his own justice with Mr Wright. Good for him and the Ministry or the Crown should have helped him do that and it didn't.

The second point to answer to that, is I don't believe there was an animus or a malevolent practice, rather poor practice that led to his outcome but I understand why

Mr Wiffin takes a different perspective, borne of his experience.

Q. You have said a few times that this was a case on a trial track, I think, if I've got your words right.

A. I might have said that, although now you say that it makes it sound like the more formal case management trial track and I'm not sure we had that in those days, but it was on its way to a hearing and/or trial, yes.

Q. A different phrase might be it was in a litigation mode?

A. Yes.

Q. Do you think there's anything about that litigation mode that can lead to a mindset that, as a feature of our adversarial system, thinking more broadly than any one case, can put blinkers on to Legal Teams dealing with a case?

A. Yes, absolutely there's a feature and a trap in the discipline of litigation and the closer one gets to the hearing, the more sure one is of one's case. Whether that's a matter with a tort, a damages claim, or whether it's a judicial review or appeal, that is a classic and recognised problem.

Q. Might that be one of the reasons that in Australia the Model Litigant Policy is written the way it is and might that idea also in some way sit underneath what Miriam Dean QC and David Cochrane said in 2008 which is that the Crown Law Office needs to avoid this win at all costs idea? Might that be part of that thinking?

A. It might be, Mm.

Q. To some extent, is there a cultural aspect to this, that the adversarial litigation process leaves lawyers open to the danger of tunnel vision and seeing things in win/lose terms and that there needs to be a very deliberate creation of a culture within a Crown legal office to make sure that no-one dealing with cases of this sort falls into that trap?

A. Yes, and we do have processes to try and make sure that we don't fall into that trap. Planning, speaking about that

with legal teams and others in agencies, often difficult or seemingly intractable issues will be elevated to more senior lawyers for review or more senior other officials for review. In Historic Claims, there's a now Chief Executive Governance Board that sits to think about these issues as and when they need to be elevated to them but to think through some of those hard issues. So, not only do I agree with you, I say we've taken steps to put in place processes to ameliorate against that risk.

Q. I want to move on now to a January 2009 letter which I suspect you will have looked at before, CRL ending 46017, page 439 of the written bundle. We're now about 8 months after Mr Wiffin had asked to meet to settle. We're about 6 months after the meeting happened. And Mr Wiffin hasn't had any formal offer from the Crown as to how the case might be settled but we're at the point in January 2009 where there's a letter from you to the solicitors at MSD to update them on where you're at?

A. Yes, I'd have to seek instruction but, yes, that is your letter.

Q. If we turn over to the top of page 2, in terms of Mr Wiffin's case, you report that there's no apparent mental illness or disability that would justify the disability argument?

A. Yes.

Q. And so, in paragraph 6, you ask or you tell the Ministry that you consider it ought to instruct Crown Law to take more proactive and aggressive steps on the claim, with a view to having it dismissed without having to go to trial?

A. Yes.

Q. Could you explain to the Commissioners how it could be that 7 months after Mr Wiffin has asked to resolve a meritorious claim, you are explicitly seeking instructions to take, in your words, aggressive steps to have the case dismissed?

A. Well, I think it's the same answer that I've given Mr Mount before now, which is that this case was being worked on as a matter being prepared for trial. And, accepting the criticisms of those two formal processes of informal settlement and trial should have come together better and didn't, this is a further example of that.

To answer his question about my language, I think I made the point yesterday that that idea that one might take a passive approach in litigation, as opposed to an aggressive, I see I've used both the words, proactive and aggressive, meaning let's not - well, the suggestion was we had previously said let's wait until trial, let's not take the limitation question on these matters first, let's go to trial. I would describe that as a more passive approach. And here I'm saying I think you should talk about taking a more proactive or not passive approach and have limitation dealt with first.

So, I can see it as a frame of litigation steps.

CHAIR: It would be a king hit if you succeeded on the Limitation Act, that would be the end of it?

A. Of the proceeding.

CHAIR: Of the proceedings?

A. Yes. In that litigation steps frame, it is thinking about do we go to trial when our assessment of the law is that that one step will answer the claim, Mm.

MR MOUNT:

Q. Would you accept that there is a difference between active as the opposite of passive and aggressive, so that an active step obviously is taking an action of some sort but there is something about taking aggressive steps which could be interpreted as moving into a zone that could legitimately be queried from a model litigant perspective?

A. I see that it could be interpreted that way but I'm confident because I wrote those words that I didn't mean aggressive in any sort of malevolent way. I mean, not this

passive, the sentence itself makes sense of that "with a view of having it dismissed without having to go to a substantive trial" and to take a more forward leaning, I could call it all sorts of things. I am confident I didn't mean malevolent perspective on it.

Q. If we go over the page to paragraphs 11 and 12, perhaps zooming in on those two paragraphs and just looking at them. Is it fair to say there was a fair dose of strategy in thinking at that time?

A. Strategy being a plan? Yes.

Q. And more broadly, looking at 12, you say, "We may be able to create further momentum in the developing case law on limitation in a way that is advantageous to the Ministry and its broader attempts to resolve historical abuse claims".

So, is part of the thinking here that really for the Crown here's a chance to create some good case law for the Ministry to try and resolve these cases?

A. Yes, the opportunity - well, as it says, the opportunity is the limitation case law is actually still pretty small in these cases and this was an opportunity to have further matters tested on limitation, yes.

Q. We looked earlier at Sir Rodney Gallen's review of these cases which occurred a little later in the same year of 2009.

CHAIR: Mr Mount, are you going to leave that document now?

