Under the Inquiries Act 2013

In the matter of the Royal Commission into Historical Abuse in State Care and in the Care of Faith-based Institutions

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Brief of Evidence of Malcolm James Burgess for New Zealand Police

Lake Alice Investigation

Dated: **6 April 2021**

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I, **Malcolm James Burgess**, of GRO-C, retired, state that:

1 Introduction

1.1 I am a former Assistant Commissioner of the New Zealand Police. I began my career in the Police in 1976. In 1983, I joined the Criminal Investigation Branch (CIB) in Auckland. I qualified as a detective in 1985, and over the following years I held various investigative roles as a Sergeant, Senior Sergeant, and Inspector. In those roles I was responsible for investigating, or managing the investigation into all types of crime, including violent crime and sexual offending. In 2002, I was appointed Detective Superintendent for the South Island. This was one of three national positions responsible for the oversight of serious crime investigation and conducting high profile or politically complicated investigations and projects. I remained in that role until 2009, when I was promoted to Assistant Commissioner in charge of the Organised and Financial Crime Agency of New Zealand (OFCANZ). In 2011, my role was expanded to provide executive oversight of criminal investigations, organised crime, financial crime, international policing and national security. I retired from the Police in 2016.

1.2 The purpose of this evidence is to:

(a) Provide an overview of the investigations by New Zealand Police into the allegations of child abuse at the Lake Alice Hospital Child and Adolescent Unit;

(b) Outline the investigation I conducted over the period 2006-2010 in inquiring into the complaints lodged with Police by former patients at Lake Alice;

(c) Explain why it was decided not to lay criminal charges in 2010.

2 Lake Alice Hospital Child and Adolescent Unit

2.1 The Lake Alice Hospital Child and Adolescent Unit was set up in the 1970s to treat children and adolescents with psychiatric and behavioural problems. It was an adjunct to the Lake Alice Psychiatric Hospital, which also housed the national high security unit for special patients as a separate unit.

2.2 Doctor Selwyn Leeks was the principal child psychiatrist and director of the Unit between 1972 and 1977. The Unit closed in the late 1970's following a number of critical investigations into practices at the Unit, which centred on the use of electro-convulsive therapy (**ECT**) or electric shocks on the child and adolescent patients.

2.3 The experiences of the children at Lake Alice became the subject of public interest after former patients went to the media recounting allegations that they had received electric shocks in the guise of ECT as a form of punishment when they were at the Unit. In 1997, following a series of television programmes about Lake Alice, a civil class action was commenced in the courts on behalf of former Lake Alice patients. The New Zealand Government decided to resolve the claims out of court and entered into settlements with a number of former Lake Alice patients in 2001 and 2002. I understand that the confidential settlements

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comprised financial compensation accompanied by an apology from the Prime Minister and Minister of Health.[1].

3 Overview of Police Investigations

3.1 In preparing this evidence, I have drawn on my investigation file and my recollection of the investigation. The Police files have been disclosed to the Commission already, and all the documents that I refer to in this evidence are from the files. There are two reports that are particularly helpful that I draw on in this evidence:

(a) A report dated 14 September 2009 (**2009 Report**) that I prepared when seeking legal advice on prosecution, in which I summarised the issues, the investigation, and the basis upon which criminal charges were considered.[2]

(b) A report dated 22 March 2010 (**2010 Report**) to the Assistant Commissioner: Intelligence and Investigations at Police National Headquarters reporting on the outcome of the investigation and the Police decision not to lay criminal charges against Dr Leeks.[3]

3.2 As I noted in my 2009 Report, the Police investigation into the Unit was not straight forward. In this evidence I have set out a summary of the steps Police took in response to the initial complaints made in the 1970s, followed by the investigations undertaken in the period from 2003 until the conclusion of my investigation in 2009. I should state that I was only directly involved in the period 2006- 2010, and I do not have personal knowledge of events prior to or after my involvement. My narrative draws on the documentary record for those events outside my direct knowledge.

1977 Police Investigation

3.3 It appears that the first complaints by former patients were made to the Police in the 1970s, while the Unit was still operating. A seven-month long police inquiry was conducted in 1977 in Whanganui and concluded that there was no evidence of criminal offending at Lake Alice.

3.4 At the time I started my investigation, I was unable to find out very much about this inquiry, as the files could not be located despite extensive searches.[4]

3.5 I did locate an article from the *Wanganui Chronicle* on 28 January 1978 that reported that the inquiry into allegations that children at Lake Alice had been given electric shocks on their legs as a form of punishment had failed to convince

[1] See letter to unnamed victim, dated 23 December 2002. All documents referred to in this brief of evidence were provided to the Royal Commission in response to Notice to Produce 6.
[2] Report from Detective Superintendent Malcolm Burgess to Senior Legal Advisor, Canterbury, 14 September 2009.
[3] Report from Detective Superintendent Malcolm Burgess to Assistant Commissioner: Intelligence and Investigations, Police National Headquarters, 22 March 2010.
[4] Job Sheets re: Ministry of Health and Wanganui Police, Malcolm Burgess, 22 November 2007; Memorandum from Area Commander for the Records Officer to The Records Officer, Central District Headquarters Palmerston North, "re Lake Alice Enquiry", 15 May 2007; Memorandum from D Brew, Professional Standards, Central District Palmerston North to Detective Superintendent M Burgess, "Lake Alice: File Audit at Central District HQ, Palmerston North/Marton/Wanganui: May/June 2007", 2 July 2007.

the relevant authorities that any offences had been committed. The article states that the Director of Mental Health at the Department of Health, Dr S.W.P. Mirams, asked a barrister, Gordon Vial, to investigate, who in turn referred the matter to Police on the basis that there may have been an offence committed under section 112 of the Mental Health Act (which made it an offence to neglect or ill treat patients in a psychiatric hospital). The article reports that the then Commissioner of Police, Mr K.B. Burnside, announced that an independent medical opinion had been obtained, and that that opinion confirmed that there was no basis for laying criminal charges.[5]

3.6 I understand that the 1977 files have now been located (they had been misfiled) and disclosed to the Commission. I have not reviewed the investigative files, but I have seen the medical and legal opinions provided for that inquiry which concluded that no criminal offence was disclosed.[6]

2002 complaints

3.7 In 2002, the Police received a number of complaints from former patients alleging that they had received shock treatment as punishment at Lake Alice. These complaints followed the Government settlement process.

3.8 On 11 March 2002, Detective Superintendent Bishop, the then National Crime Manager, wrote to Superintendent Graham Emery, who I believe was at that time the Chief Legal Adviser, seeking advice as to whether the allegations being advanced in the class action by 34 individuals represented by lawyer Grant Cameron (out of a total of 95) should be the subject of further investigation by Police.[7] The letter states that the files contained evidence of "very disturbing practices", but also observed that the "practices may have the support of the medical fraternity".

3.9 On 25 March 2003, Superintendent Graham Emery, who by then was the National Manager: Professional Standards wrote to the Deputy Commissioner: Operations, recommending that an investigation be conducted into the use of electro-convulsive therapy on patients at the Unit.[8] The letter indicated that multiple complaints had been received, that there was "substance" to the complaints, and that they should be thoroughly investigated for "public interest reasons".

3.10 On 12 June 2003, the Deputy Commissioner: Operations referred the file to Detective Superintendent Larry Reid advising that a Crown Law opinion regarding whether there was sufficient evidence to lay charges should be obtained.[9] In late June, a complaint made by one former patient was chosen as being representative of all the complaints and forwarded to Crown Law, with supporting documentation.

[5] Whanganui Chronicle, "No criminal misconduct at Lake Alice Hospital", 28 January 1978.
[6] The medical opinion was provided by Dr D.G. McLachlan and the legal opinion by Police legal adviser Neville Trendle.
[7] Letter from Detective Superintendent Bishop to Chief Legal Adviser, Office of the Commissioner, "Lake Alice Hospital: Proposed investigation into the actions of staff at Lake Alice Hospital between the period 1972-1977", 11 March 2002.
[8] Letter from Superintendent Emery to Deputy Commissioner SE Long, "Re Lake Alice: Criminal complaints to Police", 25 March 2003.
[9] Handwritten note on the letter from Superintendent Emery to Deputy Commissioner SE Long, "Re Lake Alice: Criminal complaints to Police", 25 March 2003.

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3.11 Some ten months later, on 15 April 2004, Crown Law provided the requested opinion, signed off by Deputy Solicitor-General Nicola Crutchley. The opinion reviewed the allegations that the patient had been subjected to electro-convulsive treatment at Lake Alice for both treatment and punishment. The opinion considered that if ECT was administered to patients as a form of punishment then that would be "reprehensible conduct and, quite likely, criminal behaviour on the part of those responsible".[10]

3.12 The opinion concluded that on the material provided there was insufficient evidence on which to found any criminal prosecution, and that it would not be responsible to lay charges on that basis. However, the opinion also stated that "the complaint taken at face value does raise serious questions which should be investigated", and recommended that the Police conduct further inquiries to locate records and witnesses, including former staff, in order to ascertain whether a full investigation is warranted.