MR MOUNT: I might, so please ask if you have a question now.

CHAIR: Yes, I am not sure if you're going to come to it, if you are, it's paragraph 11 that I'm interested in. When we're talking about strategy, strategic advantages includes not just ways to resolve historical abuse claims that you refer to in 12 but also the public examination of a wide range of

potentially difficult issues relating to Kohitere Boys' Home?

A. Yes.

CHAIR: So, this was a strategy designed to hide the potentially difficult issues?

A. Well, I see why you put that to me. At a similar time, the Ministry was undertaking research into Kohitere Home which led to, I think I mentioned this already yesterday, which did lead to some settlements of those. And so, it was more about let's not have those matters aired until we are ready to know what it says. I think that would have been the simultaneous nature of that Kohitere research project would have been in my mind.

CHAIR: You're saying that was going on at the time you wrote this?

A. At about that time, as I recall.

CHAIR: Because another interpretation, I'm bound to say, you can see what the other interpretation is, isn't it?

A. Yes.

CHAIR: There's some very embarrassing things that we know about this place and we don't want them aired?

A. Yes.

CHAIR: Do you wish to comment on that?

A. Only to say, as I did, because it's saying, you know, the advantages to delay or prevent those trials for the time being, get that Kohitere research sorted. But I have to accept that it is open to the different perspective that is saying keep that door shut.

CHAIR: Because it doesn't refer, does it, to the other work that's being done, the examinations?

A. No.

CHAIR: Thank you.

MR MOUNT:

Q. If we can come to CAB 14, which is Sir Rodney Gallen's report later in the same year, 2009. He, on page 5, in paragraphs 30-32, sorry next page, articulates a different way of thinking about limitation. And I'll give you a moment to read that.
A. Yes.
Q. I'll take a risk and try to summarise what Sir Rodney eloquently says in those paragraphs. He said along the lines that you could take a broader view of disability in sexual abuse cases like this, wider than the Courts even, and look at the reality that decades ago community attitudes were such that it just wasn't realistic to expect victims of sexual abuse to turn to the Courts. And it's a view that Sir Rodney explained in even more detail further on in the document and with an eye on the clock I won't take you to it now but you might look at it over the break, and I'm thinking in particular of paragraph 160, if you have the hard copy there.
A. I do, yes.
Q. Accepting that in these paragraphs and paragraph 160 Sir Rodney was essentially saying you could take a view that is broader than the Courts have but which might have some merit to it when you're in the settlement zone. Would it have been appropriate in seeking instructions from MSD in 2009 to at least float that kind of a view about limitation, so far as it would apply to Mr Wiffin?
A. Well, Sir Rodney was having a much more compassionate response to the Limitation Act and the reasonable discoverability aspect of the law as it stood and stands. No, I should say as it stood. But, as he points out, that's actually a matter of policy. I mean, it is still for lawyers to say this is how the law applies to these facts and for agencies and/or government to say as a matter of policy we want to shift that, a matter of legislative policy in this case. And, as I might have already touched on, that did lead

to further thinking about the Limitation Act and the provisions of the 2010 Act which do deliver something of what Sir Rodney was getting at, allowing the Court the discretion to set aside such a defence in respect of a child who's been abused physically and sexually.

CHAIR: We will take the afternoon adjournment for 15 minutes, thank you.

Hearing adjourned from 3.30 p.m. until 3.45 p.m.

MR MOUNT:

Q. We were talking about Sir Rodney's broader view of limitation in a settlement context, not in a legalistic or Court context. It would presumably have been open in January 2009 in your letter to MSD to raise with them not only the strategic reasons to take more aggressive steps to have Mr Wiffin's claim dismissed but also to raise with them a broader view of limitation and a possible settlement?

A. Yes, it would have been open to me to do that, yes.

Q. In hindsight, was there perhaps some degree of tunnel vision that flowed from the litigation mode the case was in by then?

A. My own? Yes, I think that's right, in that I saw my role as preparing the matter for trial and so, it is easy to criticise that now, I mean perhaps even at the time, for not thinking across the border to the Agency about how it might think about things differently.

Q. When Mr Howden gave evidence on behalf of Legal Aid, he said, if I remember correctly, that the Crown's approach to limitation defences was a significant factor for Legal Aid in its decisions about funding.

I assume you weren't aware of the way that Legal Aid was thinking about funding at that stage or were you?

A. Do you mean - no, I was not. I mean, I knew they were funding claims that we thought wouldn't survive, not just

limitation but also ACC and other legal barriers but we didn't know why or I didn't know why they were funding them.

Q. Thinking about that time, early 2009, was there a strategic fear that if the Crown was too generous, I don't know if that's the right word, but too generous with these claims, the floodgates would open and the Crown would be met with very high liability?

A. There's two things in that to address. One is that by this time, 2009, we were seeing a lot of claims, so was the Crown sort of fearful of a flood, not really that it was seeing it, it was seeing the many, many hundreds of claims coming. But I don't agree that there was a view that if the settlements were generous that would - is your question if the settlements were too generous, would that lead to a further encouragement? There is something of that flavour in some of the Cabinet Papers, about trying to not compensate but I am not sure it is written quite like this in the papers but this idea that settling claims is trying to settle the individual's grievance and recognise and acknowledge their experience but not to, sort of, copy or mimic what a trial Court might give if you could get over all of the hurdles because then that would encourage a different way of coming at the Crown for considerable financial compensation. So, there is a flavour of that through the material, yes, through the Cabinet Papers.