3.13 In response to the Crown Law opinion recommending further inquiries, Inspector Taare took receipt of the complaint referred to Crown Law, and planned the further investigative steps that needed to be taken .[11] Inspector Taare noted that there was a fresh development, in that the Medical Practitioners Board of Victoria had determined to investigate Dr Leeks' practice in both Melbourne (where he was then living) and New Zealand. As matters transpired, Dr Leeks surrendered his practising certificate on the eve of the hearing commencing so it did not proceed.

3.14 On 7 October 2004, Inspector Taare interviewed a school teacher, Anna Natusch, who had worked at Lake Alice. Ms Natusch stated that ECT was administered as a punishment for failing to achieve adequate grades in school work and for other behavioural issues. In the interview, Ms Natusch described in detail her disapproval of the "cruelty" of the behavioural modification regime at Lake Alice. She also stated that she had not actually seen ECT being administered so she was not a direct witness to the application of electric shocks. The basis of her information was observation of patients who had received ECT and hearsay accounts from the children.[12] To progress the inquiry it would have been necessary to locate witnesses who had direct knowledge of what had occurred. It appears that some efforts were made to locate former Lake Alice staff through Births, Deaths and Marriages[13] responding to the Citizens Commission on Human Rights New Zealand's letter of 31 March 2005[14] concerning the steps being taken.

3.15 A *New Zealand Herald* article in 2005 examined why Dr Leeks was not being extradited from Australia. In response Police indicated that there was "no disclosed activity or intervention with patients at Lake Alice that amounts to criminal offending on the part of Dr Selwyn Leeks. On that basis there is neither

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[10] Letter from Nicola Crutchley, Deputy Solicitor-General to Detective Superintendent Reid, "Lake Alice complaints to Police of criminal conduct", 15 April 2004.

[11] Memorandum from Inspector Jim Taare to Detective Inspector W Van der Welde, "Operation Alice", 7 September 2004.

[12] Job Sheet by Inspector J K Taare, "Operation Alice – Lake Alice Investigation – Speak to Anna Maud Stewart Natusch", 5 October 2004.

[13] Memorandum from Detective Superintendent Larry Reid to Cheryl Brockelbank, "Lake Alice Inquiry", 18 February 2005.

[14] Letter from Victor Boyd, Researcher, Citizen's Commission on Human Rights New Zealand to Detective Superintendent Larry Reid, "Re: The Children of Lake Alice Hospital Child and Adolescent Unit", 31 March 2005.

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requirement nor authority to seek the extradition of Dr Leeks from Australia".[15] It was probably more accurate to say that at this time the investigation was still ongoing, and therefore it was too early to say whether there was a basis for considering extradition.

3.16 I note in my 2009 Report that after this interview, "little further investigation appears to have been conducted". As I was not involved at this point, I do not know exactly why this was, but it is unfortunate that there was no follow up at this point.

Paul Zentveld's complaint

3.17 The Police investigation was given fresh impetus by the efforts of a former Lake Alice patient, Paul Zentveld, who was determined to see Dr Leeks prosecuted and was also preparing to give evidence in the Victorian disciplinary hearing. The *Herald* article quoted Mr Zentveld as saying "Let them turn us down at the moment but we aren't going away... Justice will be served one day". Mr Zentveld subsequently approached the Police to lay his complaint. It was at this point that I became involved, as I happened to be in Wellington at the time and I was tasked to meet Mr Zentveld. (Although by then I was Detective Superintendent for the South Island, I was temporarily based at Police National Headquarters in Wellington leading the Police Response to the Inquiry into Police Conduct.)

3.18 On 21 April 2006, I met with Paul Zentveld and Stephen Green, the Executive Director of the Citizens Commission for Human Rights.[16] In preparation for this meeting I obtained the Police files, and located 20 statements of complaint. At the meeting, Mr Zentveld explained the background to his complaint and provided supporting material. Mr Zentveld's complaint included allegations that during his time at Lake Alice over a three year period, Dr Leeks had administered unmodified ECT to him as punishment, including one incident where electrodes were wired to his genitals as punishment for wetting the bed, which he said was extremely painful. He also alleged that nurses had given him paraldehyde injections as punishment.[17]

3.19 At the meeting Mr Zentveld expressed his concern to me that the authorities in New Zealand would not do anything about Dr Leeks whilst the Australian authorities were dealing with him. He indicated that he was dissatisfied with the progress the New Zealand Police had made since he provided material to Superintendent Emery. Mr Zentveld made it very plain that he wanted Dr Leeks prosecuted, and he adhered consistently to that view over the time that I dealt with him. My notes of the interview record that I explained to Mr Zentveld that it was premature to consider extradition at that point, and that there were certain practical difficulties with any extradition process, as the Police had recently experienced with the extradition process to extradite clergy from St John of God from Australia. In my experience of extraditions, particularly those which are opposed, they typically seek to test the evidence supporting the application, they may consider the age and health of the accused and they provide multiple appeal options for to the accused person. Extradition is often a lengthy process.

[15] *New Zealand Herald*, "No proof of abuse by doctor – police", 21 September 2005, p A7.
[16] Jobsheet dated 21 April 2006.
[17] Affidavit of Paul Zentveld, sworn on 11 January 2006, which appears to have been prepared for the disciplinary hearing of the Medical Practitioners' Board in Victoria, Australia.

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3.20 After meeting with Mr Zentveld, it was clear that there were serious allegations of abuse which required further investigation. I took steps to compile the available information. I contacted lawyer Grant Cameron, of Grant Cameron Associates, to obtain his files relating to the 34 complaints he had referred to the Police. Additional complaints were subsequently received directly from other complainants or from other sources, bringing the total number of complaints to 41. This was less than a third of the total number of former Lake Alice patients who had participated in the settlements. I understood that the remainder did not wish to lay complaints or make statements to the Police.

3.21 On 22 June 2006, I drafted a report setting out some tentative views that I had formed from my initial inquiries and recommending that a preliminary investigation be undertaken given the continuing public interest in the allegations. As part of my report, I recorded that the medical notes disclosed multiple use of unmodified ECT in circumstances which "strongly suggest the 'treatment' is being given as a punishment to modify behaviour" (p4), since electric shocks had been given on parts of the body that ostensibly related to the behaviour being punished. I noted that while I had not obtained expert opinion on the subject, an earlier report had quoted from authoritative sources that suggested that very few child psychiatrists used ECT, and that its use was as a last resort. Given the apparent application of ECT in its unmodified form as a punishment and/or the application of electric shocks as a form of aversion therapy, I considered that there was a basis for considering criminal charges in relation to the Crimes Act 1961, s195 offence of wilful ill-treatment of children (pp5-6). I considered that further inquiry was required to establish with much greater certainty whether a criminal prosecution might properly be brought. My report recommended "the establishment of an Inquiry team, as a matter of priority, to investigate these allegations" (p7).[18]

3.22 It was decided not to appoint a full inquiry team at that point. Instead, having regard to the historical nature of the allegations and the fact that they had been the subject of various inquiries already, it was decided that I should first conduct a preliminary inquiry to assess the likelihood of establishing that criminal offending had occurred. We would then decide whether the allegations warranted the establishment of a dedicated inquiry team.

3.23 It was also at this point that a decision was made to focus the preliminary inquiry solely on Dr Selwyn Leeks, since it was his actions that were the overriding concern of most of the complainants. A further key reason was that it was evident early on that the other allegations of offending by both staff and patients were simply not capable of prosecution. There was either insufficient evidence of what had occurred, or the alleged perpetrators were dead. The decision is summarised in the 12 July 2006 report of the National Crime Manager, Detective Superintendent Nick Perry, to the Assistant Commissioner: Crime and Operations:

> ... I would propose that any investigation should focus solely on the activities of Doctor Leeks. This would be on the basis of a 'top down' driven approach as opposed to a 'bottom up' approach. In essence this approach would focus on assembling a case against Doctor Leeks

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[18] Report by Detective Superintendent Malcolm Burgess to Assistant Commissioner Marshall, "Lake Alice: Historic Allegations", 22 June 2006.

based on a small number of cases which would reach the 'prima facie' standard.[19]

4 My Investigation

4.1 I conducted the preliminary inquiry over the next three and a half years. It was conducted on a part-time basis, as I had other more immediate responsibilities at this time. Although the Lake Alice complaints were clearly serious and warranted the attention that any allegation of child abuse deserves, the reality was that more immediate and urgent investigations or police matters had to take priority.