Q. We will come back to that particular point. We'll move on to March 2009 and document CRL46254. Again, an email, go to the bottom half first. By March 2009, you will remember from Mr Wiffin's evidence that he talked about the result of the White case weighing heavily with him, do you remember?

A. Mm.

Q. And he did talk about his mental health suffering by that stage. Your email on the 9th of March to Mr Young and some of the other lawyers involved in the case is asking for essentially an update on Mr Wiffin's case.

And the third paragraph, in particular, suggests that news Mr Wiffin's struggles had reached you you're asking Mr Young, if I've got this right, how tenacious Mr Young thought that Mr Wiffin would be and whether Mr Wiffin might settle or give up.

One interpretation of that might be that the Crown has seen a potential that a vulnerable plaintiff could be persuaded to give up or settle on what's described as a services basis, in part based on his mental health. Is that a fair interpretation of what's being said there?

A. I would say that paragraph is recognising, through the litigation process, that Mr Wiffin is suffering on account of the processes that he's been put through, and so asking MSD how are you progressing with the merits of his case, as it says at the top paragraph, because I notice this, is there a likelihood that he will settle on a services basis? I think that's actually a concern being expressed about what I could see in the plaintiff or in Mr Wiffin's material, about saying can we settle? How are you progressing? I don't think it is trying to take advantage of that, rather recognising it and asking the other side of the question, how are you getting on with exploring settlement options?

Q. If we scroll up to Mr Young's response, last paragraph beginning, "Like you", he says that he got the sense Mr Wiffin was pursuing, from a sense of obligation, and saying he's not sure about how Mr Wiffin might respond. But he goes on to say the main vulnerability would be around Moncreif-Wright.

Your comment about Mr Moncreif-Wright at that stage being seen as a vulnerability by MSD -

A. That's Mr Young's comment but yes.

Q. Sorry, I am inviting your comment on that framing, that Moncreif-Wright is seen as a vulnerability at that stage. Is that a rather tactical approach that, thinking about the

settlement, really Moncreif-Wright is the main vulnerability, so that's how he should be thought about?

A. Well, I think seeing - I don't really know what the writer was thinking but the context of that email seems to be to say Fiona, I don't know who that is actually, perhaps she is the senior person we talked about earlier but from Fiona's reading it refers to the file and social work practice, which reminds me not about this case in particular but about generally the claims had a lot of allegations in them and social work practice reviews was a comprehensive part of what MSD did when it was considering understanding the file and the individual person's grievance.

And so, he's saying there's not much there that makes us concerned that the social work practices are a problem. And, in that context, I think he's saying our vulnerability, the part where we're not strong, is Mr Wright.

Q. If we move over to document Witness 80018 which is on page 446 of the bundle, this is Cooper Legal's offer letter. You will see on the page we have on the screen, Ms Cooper points out it's been 9 months since the attempt to settle at ADR and no response. For starters, that's obviously not acceptable, is it?

A. Not necessarily unacceptable that there was no response but that there has been no, there's been nothing. Sorry, I mean not necessarily unacceptable there's no substantive answer because that can take time but there was no update, that's not good enough practice. Yes, I would agree with that.

Q. And then Ms Cooper goes through her analysis of the strength of Mr Wiffin's claim and she points out at the bottom of the page that many of Mr Wiffin's allegations are similar to those in the White case, which by that stage we've got the factual findings we went through carefully earlier. And then across the page, top of page 2, there's reference to the sexual abuse by Mr Wright, his convictions, and it's said in the next paragraph that there may be about 15 similar fact

witnesses to be called by Cooper Legal and Mr Wiffin would be an exemplary witness, articulate and intelligent. At the bottom of that page, Ms Cooper points out with a bold heading "Meritorious Claim" the statement that meritorious claims would be settled, so it is said by Crown Law. And so, there is a suggestion as to what the appropriate settlement sum should be.

In hindsight, do you find much to disagree with in that letter?

A. Well, in relation to the first paragraph, I agree that 9 months after a meeting with a survivor was too long. I understand Mr Young to have made the same point.

The fourth paragraph sets out Mr Wiffin's main complaint at a certain family home and at Epuni, and my comment to that goes back to the point I made earlier, that as I understood or as the file records our instructions, some of those allegations had been investigated and were not agreed to. I'm unable to agree or disagree with many of these points put by Ms Cooper, I don't have reason to disagree with them but they are her interpretation.

We disagreed about the level, sorry the application of the Accident Compensation bar. So, when she says it applies to a period before the ACC legislation came into force, I don't agree as a matter of law that that is right because, as I think is accepted, the ACC bar was in 2005, extended pre-1974 events.

I would disagree that exemplary damages are also available on the basis of the review that I've just referred to about the social work practices, so that idea that there is some conduct that's so reprehensible that the wrongdoer is to be punished. To be clear, that's a vicarious liability comment about exemplary damages. I disagree with that.

We disagreed on the analysis about the limitation defence. We didn't have the same view of the law and the facts.

And then she repeats, sorry doesn't repeat, says in the second to last paragraph, she notes that the meritorious claims will settle undertaking - not undertaking but commitment.

The sum that she asserts would be an appropriate settlement doesn't appear to be one that the Ministry agreed with even when it realises its error and goes back to the matter and sets Mr Wiffin's settlement amongst several others of the same nature, the Ministry disagreed with that quantum.

And only to point out the point that I've been making, that this matter was already timetabled for trial, so we were certainly on that path.