My judgment in this regard was informed by the fact that no-one was currently at risk as a result of the allegations, due to the following factors:

(a) the age of the complaints- they were more than three decades old;

(b) the Unit had been closed for many years;

(c) Dr Leeks was no longer practising, and could not practise further without obtaining a certificate of good character from the Victorian Medical Board which would likely not be forthcoming.

4.2 I started my inquiries by reviewing the statements of complaint, taking these at face value for the purposes of investigation. The complaints were disturbing to read. The complainants had all been in Lake Alice when they were young and vulnerable, and they clearly harboured deep convictions that they had been victims of cruel punishment and abuse. The complaints disclosed some common features, the most notable of which was the number who alleged that they had received either ECT or electric shocks (and in some cases paraldehyde injections) as a form of punishment. A number stated that they had received electric shocks in different parts of the body to punish them for misbehaviour, for instance, shocks to the genitals in response to sexual misbehaviour. Some said that other children administered the electric shocks. Many also complained of being given "unmodified" ECT, that is, ECT without anaesthetic and muscle relaxant, which they stated was extremely painful.

4.3 The number and similar nature of the allegations suggested a systemic issue at Lake Alice. Nonetheless, Police were still required to investigate the individual complaints to establish if the facts supported criminal charges in relation to each complaint. The statements of former patients had to be assessed against other evidence of what had occurred from staff and medical records. I actively sought corroborative evidence from the statements of other former patients, staff and medical records. The facts needed to identify evidence of ill treatment sufficient to establish a prima facie case for further investigation and potential prosecution. It was also necessary to consider the context in which these events occurred and the prevailing law and medical practice that existed at the time. Finally, although the sheer number of complaints could have been relevant in terms of propensity evidence to support criminal charges, the factual elements of each offence had to be established before an application for propensity could be made.

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[19] Report from Detective Superintendent Nick Perry, National Crime Manager, to Assistant Commissioner: Crime and Operations, "Lake Alice: Historic Allegations", 12 July 2006.

Prior inquiries into Lake Alice Unit

4.4 In commencing my investigation, I was aware that there had been a number of prior official inquiries into the Lake Alice Unit. These reports were obviously relevant and helpful in setting out the issues and their findings concerning Lake Alice. However, most of them had been conducted in a civil jurisdiction and had different evidential requirements to those which bound me in a criminal inquiry. One of the most helpful aspects of these earlier inquiries was that Dr Leeks had participated in some of them, which provided valuable insight into the defences that he was likely to raise to any criminal charges. In his response to various inquiries, Dr Leeks had maintained that his application of ECT or other electric shocks were for therapeutic reasons or as a form of aversion therapy.

4.5 The prior investigations are outlined below:

(a) **1974 investigation:** The first investigation of allegations of the mistreatment of patients appears to have been undertaken in 1974, it appears to have been undertaken by a local Justice of the Peace. The investigation apparently resulted in changes to staffing and a new charge nurse was appointed;

(b) **1977 Commission of Inquiry:** In January 1977, a Commission of Inquiry inquired into the treatment of a Niuean boy, Hakeaga Halo who had been a patient at the hospital in 1975 and 1976. The Commissioner, Magistrate Mitchell, delivered his report on 18 March 1977. The Commission did not find evidence of any criminal wrongdoing, but raised issues as to the legal authority for treatment. The report found that there was no express authority provided either by the family or Social Welfare to administer ECT treatment to the patient, but that authority for treatment could be implied from the conduct of his family and the Social Welfare Department (p31, p34). The report considered the concerns expressed at the use of unmodified ECT on the patient. Although the Commissioner acknowledged he was somewhat out of his depth, he was satisfied by Dr Leek's assurances that ECT was warranted. He further found that (emphasis added):

> I was not persuaded that the treatment was administered in such a way as to cause unnecessary suffering, mental or physical, but if ever an inquiry is set up to consider E.C.T. in general this matter would obviously be considered. **I am certain that E.C.T. was not used at Lake Alice Hospital as a punishment.**[20]

(c) **1976 Ombudsman inquiry:** In July 1976, a complaint was laid with the Office of the Ombudsman regarding the treatment of another former patient, GRO-B. In his report of April 1977, the Ombudsman was critical of the Unit and highlighted his concern at the use of ECT on adolescents. He found that Lake Alice acted unlawfully in that it had not obtained legal authority to detain the patient (rendering his status that of an informal patient), and had not obtained the consent of his legal guardians to administration of ECT, which was "far from satisfactory" (paragraph 67).

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[20] Report of the Commission of Inquiry into The Case of a Niuean Boy, 18 March 1977, p 37.

The Ombudsman was also critical of the use of ECT as therapy for children and young people, and recorded the "disturbing features" of its use he encountered in Lake Alice. Whereas Dr Leeks stated that the patient had been given "a recognised form of medical treatment appropriate to his condition" (paragraph 75), the Ombudsman found that very few child psychiatrists used ECT, quoting from an authoritative text that its recommended use was "as a last resort with adolescents who present a clinical picture of overt depression when pyscho-therapy and medication have proved ineffective".

The Ombudsman recommended that (i) the use of unmodified ECT for children and young persons should be discontinued, and (ii) that the use of ECT treatment should "be discouraged in all but exceptional circumstances and where the principles of consent have been met fully", and (iii) that the law be changed to give effect to these recommendations (paragraph 80).[21]

(d) **1977 Complaints to Hospital Inspector:** In 1977, two other patients, GRO-B and GRO-B made a complaint to the Hospital Inspector alleging improper use of ECT as a punishment at Lake Alice in 1974. These are the allegations that Mr Vial initially investigated and referred onto Police, as outlined in paragraph 3.5 above. The Police found no evidence of criminal misconduct. Dr Leeks left New Zealand for Australia shortly before the result of the inquiry was released.

(e) **1977 Medical Council Inquiry:** In June 1977, another former patient, GRO-B lodged a complaint with the health authorities. Dr Mirams, the Director, Division of Mental Health at the Department of Health, initially referred the complaint to the New Zealand Medical Association.[22] There were four allegations: (i) that Dr Leeks gave the patient ECT on more than one occasion in circumstances that he considered a punishment because of unsatisfactory behaviour; (ii) that Dr Leeks had deliberately administered painful electric shocks on more than one occasion as punishment for unsatisfactory behaviour; (iii) that on one occasion the patient was strapped to another boy and they were jointly administered shocks; and (iv) that on another occasion the patient and four or five other boys had participated in administering electric shocks to another patient who had sexually assaulted them.

In his written statement in response dated 22 July 1977, Dr Leeks did not deny the application of shocks to the patients in three of the four allegations but rejected the third allegation as a fabrication. Dr Leeks stated that ECT had been administered as treatment for the patient's mental illness, and that lower level electrical current had been applied as aversion therapy. He stated that at no time was either ECT or aversion therapy related to breaking of rules. In relation to the fourth allegation, he gave a lengthy explanation where he described how he had spent time in therapy with each of the boys after they had been assaulted, and decided that allowing them to participate in an aversion therapy session

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[21] Report by Guy Powles, Chief Ombudsman, Office of the Ombudsman, "Report on the complaint of GRO-B in connection with their son GRO-B against the Department of Health and the Department of Social Welfare", 5 April 1977.

[22] Letter from S W P Mirams, Director, Division of Mental Health, Department of Health to Dr W J Pryor, Chairman of the Ethical Committee, New Zealand Medical Association, 22 June 1977.

was a "reasonable" opportunity to do something about their feeling of powerlessness while bringing home to the culprit the feelings of the people he had harmed. He therefore permitted the boys to each administer an electric shock to the culprit.[23]

The Central Ethical Committee of the Medical Association accepted Dr Leeks' explanation in relation to the first three allegations, but strongly disagreed with Dr Leeks in relation to the fourth allegation. The Committee stated that involving the victim in a punishing situation with the patient was "grossly unethical conduct" and could in no way constitute acceptable psychiatric therapy, even though they appreciated Dr Leeks could have been acting in good faith.[24] It also expressed "considerable doubts" as to whether it was ethical to administer aversion therapy without the patient's informed consent. Dr Mirams agreed with the conclusions reached, observing that it was his impression that the aversion therapy was "dictated rather more by enthusiasm than by sound judgement".[25]

The Medical Council of New Zealand, which at that time was the body responsible for disciplinary proceedings against medical practitioners, then laid a charge of disgraceful conduct against Dr Leeks for his actions permitting "young fellow patients to administer the shock treatment to the patient concerned by means of the ECT machine".[26] The Committee also obtained the expert opinion of Professor FJ Roberts, Professor, Psychological Medicine, Wellington Hospital.[27] I consider Professor Roberts' opinion further below, but in summary, while he expressed various concerns about Dr Leeks' judgement and treatment methods, he appeared reluctant to conclude that Dr Leeks had transgressed any professional and ethical boundaries. After hearing from both the complainant and Dr Leeks (the latter by letter[28] and at the hearing on 23 November 1977), it appears that the Penal Cases Committee decided not to take the matter any further. (The decision is not on file, but there is a letter responding to Dr Leeks stating that the matter would not be referred to the Medical Council).[29, 30]

This patient's complaint was also investigated by the Police, as I have set out above in paragraph 3.5.