Q. Just for a moment focusing on the meritorious claim aspect, if we go back to your statement to this Royal Commission, paragraph 9.2(b), I know we've been over this many times but the way you put it to the Commissioners was the 2008 strategy would look for settlement. Putting to one side available defences, applying that standard from your own statement, would mean I think that we would forget about the Limitation Act and any other defences. Through that lens, was this not a settlement offer in March 2009 that should have led to a constructive discussion with Mr Wiffin about the terms of any settlement?

A. It certainly should have been something that was considered, yes. I'm not certain that the next step would be a discussion with Mr Wiffin but, yes, the -

Q. Through his lawyer?

A. But, yes, it was an offer that was to be considered, yes.

Q. As you say, even if we strip away everything else and just look at the money figure, the two numbers were not that far apart and could have resulted in a constructive discussion?

A. Sorry, what were the two numbers? What were the two numbers?

Q. The number you referenced was the ultimate settlement that MSD arrived at.

A. Yes.
Q. I shouldn't use the word settlement because it wasn't a settlement.
A. No, quite right.
Q. And I think it's fair to say that the figure from MSD related only to Mr Moncreif-Wright, not the other aspects of the claim; if I've got that right?
A. I would have to now, I would have to look again. I'm not certain.
Q. So would I. The point is just that the difference in terms of where MSD ultimately got to and what Ms Cooper was suggesting in the scheme of things was not enormous; is that fair to say?
A. It's nearly double what was ultimately arrived at, this figure, so -
Q. More than double.
A. I'm not sure that I can agree with that.
Q. If we turn over to document MSC ending 336, this is an email to you from Crown Counsel a few days later, after Ms Cooper Legal's letter. And you will see the date. In terms of the hard copy, page 450, if you have that?
A. I do.
Q. Rather than there appearing to be any serious consideration within Crown Law to the settlement offer that has come in, what instead we see is that there's a note from one of the lawyers working on the file focusing on people who might be witnesses in Mr Wiffin's case. And you will have seen in Ms Cooper Legal's letter, that she talked about a large number of similar fact witnesses that Mr Wiffin might call. So, the chances are this is probably referring to some of those witnesses, I think.
   And the second paragraph, I am sure this is a document you've looked at in preparing for today.
A. Mm.

Q. But it's a reference by Crown Counsel to a suggestion in "the "robust" camp of model litigant but might be worth consideration in any event". As an aside, this might tell us something about whether a model litigant policy by itself is the answer but the suggestion, if we take down that box, the suggestion from Crown Counsel to you was that there was a number of good candidates for leave hearings that should be filed in the next few months, "We don't need to lie down and allow her to call good witnesses that we know will damage us when their own cases are weak".

CHAIR: Can I be clear what we think we mean by "leave hearings", leave for what?

A. Limitation Act hearings, that's what I understand is being referred to there.

CHAIR: These are preliminary hearings, on the basis that the cases would go, if they were successful, the cases would be dismissed? Would not proceed to full trial?

A. If the defence was successful, yes, if the defence was successful, yes.

MR MOUNT:

Q. On the face of it, does this suggest that instead of a constructive review within Crown Law about settlement, we are seeing a tactical approach, thinking about how to put the Crown in the strongest position to fight Mr Wiffin?

A. I would see this email as being a more junior lawyer than the lawyer who was leading the file, which was me, so Associate Crown Counsel, a more junior lawyer floating with the more senior people in the team some ideas; is this a good idea or not? And she is acknowledging that this might be a bit, as she says, robust, so she's clearly questioning, is this a good idea? So, I see that as being a useful indicator of understanding the model litigant values, whatever the right words are for it, and saying, oh, this is a litigation strategy but is it something we should do? I

actually quite, you know, I see why you're taking me to it and I don't know what the response to it is or was, although less than a month later a settlement offer is made, and we know it missed the mark and it wasn't accepted, but it suggests that those ideas weren't picked up. So, that's sort of how I view that now and in the benefit of what we are trying to learn here at this Inquiry, see it as quite a useful indicator that Crown Law even then had a culture of saying, oh, we could but should we? Can I invite you while we're there to look at the next document? No, sorry, you take me where you want me to go.

Q. No, that's fine, happy to look at the next document, page 451?

A. Yes because it's something similar about -

Q. Just pause for a moment. CRL ending 4694. Zoom in on the top half of the page. Please go on.

A. It's something of the same character, in that it has parts to it that are not very flash for the Crown, that email, but again it's asking how do we learn from what we know? What do we know about Epuni and Hokio? What do we do next? And I can't step aside from the fact that that, like Sally McKechnie's email, has some aspects to it that now we look at it and think, oh. For me I'm wanting to emphasise that it is showing there was a time and a place for reflection and it is a bit unvarnished because, of course, as I've already mentioned, it's the in private communications on a litigation file which would not usually see the light of day.

Q. Understood. While we're looking at that email on the screen, the 19 March email, looking at the last paragraph, there is quite a focus on Ms Cooper being described as her allegations and her evidence. Again, I'm wondering, is there something about the litigation mindset where there's a focus on the opposing lawyer, the heat of the battle, who can prove what in that environment? Where actually, the

underlying reality of the 11 year old boy abused by a convicted sex offender in the care of the state is completely lost?

A. Yes, I accept that and I think I said it yesterday, that we need to be more survivor focused. We have become so. We might not be as survivor focused as we should be or we may never be as survivor focused as survivors would want but that does happen in litigation, that lawyers lose sight of the people's lives that they are talking about. I don't say that to defend it, I just say that that is a reality.

CHAIR: Ms Jagose, I feel bound to put this to you. You said before that the letter from Ms McKechnie, which was an April 2009 letter, I believe, came from a more junior lawyer?

A. Yes.

CHAIR: It was suggestions and, what did you say, just a suggestion by a junior, it was not picked up, just ideas about what we could do. What concerns me about that piece of evidence from you, is that I note that this letter that we're looking at currently, CRL194, predates the McKechnie letter or does it? Because it's about Sally's download?

MR MOUNT: I can help here. They're actually successive days. Ms McKechnie was 18 March and this one was 19 March.

CHAIR: This follows Ms McKechnie's?

MR MOUNT: Yes.

A. It comes the following day.

CHAIR: Having established that, this appears, at least to me, that you are picking up or Ms Schmidt is picking up the idea of a more robust approach, if we can call it that, and again questioning. But it doesn't look like there was any suggestion of saying, no, that's completely wrong, inappropriate, we should follow another line of thought?

A. I agree with you that it doesn't show those latter things. It's a bit hard to put them side by side because they don't speak to each other.

I take it from the subject heading of the one that's on the screen now, that in fact the reference to Sally was a reference to a junior lawyer in the White litigation, and I take it that it is about a series of what did we learn there that we need to know for future cases? I am not sure they're speaking to each other, those two emails, or they're not speaking to each other. They are not responding, if I am making myself clear.

CHAIR: I must put it to you, it doesn't seem to me that this is just idle chat, what if, what if. It does feel as though it's becoming more of a concretised strategy?

A. Yes, I don't want to step away that the earlier email, 18 March, is being put up, we could do these things. We don't know what happened. We know those things didn't happen because within the next month a settlement offer was made and we know what happened next. Mr Wiffin walked away from the whole thing, so much had we misfired with that settlement offer.

So, we just can't tell now. I agree with you though that there is no other thing here to say that is not an appropriate idea.

CHAIR: That's right. That's really what I had in my mind, thank you.

MR MOUNT:

Q. Okay. We can take that document down now. I think I did promise you that this would be a painstaking walk through the documents. We might not need to put the next one up on the screen but if you in your hard copy bundle turn over to 453, we are another couple of weeks on, 1st April 2009?

A. Yes.

Q. This is your letter to Cooper Legal where in paragraph 9 you address the conviction history of Mr Moncreif-Wright. And what you said in paragraph 9 was that this is a publically available document and so, it's not necessary to discover it but the Ministry was "happy to provide it to you" and that is the point in April 2009 when the convictions are disclosed to Cooper Legal.

Was it good enough that a document sitting on Crown Law's file for nearly 2 years is only provided to Mr Wiffin this late?

A. No. I mean, I'm saying is shortly because I think I've already answered that question, that I can't explain why that failing occurred, it's not acceptable.

Q. Now, again, this is not something we need to put on the screen but the next thing that happens is the drafting of the reply to Cooper Legal's settlement offer. But if you in your hard copy bundle turn over to 475, I think you've got a draft letter being exchanged at that point?

A. Yes.

Q. Do you have any recollection about what your own views were of the settlement proposal going back to Cooper Legal?

A. Well, I can only recall what I can see on that page which is quite plain, asking is it enough?

Q. So, if we go now to the 9 April letter to Cooper Legal, it's Witness 80022, page 477. This is your letter to Cooper Legal of, as I say, the 9th of April. We've talked a little about this letter without actually having it on the screen yet.

So, this is Crown Law's response to Ms Cooper's letter?

A. This is MSD's response to the settlement offer.

Q. MSD's response, correct, to Mr Wiffin's offer?

A. Yes.

Q. And you've already said that you would write such a letter differently today, so that has been heard.

A. In its tone, recognising that a person about whom we are writing, that there is a person about whom we are writing, yes, as to tone I would write that letter differently.
Q. The words we see in paragraph 2 are that the settlement offer is rejected and, of course, I can understand from a legal perspective it's important to say that.
Paragraph 3, the language "denied and defended" is language that clearly resonated with Mr Wiffin. Is that some of the language that you would change now?
A. It might be more about putting it in a different perspective perhaps because the language of allegations are denied, I mean that is, as we know, just the way that lawyers say, accepted or denied and so on. Maybe, it's hard to say now, 12, so many years later, how I would write the letter differently. What I anticipated when I said that in my evidence is to perhaps frame the letter in a way that is more acknowledging of the person, rather than not saying what the Ministry's perspective is on the matters of factual allegations that are to be denied. I mean, that is also a matter that I wouldn't want to end up being so subtle in a letter that it wasn't clear that the litigation would be met in the way that it would have, had we got to trial, that is so confronting for survivors, that matters are denied. So, I would say there needs to be a balance in the letter to be clear but to be more empathic in its approach to the person.
Q. So, perhaps if you could tell the Commissioners how would you write such a letter now?
A. I thought that I had just answered that question. Do you want me to literally rewrite the letter?
Q. No.
A. No. I'm saying I would put it in a more empathic framing but I wouldn't want to make it so subtle that it's not clear the position that the Ministry was preparing to take in litigation. It would be irresponsible.

Q. Is it your view now that the real deficiency with this letter was the language, the framing, or was the problem with this letter the substance of it?
A. Well, with the benefit of the Ministry's determination that it made an error in its assessment, therefore an error in its instruction to us on what basis to offer to settle, I can agree that the content was in error too because it relied on the Ministry's error.

So, if we had our time again and the Ministry's second look at this was at issue, this letter would be different. It would be making the offer that was ultimately made.

Q. There seems to be a real disconnect between the Ministry and Crown Law at this point. You will have heard evidence from Mr Young, if we go to transcript 18, page 750 of the hard copy, I think it will be page 59, yes, of the electronic document, from line 5, where Mr Young talked about his unease about the claim and having very mixed feelings about the proposed settlement offer.