(f) **1991 Complaint to Medical Practitioners Disciplinary Committee:** In 1991, another former patient, GRO-B made a complaint about the

[23] Letter from S R Leeks to Dr W J Pryor, Central Ethical Committee, New Zealand Medical Association, 22 July 1977.

[24] Letter from W J Pryor, Chairman, Central Ethical Committee to Dr Leeks, 26 August 1977.

[25] Letter from S W P Mirams, Director, Division of Mental Health to Dr W J Pryor, 1 September 1977.

[26] Letter from H W Gowland, Convenor, Penal Cases Committee to Dr S R Leeks, 3 November 1977, enclosing notice under s56(2)(a) of the Medical Practitioners Act 1956.

[27] Letter from FJ Roberts, Professor, Psychological Medicine, Wellington Hospital to Mr Humphrey Gowland, 18 November 1977.

[28] Letter from Selwyn Leeks, Child Psychiatrist to Dr N W Gowland, Convenor Penal Cases Committee, Medical Council of New Zealand, "Re: Complaint pertaining to GRO-B", 7 November 1977.

[29] Letter from Selwyn Leeks to The Secretary, Medical Council of NZ, "Re Certificate of Good Standing", 4 January 1978.

[30] Letter from K Hindes, Secretary to Dr S R Leeks, "Ref: 184/6242", 9 January 1978.

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treatment he received at Lake Alice to the Medical Practitioners Disciplinary Committee. After reviewing the medical file, the Chairman of the Committee determined there were no grounds for inquiry into the conduct of Dr Leeks.[31]

(g) **2002 Justice Gallen Report:** Justice Gallen delivered a report to accompany his allocation of the government settlement compensation. Justice Gallen found that ECT was being used as a punishment.

> [6] From the material contained in the statements, backed up as it is by such medical notes as are available, it appears that the basic theory at Lake Alice in respect of adolescent inmates was that behavioural modification could occur through the imposition of rigid discipline and the application of punishment related to what was seen as unacceptable behaviour. Put in other terms, the theory involved the view that behaviour could be controlled by what is described as "aversion therapy". Certain forms of behaviour resulted in certain consequences, designed to be so unpleasant that the perpetrator would cease behaving in such a way.
>
> [8] The statements and the medical notes make it plain that electroconvulsive therapy was in constant use on the children. Electroconvulsive therapy is a controversial therapy in any event. In the 1970s and earlier it was much more generally used than is the case today. But its only justification is as the name implies: as a therapy. That is not the way in which it was constantly used at Lake Alice.
>
> [11] While in some cases modified ECT was administered on children at Lake Alice, the administration of unmodified ECT was not only common but routine.... What is more, it was administered not as a therapy in the ordinary sense of that word, but as a punishment.
>
> [12] There can be no doubt at all that the children saw the administration of ECT, at least in an unmodified form, as being a punishment and intended to dissuade them from certain forms of conduct.
>
> [16] What is even more concerning is the way in which unmodified ECT was administered to parts of the body other than the head. Statement after statement claims that children were subjected to ECT administered to the legs. This seems to have occurred when children had run away from the hospital, and was seen as a deterrent to prevent future attempts to escape. ... Several claim, and there is corroboration from other unrelated statements, that ECT was administered to the genitals. This seems to have been imposed where the recipient was accused of unacceptable sexual behaviour. I point out that these are children with whom we are concerned. **The ECT was plainly delivered as a**

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[31] Letter from G J Neville, Deputy Secretary, Medical Practitioners Disciplinary Committee to Mrs J Hartnell, Medical Information Service, Lake Alice Hospital, "re: GRO-B GRO-B 17 June 1991.

> **means of inflicting pain in order to coerce behaviour. ECT delivered in circumstances such as those I have described could not possibly be referred to as therapy, and when administered to defenceless children can only be described as outrageous in the extreme.**[32]

These conclusions were clearly relevant to my investigation, however I noted that Justice Gallen relied solely on the evidence of the complainants (and supporting evidence from the medical notes), and had not interviewed either Lake Alice staff or independent medical experts. I could not accept those findings uncritically because of the inevitable response anticipated from Dr Leeks that his actions were intended to treat, not punish, the recipients.

Inquiry process

4.6 In conducting the Police inquiry, I took the following steps:

(a) I reviewed the statements of complaint from the civil proceedings. For the purposes of the preliminary investigation, I considered it was not necessary at that point to interview all the complainants, I took these statements at face value. If the investigation was to proceed to prosecution, however, then full statements would have had to be taken from the complainants;

(b) I arranged for files, statements and medical records to be located and retrieved, where available, from Police, Health authorities, the Medical Council of New Zealand and Crown Law. I notified the Victorian Medical Practitioners Board of my inquiry and asked to be kept informed of progress in their hearing;

(c) I analysed the available Lake Alice files, including the medical records of the complainants. To try and verify the complainants' allegations, I analysed the complaints against available medical and nursing records seeking to corroborate the allegations made with the records of the dates that ECT or Ectonus therapy was administered, the staff members present, and so on;

(d) Police interviewed some of the former medical, nursing, psychology and other staff of the Lake Alice Unit who could be located and were willing to participate (seven in total). We also took possession of statements made by staff for the earlier civil settlement hearing. In total we gathered information from about a dozen staff members.

It is fair to say that many of the staff presented a starkly contrasting picture of the allegations made by the complainants. In my 2009 Report, my analysis was that the staff were "generally dismissive of the claims that ECT was administered as a punishment", but "less clear about the application of aversion therapies". The staff also considered that paraldehyde was only used for therapeutic purposes, not punishment. From statements provided by witnesses, it appears that Dr Leeks was considered by some to be professional, kind and caring, and by others to be authoritarian and arrogant.

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[32] Sir Rodney Gallen, "Report on the Lake Alice Incidents", (2001).

It appears that the practice of aversion therapy ceased from around 1974 onwards. This is evident from the patients complaints as well, nearly all of which relate to the 1972-1974 period.[33] The Charge Nurse of the Unit, John (Dempsey) Corkran, stated that to his knowledge the application of ECT as aversion therapy was never practised while he was on location, and that he had made it a condition of his employment commencing at the Unit in November 1974 that it would not be. He stated that ECT was a "legitimate form of therapy", "an essential form of treatment" and was "never applied as a form of punishment".[34] Mr Corkran created a behavioural modification programme that was reward focussed.

Two staff members, Brian Stabb and Terrence Conlan were less positive about Dr Leeks' treatment methods. They had both agreed to provide testimony against Dr Leeks in the Victorian disciplinary hearing. Psychiatric Nurse Brian Stabb stated that aversion therapy was practised at Lake Alice by giving electric shocks with an ECT machine, that the "regime was conducted in an air of secrecy, neither being documented, controlled, nor monitored", and that this was a "barbaric cruel practice". Mr Stabb considered that although Dr Leeks had a "genuine concern" for his patients, he "failed to recognize the development of his own sadism" and that he could be "omnipotent and unreasonable". Mr Stabb concluded that the "principle [sic] flaw in the system, was the inordinate amount of power afforded and entrusted to the psychiatrist, the total lack of accountability and absence of monitoring or supervision of his practice".[35] Mr Conlan was less critical, stating that the therapy applied was in fact low-level ectonus stimulus aversion therapy (even though it was often described in the notes as unmodified ECT), and that it was seen as "appropriate and acceptable at the time and was not regarded as radical or cruel". Mr Conlan stated he had volunteered to experience the ectonus treatment himself to see what it was like. He experienced the stimulus as "like a noise rather than a feeling", but then saw wavy lines and lost normal vision, at which point he took the apparatus off "as it was a very unpleasant sensation and quite frightening". Mr Conlan confirmed that he had been present when shock treatment had been given to patients on the legs, genitals, and other parts of the body;[36]

(e) The Lake Alice site was photographed and the site plans obtained;

(f) I wrote to Dr Leeks requesting an interview, but acting on legal advice he declined to be interviewed;[37]

(g) I sought expert advice from Professor Garry Walter, the Chair of Child and Adolescent Psychiatry at the University of Sydney on accepted psychiatric standards for the use of ECT on children and adolescents, and the use of aversion therapy.[38] This understanding was necessary because a key

[33] Only one sustained complaint, that of GRO-B is later, relating to 1976.
[34] Statement of John Richard James Corkran, 14 June 2007, pages 13, 17, 18 and 21.
[35] Statement of Brian Kenneth Stabb, 5 February 2001.
[36] Affidavit of Terrence Francis Conlan, undated, paras 21, 19, 23 and 26.
[37] Letter from McDonald Slater & Lay, Barristers and Solicitors to Detective Inspector Phil Jones, New Zealand Police Liaison Officer, "Re: Dr Selwyn Robert Leeks", 17 February 2009.
[38] Report from Professor Garry Walter, Chair of Child and Adolescent Psychiatry, University of Sydney, 20 January 2009.