Mr Young saying for whatever reason, the views held by MSD didn't translate into an offer. I take it, you were unaware of those views held within the Ministry?
A. Yes, and your starting of this question was there was a disconnect between the Ministry and the Crown office, and I resist that description because this letter was sent in draft. You know, this was written on instruction, sent on draft back to the Ministry and approved to send. So, there was no disconnect in that literal way. This is a letter sent on instruction. But I do see Mr Young's evidence, I have seen his evidence and we have it there, saying that somehow within the Ministry there was some, I don't know what, disconnect, that meant that that settlement offer was sent. So, I can accept there has been a disconnect but I don't want it to be said that I am agreeing that we sent a letter without instruction.

Q. I am not suggesting that, of course. If we turn over to page 318 of the transcript, page 77 I think of the electronic file, and look at the bottom. This is Mr Young's evidence to this Royal Commission and he says from about line 28, "If I'm brutally honest, the legal impediments got in the way of our team's moral judgement and acceptance of Mr Wiffin's claim" and he said he held himself partly responsible for not being more assertive and taking a different approach. A real suggestion there that the legal impediments, whatever they were, got in the way of MSD's internal moral judgement, what do you say about that?
A. I am not sure that I can say anything more than that I see that that is Mr Young's view and that he regrets, and knowing Mr Young as I have done for years, he will feel that regret hard, that he didn't do more.
Q. There seems to be more than a hint of a suggestion there that the legal impediments might be indicating that Crown Law took a particular view and that Crown Law's view of the legal impediments prevailed; does that seem fair to you?
A. Well, I accept that Crown Law's view of the law will be authoritative - not authoritative - weighty in relation to how the matter is looked at as a matter of law and I can't really comment then on how that was dealt with within the Ministry.
Q. And standing back from Mr Wiffin's claim now and knowing what you know now, having it all laid out step-by-step, what is your view about whether the legal impediments got in the way of a more moral response to Mr Wiffin?
A. Isn't the answer to that also in the documents, in the Ministry's assessment of accepting that it made the wrong decision and should have made a more substantive offer and apology, which it then goes on to do? I mean, yes, the Crown Law Office offers legal advice about the legal position and defends matters in Court according to law and instruction, and I'm responsible for that. But to this Inquiry, the

answer that has been given, that I don't see that I can take it any further, is that the Ministry accepted, after Justice Gallen looked at the material, that it had erred in its assessment and its approach to settlement.

Q. Do you think that Crown Law's approach to the case in any way contributed to the instructions you got from MSD in a negative way? In other words, was Crown Law taking too narrow a view of the case which now, with the benefit of hindsight, was a deficiency within the office?

A. Well, I can accept that Crown Law's view about the law was persuasive to the Ministry about what the law would be and found to be at trial. I still think that the position on the law was correct and so the deficiency I think that you are inviting me to comment on is the translation between that sort of - that track of litigation and thinking differently about this claim and resolution, and I've already said it in this session, I think, that what we can see is the two paths not meeting or perhaps meeting in a way where one factor overbore the other. So, I can see that but, as I say, that seems to be the Ministry's own assessment of saying as it did to Mr Wiffin, our assessment was wrong and it led us to make an offer that you turned down.

Q. As you say, there was a reassessment of the case the following year, 2010. It was reviewed and ultimately between June and August there was a view signed off by the Chief Executive of MSD that Mr Wiffin should receive an ex gratia payment?

A. Yes.

Q. We've heard that Sir Rodney Gallen's review was part of the reason for that. You will have heard Mr Wiffin's evidence that his belief is that a media interview with Mr Vaughan was also a factor?

A. Yes.

Q. Do you know anything about that? Can you shed any light on that?

A. Well, I know that that - I only know that that was Mr Wiffin's view and that I think Mr Young's, maybe it was someone else in MSD's view that it was Sir Rodney's review. Perhaps they were both a combination to reviewing it, I don't know.
Q. This is a very technical question I'll ask you now, and forgive me for that. I just want to ask about the ACC position as it applied to Mr Wiffin because, of course, his assault by Mr Moncreif-Wright was before 1974, and so before the ACC regime came into force. But, as you know perhaps better than anyone, the position with ACC cover for pre-1974 injuries is a very complicated area; have I got that right?
A. Yes.
Q. Am I right that one interpretation of the law is that cover bites or takes effect at the point for these older cases when someone seeks or receives treatment under ACC?
A. I would want to look at the legislation because it has an expression in it that I now can't bring to mind that relates to the question you're asking me.
Q. Yes. We might not dive into all of those complexities this evening, it's something you should certainly feel free to check overnight. But I'm wanting to try to short circuit this slightly and perhaps you just might want to reflect on it overnight but I think it's clear from the file that when Mr Wiffin made his claim, he had not had any ACC claim or counselling?
A. Yes, I think one of the documents we've been to today says that.
Q. It says that, yes. And I think we know from the file that Mr Wiffin only had access to ACC counselling after his response to the White trial and the difficulties that you referred to in that earlier email exchange that we've seen. What I might ask you about tomorrow is whether on one interpretation of the law, Mr Wiffin's claim would not have been ACC barred until that point around the time of the

White trial where he sought counselling. You may have an answer straight away or that might be the sort of technical question -

A. We might come back to it. I would now make the point that there is a distinction to be made between when you have cover and when you seek and obtain an entitlement. That's a general proposition though because I don't know and I'm not even sure that by tomorrow I will have an analysis of how the legislation and which one applied to Mr Wiffin's case in 2009.

There was another point to make about ACC. But in the litigation process, that is how the parties reveal to each other, as you know, the way in which each party sees the case. And so, when the defence of limitation is put, then the plaintiff has an opportunity to reply - I mean, this is all in documents filed by lawyers - to reply to say why you're wrong about that defence. As I recall, Mr Wiffin's reply was to say the events were pre-1974. That alone was not an answer.

Q. Not a complete answer, no.

A. No. And so, I think one of the letters that you might have taken me to from Ms Cooper says the same thing. Mr Wiffin's settlement offer from Ms Cooper says the same thing, it was pre 1 April 1974.

Q. That's not the end of the matter?

A. No.

Q. All right. We don't need to go into the nitty-gritty at this point but is it at least possible that, on the correct interpretation, the ACC bar did not apply to Mr Wiffin's claim initially but was triggered only when he later sought counselling?

A. I really don't know. It might be possible but I don't actually know the answer. When you say we don't need to go into it, will you be questioning me tomorrow on this question?

Q. No, I think we might have done enough on this. It is ultimately a question of law that the Commissioners can simply look at and if there is a need to come back to Crown Law, we can.
A. Sure.
CHAIR: Is the point you're making, Mr Mount, that there was a possible defence sitting there somewhere that was arguable?
MR MOUNT: Yes, and perhaps if I put this as a proposition to the Solicitor-General.
CHAIR: Yes.
MR MOUNT:
Q. Whatever the right or wrong answer is about ACC applicability, the phrase "technical defence" which is used by many, and was used in the Cabinet Paper we saw earlier today, might be thought to capture the very fine legal technicalities that can arise with, for example, ACC cover. And I understand, I don't think you need to repeat your view that these are not technical defences, these are the law, if I've got your position correctly, and there's nothing technical about the law, the law is just the law; is that essentially your position?
A. When I say not technical, they are substantive and have got policy basis for why that is the law but yes.
Q. Perhaps if I can approach it this way. Can we think about a counterfactual for Mr Wiffin as to how his claim could have been handled over that 3 year period. It comes in, in 2006 and there is a prompt factual analysis of its fact all merits entirely possible, I take it. And presumably, that factual analysis would have very rapidly joined the dots about Mr Moncreif-Wright and his convictions for offending against boys at Epuni in the 1970s and, indeed, by that stage he had further convictions for sexual offending, I think we saw on the criminal history, if I've got that right?

A. Yes but that one we went to had three and two charges.
Q. I think even some further convictions in the 1990s too.
A. Oh, okay.
Q. There would also have been, at least by 2007 after the White trial, some joining of the dots about Chandler and Weinberg, if I've got that right?
A. Yes.
Q. And maybe even some follow-up of the Hamilton Boys' Home connection, depending on the interpretation of the document we saw earlier today. On an application of the 2008 Litigation Strategy, certainly by mid 2008, May or thereabouts, Mr Wiffin's claim would have been identified as meritorious and one where the Limitation Act or other legal defences could be put to one side; have I got that right? And on receiving a request from Mr Wiffin of an ADR meeting that would have resulted in a genuine engagement with Mr Wiffin about how the case could be resolved to his satisfaction.

And I know you don't like the language of negotiations but would you accept that some process of dialogue with Mr Wiffin would have been appropriate and that there would be nothing improper about that dialogue? A negotiation wouldn't have to be improper, I take it you'd accept?
A. Yes, that's right.
Q. And given what we now know about the claim, is it not likely that Mr Wiffin's case would have been settled perhaps by mid to late 2008, something like that, within a reasonably fair timeframe from it being filed; does that now look likely?
A. Well, with the benefit of hindsight, I can agree with you that having connected, as the Crown side should have, the Mr Wright information that we had in a timely way with an ADR meeting, it could have been an outcome, the one you're describing. It should have been even.
Q. Now, I know these questions might feel slightly sustained but having got to that point, please feel free to address

the Commissioners, or indeed Mr Wiffin who is here, with your best understanding now as to all things considered how could it be that we didn't get to that resolution of his case?

A. I think I've addressed some of the failures to connect vital information. I think I have already addressed the focus that was brought in the litigation stream that might have blinded lawyers to thinking about the broader picture. But I think the critical thing is that the Chief Executive of the Ministry and Mr Young at the time, and Mr Young in this Inquiry, recognise and apologise for that error.

Q. Do you take the view that there is anything that Crown Law ought to apologise for in the way that the case was handled?

A. Yes, the Crown Law Office can and should apologise to Mr Wiffin. If he's here, it can be done that way, it can be done another way, for having information on its file that was relevant and not produced in a timely way. I share that responsibility absolutely.

Q. Any other matters?

A. Not specifically that I can think of are ones that we haven't already addressed, yeah, no. Can I say one thing just to the Commissioners? I am happy to leave it to the Commission to make a recommendation on this point. I've said a couple of times, I think in my evidence, I feel like it's too easy to sit here and say, oh yes. I do think that meaningful engagements, I think the engagements that Mr Mount is putting to me should be meaningful. I do invite the Inquiry to recommend, if it wishes, any further steps that should be taken.

CHAIR: Do you mean in relation to this particular claim?

A. Yes.

CHAIR: All right, thank you.

MR MOUNT:

Q. Mr Wiffin of course when he gave evidence did address his response to the settlement letter. It may be appropriate to replay, if we can, the evidence from 21 September, page 31 of the transcript. (Evidence replayed).

I wonder if you have a specific response to that concern that overall the Crown's focus was on defeating Mr Wiffin's claim in pursuit of a broader agenda, rather than on the merits?