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issue was whether Dr Leeks considered he was administering medical treatment to the complainants.

4.7 It was clear at the outset that the historical nature of the allegations posed significant difficulties for the Police investigation:

(a) The complainants were giving evidence of events that had occurred decades prior. While the complainants had vivid memories of experiences that were distressing for them, due to the lapse of time they could not be specific as to dates or times, or often the staff involved. Accordingly, it was necessary to seek other independent evidence that could fill in the gaps and establish the specific details of what had occurred, when it had happened, who was involved, and what had been their intent. The independent evidence supported some accounts, in others it threw doubt on the accuracy of the recollection.

(b) The youth (and perhaps the mental health) of the complainants the time of their experience at Lake Alice meant that they did not always understand what was happening to them, and furthermore it appears that there was a culture where they were not consulted or provided explanations on their treatment by the staff. Nor were they asked to consent to the treatment;

(c) Some of the medical records of patients were missing, and those that were available often were either incomplete or provided only brief summaries that did not make clear why treatment was being administered or what form it took.

(d) The passage of time meant that the former Lake Alice staff were also giving evidence about events that happened decades previously. I had to consider therefore that they too were less accurate in their recollection than might be desirable. Most were elderly, and one had dementia. Others had died.

4.8 Throughout the inquiry, I had several conversations with Paul Zentveld to update him on progress (often instigated by him leaving me a message to call him), and I also communicated with representatives of the CCHR, primarily Victor Boyd.

5. The issues concerning medical treatment

Dr Leeks' statements

5.1 One of the key issues in the investigation was whether the administration of electric shocks by the ECT machine in the circumstances described by the complainants was for the purpose of punishment, as they alleged, or whether it was for the purpose of administering accepted medical treatment, as Dr Leeks asserted. This was critical to the question of criminal intent, and whether the prosecution could prove that Dr Leeks' intention was to wilfully ill-treat the children by punishing them with electric shocks.

5.2 I was aware from Dr Leeks' submission to the 1977 Medical Council investigation that he maintained that his administration of electric shocks amounted to aversion therapy and that he regarded this as accepted psychiatric treatment. In his letter of 7 November 1977 to the Penal Cases Committee hearing the

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disciplinary charge, Dr Leeks set out the context to his treatment of a patient GRO-B for sexual assault. He stated that in order to treat the symptoms of the patient's "psycho-sexual disorder", he had conducted a two-week course of "aversive treatment" as a behaviour therapy. His methodology was to discuss with the offender his feelings, and when the offender exhibited symptoms of the disorder, this would be paired with the administration of electric shocks at a current which was "below the threshold of pain but is nevertheless experienced as a noxious stimuli". [39]

5.3 Dr Leeks asserted that the incident involving the boys administering electrical shocks to another patient was conducted for the purpose of "group therapy", having been initiated by the boys. He explained that:

> It did not seem unreasonable therefore, that much could be done to help the five youngsters by their being a part of the therapy of their attacker, as well as doing something in an active way about their feelings. It would I felt be of great value too for GRO-B to hear and perhaps understand a little better the feelings of those whom he had harmed. The five boys were asked to tell GRO-B about what it was like for them in the recent assaults and their feelings now. At that point they turned the switch and gave GRO-B the faradic stimulus, I had a few words with GRO-B and the boy concerned, and the next one took over. They then left the room and I continued the treatment session as on previous occasions.

5.4 Dr Leeks asserted that this incident was "therapeutic to most of the participants", although he also conceded that it would have been preferable to have adopted alternative methods discussed in the literature that he cited.

5.5 Significantly, Professor Roberts' peer review of Dr Leeks' use of aversion therapy in the Medical Council inquiry was somewhat critical of his professional judgement, but did not draw firm conclusions that Dr Leeks had acted improperly or beyond ethical boundaries.[40] Prof Roberts described the theory behind aversion therapy, and although he appeared to consider that by 1977 Dr Leeks' methods were outmoded, he nonetheless acknowledged that in 1973-1974 "there were still a number of enthusiastic practitioners of these methods around the world".

5.6 Prof Roberts did express his concern that treatment with the ECT machine was clearly identified with punishment, but his comments appeared directed more at the effectiveness of this approach rather than the ethics. He did not oppose the treatment altogether, but thought that the subject ought to consent to it. Prof Roberts was more critical of Dr Leeks for incorporating the victims in administering the shocks as group therapy, stating that he found it inappropriate and "very difficult to understand the justification", but again was inclined to excuse him on the basis of the "enormous pressure" he was under by virtue of the "very large clinical load" he carried. Prof Roberts concluded by expressing his concern that Dr Leeks was "in a situation where he is being called to account for his utilisation of a technique which in the light of the present day no longer is

[39] Letter from Selwyn Leeks, Child Psychiatrist to Dr N W Gowland, Convenor Penal Cases Committee, Medical Council of New Zealand, "Re: Complaint pertaining to GRO-B", 7 November 1977.
[40] Letter from FJ Roberts, Professor, Psychological Medicine, Wellington Hospital to Mr Humphrey Gowland, 18 November 1977.

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regarded in the same favourable way in which it was at the time which is under consideration".

5.7 Having recently seen Dr McLachlan's medical opinion from the 1977 Police investigation,[41] I observe that in many respects that opinion aligns with Professor Roberts' views, and is indeed even more adamant that treatment was administered with "genuine therapeutic intent".

5.8 The point of reciting these accounts at some length is that it illustrates the challenges that the prosecution would have faced, since it is likely that Dr Leeks would have claimed, perhaps with support from other psychiatrists, that his methods constituted appropriate medical treatment. Ultimately, while those methods appeared to be regarded as outdated and inappropriate even by 1977, it is notable that Prof Roberts' analysis concerned the effectiveness and propriety of Dr Leeks' treatment methods, but did not question that he had acted in good faith. This evidence indicated that Dr Leeks' treatment methods may have been subject to challenge in a professional disciplinary context but were less likely to meet the threshold of criminality.

Expert psychiatric opinion

5.9 In order to advance the investigation, I sought the expert advice of Prof Garry Walter, Chair of Child and Adolescent Psychiatry, University of Sydney.[42] Prof Walters declined to comment on whether Dr Leeks' treatment amounted to criminal conduct, but had a clear opinion that it "often amounted to very poor or inappropriate medical treatment (or worse)". He summarised his conclusions as follows:

> In summary, Dr Leeks' treatments appeared to depart significantly from the standards of the day. This was in the areas of his direct clinical care (including his method of use of electrical treatments, and his dubious reasons for some of those treatments), his level of supervision of staff (including the various treatments used by those staff), and his documentation (the last even by 1970 standards). It is worth adding that it appears difficult to ascertain what governed Dr Leeks' decision–making (e.g. when to give patients modified versus unmodified ECT, not that the latter is ever medically indicated).[43]

5.10 Prof Walter distinguished between the types of treatment administered by Dr Leeks in the following way:

(a) **Electroconvulsive therapy (ECT)** – ECT is a "recognized medical treatment" for depressive illness, mania and acute schizophrenia, which "involves the production of a seizure (convulsion), via the application of an electrical current, to produce positive change in a patient's clinical condition". In the 1970s, general medical opinion was that ECT was medically warranted for use in children and adolescents in similar situations to that in which it was indicated for adults, but it would generally not be the initial choice of treatment. Professor Walter

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[41] Report on Lake Alice Hospital Enquiry, from Dr D G McLachlan to the Commissioner of Police, 28 December 1977.
[42] Report from Professor Garry Walter, Chair of Child and Adolescent Psychiatry, University of Sydney, 20 January 2009.
[43] Email from Garry Walter to Malcolm Burgess, re: Dr Leeks and Lake Alice, 5 February 2009.

considered that it was appropriately administered for a recognised clinical indication, once informed consent had been obtained, and using agreed treatment methods (including the use of anaesthetic and muscle relaxant, and using conventional electrical stimulus parameters);

(b) **Unmodified ECT** – unmodified ECT is the term for the use of ECT without anaesthetic and muscle relaxant. In Professor Walter's opinion, by the 1970s "it was no longer considered appropriate to administer unmodified ECT" to patients, including children and adolescents, due to the recognition of the adverse effects of unmodified ECT (namely, the risk of fractures, dislocations, and patient awareness of the treatment);

(c) **The use of electric stimuli in aversion therapy** – aversion therapy is a "treatment intended to reduce unwanted or dangerous behaviour by pairing that behaviour with unpleasant sensations". Professor Walter observed that aversion therapy had been the focus of prolonged debate, and that "its use remains controversial on ethical grounds and because of concerns about its effectiveness and safety". It appeared from the limited literature available that "electrical stimuli have been used as a form of aversion therapy for children and adolescents for several decades", for a range of potential behaviour disorders. Critically, the stimulus used would be much weaker (e.g. 9 V) than ECT, the patient would remain awake, and the potential side-effects were much milder.

5.11 While Prof Walter recognised that electrical stimuli had been used as a form of aversion therapy for children and adolescents for decades, he noted that it had "always been controversial" and that there was negligible evidence that it had positive long-term benefits. Prof Walter considered Dr Leeks' use of aversion therapy dubious in the following respects:

(a) "Importantly, it has *never* been medically approved that these aversive treatments may be administered via an ECT device/ Ectonus, as (i) the degree of discomfort and side effects would have been excessive compared to standard aversion therapy, and (ii) the theory underpinning aversion therapy requires the patient to be awake during the procedure (ECT generally renders the patient unconscious)".

Therefore, Professor Walter's conclusion was that "the use of ECT by Dr Leeks would not constitute aversion therapy" due to a combination of factors, namely (i) the fact that ECT was not a recognized form of aversion therapy; (ii) the specific behaviours that Dr Leeks was seeking to abolish were not always clear; (iii) "the level of discomfort reported by patients was presumably extreme, and thus way beyond the pain and discomfort levels described in conventional aversion therapy"; (iv) the "patients and families presumably did not consent to ECT for this purpose"; and (v) the "general atmosphere that may have pervaded the unit and ECT sessions were [sic] possibly not 'therapeutic'".

I note that Professor Walter's conclusions in this regard appear to be based on the assumption that the Ectonus machine would be used to administer ECT, since he refers to the patient being rendered unconscious, whereas Dr Leeks' asserted that aversion therapy was administered on a different circuit at a weaker current (see paragraph 5.14 below);

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(b) In relation to the group therapy incident, it had "never been accepted practice" to apply electrodes to parts of the body associated with the offending behaviour. This would have been inappropriate because there was no evidence base for it being an effective treatment method, there may be medical risks associated with the procedure, "patients would regard this as a procedure whose primary purpose was to punish, rather than to treat", and there may be longer term serious psychological complications.

(c) It was "never appropriate" for a doctor to permit children and adolescents to administer electrical stimulus or ECT to fellow patients. This was because the patients are not part of the treatment team, do not have training and experience required to administer treatments, it would have been bewildering and traumatic for both the recipient and the patients administering it, and could be seen as giving encouragement for further aggressive acts.

My analysis of the medical evidence

5.12 Based on Prof Walter's advice, it seemed clear that the administration of ECT fell within the bounds of recognised medical treatment, provided that it was administered for the purpose of treating a diagnosed psychiatric disorder. While in most cases the complainants perceived the treatment that they received as being administered for punishment, that perception was not necessarily borne out by the medical records. In some cases, but not all, the medical records indicated that ECT was being administered as treatment for psychiatric disorders. Therefore, it seemed highly unlikely that there would be grounds for laying criminal charges in relation to the modified ECT treatments.

5.13 I also considered the position in relation to the administration of unmodified ECT. According to Prof Walter, unmodified ECT was no longer considered within the bounds of acceptable medical treatment by the 1970s, although some of the earlier medical opinions differed on this point. However, so long as Dr Leeks was administering it as medical treatment for psychiatric disorders I did not consider that criminal intent could be proved. In this scenario, the use of unmodified ECT appeared to fall into the category of a professional disciplinary issue for the Medical Council to pursue.

5.14 I considered that criminal charges in relation to unmodified ECT could potentially be viable if it could be established that Dr Leeks was administering it for the purposes of punishment. Applying unmodified ECT generally rendered the patient unconscious, which made the stupefaction charge in s197 of the Crimes Act a possibility. However, it was unclear on the evidence whether Dr Leeks ever actually used ECT treatment as aversion therapy. It certainly appeared clear that he used the ECT device to administer electric shocks, but in his letter of 7 November 1977 Dr Leeks stated that when administering aversion therapy, the electric shocks were at a lower level that was below the threshold of pain (an aversive electrical stimulus of between 5 and 10 milliamperes). He explained that this current was on a separate circuit to that used for ECT and could not produce a convulsion nor unconsciousness (which does appear to be consistent with some of the complainant evidence that they remained conscious throughout).[44] I note

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[44] Letter from Selwyn Leeks, Child Psychiatrist to Dr N W Gowland, Convenor Penal Cases Committee, Medical Council of New Zealand, "Re: Complaint pertaining to GRO-B ", 7 November 1977.

that Dr Leeks' explanation was later questioned by Prof Roberts, who pointed out that Dr Leeks had not identified the voltage used, only the current, and "therefore we cannot make any accurate assessment of the amount of energy which was used at any one time".[45]

5.15 The level of electric current used in a particular treatment was impossible to verify, as details of the voltage used were not recorded in the medical notes. In fact, often the medical and nursing notes failed to clearly distinguish between ECT treatment and aversion therapy, with the terms ECT, ectonus, or ectonus therapy being used interchangeably in the notes (Ectonus being the brand of ECT device). To the extent that they existed at all, the notes could best be described as cursory, simply stating, for instance, "ECT today" or "Ectonus therapy per Dr Leeks". There was a standard ECT form, with columns for the doses of anaesthetics and relaxant. The administration of aversion therapy was not referred to at all in the ECT notes. By contrast, the nursing notes often referred to ECT, Ectonus or Ectonus Therapy but are not sufficiently detailed to indicate what current was used for the purpose of aversion therapy, or for that matter to distinguish between the application of ECT treatment and aversion therapy. For these reasons, in my 2010 Report, I concluded that aversion therapy "apparently entailed the ECT machine being used on a different setting to the setting that would be used to deliver ECT". However, we do not know for certain.

5.16 Aversion therapy created a particular investigative challenge in establishing a distinction between what might be considered legitimate medical treatment, albeit unpleasant or painful, as opposed to punishment that might amount to criminal behaviour. It is not hard to see why aversion therapy could be viewed as punishment by the recipients since the administration of electric shocks was undertaken for the purpose of giving the child an unpleasant experience in order to modify their behaviour.

5.17 I concluded, therefore, that I should focus my investigation on the administration of electric shocks (either as ECT or the Ectonus treatment using lower electrical stimulus) when the treatment was given for the purpose of punishment in order to modify behaviour. I analysed each of the complaint statements to ascertain whether either ECT or shocks had been given in circumstances which suggested it was given for the purpose of punishment (i.e. so-called behavioural modification), rather than treating a psychiatric disorder. I also compared the complainants' statements to the medical notes for corroboration of what had occurred and why. For instance, I compared the dates of misbehaviour with the dates of treatment to try and establish whether there was any plausible correlation between them. The reasons the treatment was given were relevant, as was the practice of attaching electrodes to various body parts associated with the offence being punished. In my 2010 Report I summarised the complainants' evidence on the way that aversion therapy was delivered:

> The location in which the electric shock was delivered during these "aversion therapy" treatments was apparently determined by the sort of behaviour that led to the application of the electrodes in the first instance. For example, boys who ran away might expect to have the electrodes applied to their legs; boys who were caught masturbating or offended in a sexual fashion could expect to have the electrodes

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[45] Letter from FJ Roberts, Professor, Psychological Medicine, Wellington Hospital to Mr Humphrey Gowland, 18 November 1977.

attached to their genitals; boys who were fighting might expect to have the electrodes attached to their shoulders.

5.18 In such circumstances, I concluded that administering electrical shocks in either form to non-consenting children and adolescents for the purpose of behavioural modification amounted to a prima facie case of cruelty to a child and could support charges of wilful ill-treatment being laid against Dr Leeks.

6 Conclusions on criminal charges

6.1 In reaching my preliminary conclusions I was mindful of the then applicable Solicitor-General Guidelines which recorded the Test for Prosecution. Such required:

(a) The Evidential Test which required sufficient evidence to provide a reasonable prospect of conviction; and

(b) The Public Interest Test.