A. I have watched Mr Wiffin's evidence already, so I've seen that now for the second time, and I recognise and acknowledge his pain and the anger that he has or had and perhaps still has for how his claim was dealt with. And I need to emphasise that the Crown's legal position is something that the lawyers for the Crown need to be conscious of, advise on and defend, if that is the instruction given. And I accept that that is a brutal process for survivors to go through. I have said that in this forum and in other forum before now but that is the one that - that is the only formal process that we have for resolving these claims. And when people come into them, I see it and I understand it, that that is not the resolution. And when claims the way that Mr Wiffin's did, it feels, I hear him say it feels like an offence to him. I see it differently because that is what the legal process requires.

Now, that is not to say it can't change and be better. That's not to say that informal processes shouldn't have a different result. But it's hard to step away from that in our system you end up - when you end up in Court, it's because you disagree with each other and you need somebody else to determine the answer, and that itself is bruising and hard.

CHAIR: Isn't it the case that there is, in fact, a mandated alternative, and that's in the Crown Litigation Strategy?

A. That's right, to go through an informal process within agencies. It's now more sophisticated.

CHAIR: I am talking about 2008-2009.

A. Yes, that was more agencies to try and settle the claims. I'm not sure that they had then established their, what we now recognise as the Historic Claims alternative processes. So, as I've said, accepted to Mr Mount, that maybe those processes of the legal strategy and the informal processes got too tangled. They are quite separate now and I'm not sure of the time at which those formally came into place.

COMMISSIONER ERUETI: It does seem, doesn't it, that ADR process, that first prong, wasn't really seen as very much in its formative stages, so that what they have, as we're seeing, is this dominant second prong, if you like, strong culture, proactive litigation mode. And we don't see this informal settlement process, it seems to not develop until some time later, a few years later?

A. Yes, I can see that too.

COMMISSIONER ALOFIVAE: Ms Jagose, given the brutality of Court processes, was it a philosophy or perhaps thought in the Crown Law Office to keep pushing it back to the agencies to essentially attempt to settle because once it hits your office, it sounds like it's game on?

A. No, I wouldn't describe it that way because, in fact, it almost inevitably starts in our office. If a Statement of Claim is filed, it tends to come, it might go to the Agency but it tends to go to the Crown Law Office.

So, that isn't the decisive point at which the litigation steps take place. And so, we do work closely with our Agency colleagues, in Historic Claims in particular. Today is very different from the description that we've just had of the process and I agree that the processes were not as distinct

as they are now and that perhaps the litigation view drove the Ministry's assessment of its informal process.

But now, the same step might taken, the Statement of Claim is filed, where Crown Law has very little to do, it doesn't just inevitably march on to litigation. The informal process is better defined. As I have been through, claims are either not filed or able to be case managed in a way that Cooper Legal primarily is putting forward the matters that she wants the Court to deal with. That's not entirely the case but in terms of getting onto a track for trial, that is how that works now.

I think we are seeing the difference between two very different strands and the development of those two strands that probably were still quite influenced by the litigation mode.

COMMISSIONER ALOFIVAE: Thank you.

MR MOUNT:

Q. Last month when Cooper Legal gave evidence, they were asked about the Wiffin case, of course, and said on the 1st of October, transcript page 503, "I don't think Keith Wiffin's claim is an outlier. It's terribly representative of how claimants are treated". Do you have a comment on that?

A. I'm almost not the right person to ask that question of because I don't see the hundreds of claims that the Ministries see and deal with. And many of them settle, some of them don't. So, if I can think about the ones that Crown Law does deal with, those are the ones where things have become either stuck, in that it's intractable and Court seems to be the only answer.

To that end, while there might be the same level or greater level of empathy for the individual, it won't be obvious because the steps then are Court steps.

So, I think I would say to the question, that needs sort of a wider scope of answer, people to answer that question, about whether this is representative or not. I would say not

generally because now we are not pursuing many cases to trial. I think I said the next ones are scheduled for April or some mid next year point. And otherwise, matters are being resolved informally.

CHAIR: Were you referring to it being an outlier or were Cooper Legal referring to it being an outlier in terms of the Court process or in terms of the factual basis upon which Mr Wiffin's claim was made?

MR MOUNT: It was perhaps not entirely clear from the transcript. We can pull it up, it's transcript 503, page 26, it's page 746 of the hard copy bundles, about line 10. It seems the particular factors were long delay and information.

CHAIR: It's what Ms Jagose has just referred to, which is the process through the legal system.

MR MOUNT: Yes.

CHAIR: Rather than the substance of his claim.

MR MOUNT: Yes, that's right, the process was the point.

CHAIR: The process?

MR MOUNT: Yes.

Q. And just having that clip in front of you, does that help you at all in terms of the answer you might give?

A. Only to say it seems that from page 503 what is said to be representative are delays and that information is withheld. I'm not aware of current criticisms of information being withheld, other than the approach to privacy and redactions. That is a matter which is still - it is a different matter I think from the one that we're talking about with Mr Wiffin where material is on the file that was relevant and not produced.

But I do accept that there continue to be delays, in part because processes take time to go through investigating and looking at and going back to files. The Ministries have put

in more and more resource to make that go faster. I am not the person to answer now about what the delays are.

MR MOUNT: Madam Chair, I am about to move on to the White case now, that might be a suitable time.

CHAIR: You are not going to do that in 30 seconds, are you, Mr Mount?

MR MOUNT: No.

CHAIR: In that case, we will draw the proceedings to a close and invite the karakia.

(Closing waiata and karakia)

Hearing concluded at 5.05 p.m.