6.2 Criminal charges were considered against Dr Leeks under the Crimes Act 1961. In my 2010 Report, I noted that the offence of ill-treating a person with a mental disorder under section 112 of the Mental Health Act 1969 "would have been the appropriate charge to consider on the facts", but this charge was unavailable because the six month time limit for commencing proceedings had well and truly expired.[46]

6.3 Accordingly, in my 2009 Report I considered the following charges in relation to the application of ECT treatment in its unmodified form as a punishment and/or the application of electric shocks as some form of aversion therapy:

(a) Crimes Act 1961, section 195 Cruelty to a child – "Every one is liable to imprisonment for a term not exceeding five years who, having the custody, control, or charge of any child under the age of 16 years, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause him unnecessary suffering, actual bodily harm, injury to health, or any other mental disorder or disability". (NB This charge has since been amended to remove the requirement of wilfulness.);

(b) Crimes Act 1961, section 197 Disabling – "Every one is liable to imprisonment for a term not exceeding five years who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person.";

(c) Crimes of Torture of Act 1989. The Crimes of Torture Act 1989 was subsequently discounted as it was not in force in the 1970's when these events occurred and legal advice confirmed that charges could not be applied retrospectively (refer legal advice of Phillip Hall, 9 December 2009, at [4]).[47]

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[46] Opinion from Ian McArthur, Senior Legal Advisor to Detective Superintendent Malcolm Burgess, 1 December 2009.

[47] Opinion from P H B Hall, Barrister, "Review for New Zealand Police re: Lake Alice Hospital - Allegations of Cruelty – Decision on whether or not to prosecute – Review of opinion of Mr Ian McArthur", 9 December 2009.

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6.4 My view was that the Crimes Act section 195 charge of wilful cruelty to a child was the "most appropriate" charge in the circumstances. As I noted in my report, the "application of electric current as a punishment seems on the face of it to amount to wilful ill-treatment".

6.5 The s197 disabling charge may have been applicable in relation to the use of unmodified ECT, if it could be established that the patients were stupefied or rendered unconscious. However, the statements of complaint and the medical notes were often insufficiently detailed to establish whether that had occurred.

6.6 My synopsis of the evidence in relation to the 41 complaints was attached as an appendix to my 2009 Report. An analysis of the complainants' statements against the medical notes that were available allowed me to conclude that it "seems clear that some of the patients had electric shocks applied as a means of modifying behaviour" and that there was "prima facie evidence that 31 of the 41 complainants were punished by the application of ECT or aversion therapy".

6.7 Having reached the view that there was prima facie evidence in relation to 31 complaints, I applied a set of criteria to identify the complaints which I believed could meet the Solicitor-General's Guidelines. I recorded in the report that this "deliberately conservative approach" had been taken due to the historical nature of the alleged offending and the difficulties in obtaining evidence to support the charges. Given these constraints I considered it was prudent to rigorously test whether there was sufficient evidence to support a prosecution. My reasoning was that a prosecution based on discrete charges with independent evidence that corroborated the complaints would be far more likely to succeed. I was also conscious that a "propensity" application could be made, thereby aggregating the charges, should a prosecution be considered.

6.8 I applied the following criteria to determine whether there was sufficient evidence in relation to each of the 31 complaints:

(a) The complainant has stated that they received ECT or aversion therapy as a punishment;

(b) The complainant account revealed sufficient detail to identify approximately how and when the event took place;

(c) The complainant account revealed sufficient detail to identify the alleged offender;

(d) The complaint was corroborated by a witness and/ or medical records;

(e) The complainant was under sixteen years of age at the time.

6.9 My analysis squarely raised the question of the credibility of some of the complainants, given their difficult personal backgrounds and in particular the extensive criminal histories of some. This issue was raised not to question the integrity of the complainants or the veracity of their complaints, but because in a criminal trial it would be an issue that you would expect to be vigorously tested by the counsel for the defendant.

6.10 I concluded that there were seven out of the 31 cases that met all those criteria:

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

6.11 The seven complaints I considered met the Solicitor-General's evidential test were set out in my Synopsis of Evidence, Appendix 1 to my 2009 and 2010 Reports. I focussed on complaints for which the application of shock treatment, in whatever form, could not in my view be reasonably treated by aversion therapy. For convenience, I set out a summary below:

(a) GRO-B (14 years on admission) - charges considered against Dr Leeks for the administration of electric shocks as a punishment in 1973. GRO-B said that he had received unmodified ECT for smoking, and that he had also received electric shocks on his hands, legs and genitals as punishment for fighting, kicking a door, masturbating and engaging in homosexual behaviours, and other witnesses provided some support. Hospital notes show that he received "ECT" as punishment for smoking and masturbation, and for masturbating and homosexual behaviour;

(b) Tyrone Marks (11 years on admission) - charges considered in relation to the administration of Ectonus therapy for bad behaviour in October 1973 (referred to as unmodified ECT by Mr Marks, but Ectonus therapy in the nursing notes);

(c) GRO-B (12 years on admission) - charges considered in relation to multiple applications of Ectonus therapy in 1973 for bad behaviour. Mr GRO-B stated that he received ECT to his head for bad behaviour, and the medical and nursing notes record that he received Ectonus therapy for poor behaviour;

(d) Paul Zentveld (13 years on admission) – a charge considered in relation to the administration of Ectonus therapy in 1974. Mr Zentveld said in his statement that he had received electric shocks to his legs and genitals. There was evidence from a school principal to suggest that he had received Ectonus therapy on at least one occasion which was not recorded in the notes and which predated the ECT treatments he received (it seemed clear that Ectonus treatment was not routinely recorded);

(e) GRO-B (14 years on admission) - a charge considered in relation to the administration of unmodified ECT as a punishment in 1976, a day after the theft of cigarettes, and there being no corresponding reference in the notes to a medical reason for treatment;

(f) GRO-B (12 years on admission) - GRO-B received unmodified ECT on at least two occasions in circumstances where it appeared designed as a punishment, as it coincided with nursing notes that he had interfered with a fire extinguisher on one occasion and absconded on another;

(g) GRO-B charges considered in relation to the administration of "Ectonus therapy" and ECT for bad behaviour in 1973.

6.12 I decided not to consider charges in relation to the incident in which a group of boys had been permitted to administer electric shocks to a boy that had allegedly

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abused them (refer to paragraph 5.3). My rationale was that the incident had already been the subject of the contemporaneous 1977 inquiry by Police (as well as the Medical Council inquiry), and it had been concluded then that there was no basis for laying criminal charges. I did not come across any fresh evidence that suggested it was appropriate to reopen the investigation.

Charges against others

6.13 As I have previously said, my inquiry focused on the actions of Dr Leeks. There were some allegations made against some of the nurses that they had also administered ECT or aversion therapy as punishment. However, there was very little detailed evidence or records concerning the involvement of the nurses, and they were acting at the direction of Dr Leeks, who was responsible for treatment. I am satisfied that there was simply insufficient evidence to consider wilful cruelty charges against other staff members.

6.14 There were also allegations that paraldehyde injections, which were painful, were administered as a form of punishment, but I concluded that there was limited evidential or legal basis on which an investigation of those allegations might proceed and little chance of identifying the alleged offenders.

6.15 There were various allegations of sexual offending made by some patients against staff or other patients. One former staff member, Brian Paltridge, was convicted in 1972 for indecencies involving boys at the hospital. One of the patients was prosecuted in 1974 for indecencies committed against other patients.

6.16 I considered the other sexual offending allegations but was unable to progress any of them. Some were so vague that the details of the offending and alleged offender could not be established. In two cases the identified staff member was dead; in one case the complainant was dead. Some allegations were not sufficiently credible to pursue, given conflicting evidence from the medical notes and no other corroborating evidence.

Legal opinion on prosecution

6.17 At the completion of my investigation, I had reached the view that the threshold of a prima facie case had been made out on the evidence relating to seven complainants, but I decided to seek legal advice to inform my decision on whether a prosecution was viable. My 2009 Report concluded that a "legal opinion is required to help determine whether further investigation and prosecution is sensible in the circumstances of this case". If the view had been reached that there was a basis for proceeding with charges, an inquiry team would have been established to complete the necessary investigative work to compile the evidence needed to consider extradition and prosecution.

6.18 The Crown Solicitor's Prosecution Guidelines 1992 state that the Test for Prosecution must be met prior to a prosecution being commenced. I was mindful that "a reasonable prospect of conviction" must exist.

6.19 Ian McArthur, Manager, Southern Legal, NZ Police, an experienced senior legal adviser, provided a legal opinion dated 1 December 2009 on the proposed charges and the feasibility of a prosecution. He had access to the whole Police file comprising some twelve Eastlight folders.

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6.20 Mr McArthur's opinion concluded that a prosecution "**would be very unlikely to succeed and that it would not be in the public interest to commence proceedings against Dr Leeks in relation to these allegations**".[48]

6.21 Following receipt of this advice, I requested an independent peer review of Mr McArthur's opinion. Phillip Hall, an experienced criminal barrister, provided the further legal opinion on 9 December 2009 and concurred with Mr McArthur that "a prosecution is very unlikely to result in conviction".[49]

6.22 As the legal advice was critical in informing my decision on whether to prosecute, I set out a summary of that advice.

Sufficiency of evidence

6.23 Although I had not specifically sought comment on the evidence, the legal advice raised issues with the sufficiency of the evidence, explicitly disagreeing with my view that there was adequate evidence to proceed in the named cases, and concluding to the contrary that there would be "major difficulty" in establishing sufficient evidence of criminal offending.

6.24 In reviewing the legal regime, Mr McArthur emphasised in particular that the Mental Health Care Act 1969 provided a general protection from criminal and civil prosecution to any persons acting under the Act, unless those responsible act in bad faith or without reasonable care. This policy position reflected different prevailing societal attitudes to mental health patients. This defence would have been available to Dr Leeks, which meant that "the Crown would have to prove that Dr Leeks application of ETC to any patient on any specified date was only as a means of punishing the patient, and not used as part of the patient's treatment".

6.25 Both Mr McArthur and Mr Hall considered that the defence would be focussed on Dr Leeks' justification that his use of aversion therapy amounted to appropriate medical treatment to patients who exhibited mental health and behavioural issues. As Mr McArthur pointed out, it would be difficult to clearly establish what constituted appropriate medical treatment in the 1970s, and while aversion therapy was controversial, the controversy concerned its effectiveness, rather than its application.

I note here that while Professor Walter's advice was clear that aspects of Dr Leeks' practice were unacceptable even by 1970s standards, his opinion is somewhat at odds with some of the contemporaneous attitudes of medical professionals, referring in particular to Professor Roberts' opinion, the Medical Council's 1977 disciplinary decision, Dr McLachlan's opinion, and the evidence of other Lake Alice staff. The medical debate over aversion therapy would have played out at trial and would have made it extremely difficult to establish with certainty what was beyond the bounds of accepted psychiatric treatment in the early 1970s, especially when the practice of psychiatry appeared to have evolved considerably over that period.

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[48] Opinion from Ian McArthur, Senior Legal Advisor to Detective Superintendent Malcolm Burgess, 1 December 2009.

[49] Opinion from P H B Hall, Barrister, "Review for New Zealand Police re: Lake Alice Hospital - Allegations of Cruelty – Decision on whether or not to prosecute – Review of opinion of Mr Ian McArthur", 9 December 2009.

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6.26 Mr McArthur relevantly summed up the significant difficulty the prosecution would have in trying to clearly distinguish between punishment and aversion therapy in this way (emphasis added):

> ... I am left with the view, as a result of the statements by staff members and, to a lesser extent, medical professionals, that Dr Leeks had a genuine interest and care for his patients and that he believed that he was treating them with the admission of ECT, even as a form of aversion treatment. In relation to the use of ECT as aversion treatment, ("Ectonus" or "Ectonus Therapy") Dr Leeks considered this to be effective and appropriate treatment. I note that there are conclusions reached that this administration of ECT was punishment. The conclusion is based on the fact that the treatment, on occasions, closely followed "misbehaviour" by the patient in question. **The difficulty here is that the correlation between misbehaviour and administration of ECT is also entirely consistent with the theory of aversion therapy, namely, that shock treatment, administered closely to actions regarded as "misbehaviour" and "unacceptable behaviour" is an effective treatment for discouraging such behaviour in the future.**

Public interest

6.27 Both Mr McArthur and Mr Hall concluded that the dominant test in the prosecution guidelines of whether a prosecution is more likely than not to succeed could not be satisfied and that it therefore was not in the public interest to proceed. On balance they considered that there was no countervailing public interest to the contrary. In considering whether there was a public interest in prosecuting, the legal advice took into account a range of considerations set out in the prosecution guidelines:

(a) **Seriousness of the offence:** Mr McArthur considered that the allegations were serious, and concerned victims who were young, vulnerable and in the care of the state. They were powerless to prevent the treatment they were subject to;

(b) **Mitigating and aggravating circumstances:** Mr Hall pointed out that Dr Leeks' actions as a doctor treating his patients were either an aggravating or mitigating factor, depending on whether the evidence showed he was torturing his patients or alternatively was acting professionally in accordance with accepted medical practice of the time, but there was "little or no independent evidence" that he had acted in bad faith or without reasonable care. As Mr McArthur pointed out, the problem is that the events "occurred at a time when the appropriate treatment of psychiatric illness was in its infancy" and aversion therapy was controversial, with conflicting views about its effectiveness;

(c) **Age and health of the offender:** Dr Leeks was of an advanced age in his 80s;

(d) **Staleness of the offence:** Mr McArthur considered this only a nugatory factor, whereas Mr Hall disagreed, and considered there may be grounds for seeking a stay of prosecution relying on s25 of the New Zealand Bill of Rights Act 1990 abuse of process, on account of the difficulties that the passage of time would create for the defence. Given the time delay and

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Dr Leeks' age, "a prosecution may be seen as unduly harsh and oppressive";

(e) **Degree of culpability of the alleged offender:** Dr Leeks was the principal decision-maker authorising or condoning the use of this ECT, although Mr McArthur thought (without deciding) that it was probable that the Hospital Board should be the body prosecuted, rather than Dr Leeks (he had flagged this issue would need to be resolved before charges could be laid);

(f) **Effect of decision not to prosecute on public opinion/ Attitude of the victim to prosecution/ Entitlement to compensation:** while some victims were pressing for a criminal prosecution, it was not clear that the majority were of that view (the 41 complainants represented less than one third of the former patients who had entered into the settlement). In terms of the wider public interest, Mr McArthur's opinion was that because the events occurred many years ago and the victims had received a government apology and civil compensation for the wrongdoing, the public could reasonably consider that the victims' allegations have been taken seriously and been adequately addressed. On the other hand, Mr Hall pointed out that a decision not to prosecute "may be seen as a denial of the victims' right to have the alleged offender prosecuted";

(g) **Obsolescence of the law:** the relevant law had largely been repealed. The more valid consideration was determining with any degree of certainty the accepted medical treatment of psychiatric patients during the 1970s, since the prosecution would depend on distinguishing applications of ECT as a punishment, rather than as treatment. Mr Hall stated that "[s]uch an argument relies very heavily on clear evidence from the victims";

(h) **Prevalence of the alleged offence and the need for a deterrence:** Mr McArthur concluded that the need for deterrence had subsided given the changing societal attitudes to mental health, the greater official scrutiny applied to public health institutions through innovations in health law and human rights, and the corresponding reduction in the abuse of personal rights. It was also relevant that Dr Leeks had relinquished his practising certificate and was no longer an ongoing risk to the public;

(i) **Availability of any proper alternatives to prosecution:** the other proceedings and inquiries that had been held weighed significantly in an argument against prosecution, since "Dr Leeks has been held to account in a number of forums" and his behaviour had been the subject of media attention;

(j) **Likely length and expense of a trial:** given the need for extradition to bring Dr Leeks back to New Zealand, and the need for expert opinion evidence on both sides, the trial was likely to be lengthy and expensive. Mr Hall warned that extradition could pose particular difficulties where there has been a very long delay between the alleged offending and request for extradition. He also considered that the aversion therapy would come under particular scrutiny and "may well be fatal" to the application to extradite;

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(k) **Likely sentence a court would impose:** Mr McArthur considered it unlikely that a court would impose a sentence of imprisonment.

Decision not to prosecute

6.28 Under the Prosecution Guidelines, the initial decision to prosecute rests with the Police (clause 2.5). It was my responsibility as the investigating officer to decide whether further investigation should be completed with a view to initiating a prosecution.

6.29 On the basis of the legal advice that a prosecution would be very unlikely to result in a conviction, I made the decision not to proceed with investigating further or laying criminal charges. I summarised the reasons in my 2010 Report was follows:

> The advice received in December 2009 from Legal Section was that there was unlikely to be sufficient evidence to successfully prosecute a charge of wilful cruelty to a child. Their opinion also considered the public interest issues identified in the Solicitor General's guidelines and reached a view that there was no other countervailing public interest in proceeding with a prosecution. That opinion was independently reviewed and the advice confirmed.
>
> Taking all those factors into account a decision has been taken that there will be no prosecution in this case.

6.30 I referred to the prospect that abuse of process would be a "live" issue raised by the defence, considering that my inquiry was the seventh examination of the same or related facts, 30 years had elapsed since the offending, several potential witnesses were dead or in ill health, and there had been "extensive and arguably one sided media attention to the issues under investigation".

6.31 I was also conscious of the challenges that an extradition from Australia would pose, particularly given Dr Leeks' age, the long delay, and the nature of the offences (in that they related to a psychiatrist who maintained he was acting professionally in the provision of medical treatment).

6.32 Once I made the decision that there would be no further investigation and therefore no prosecution, I prepared my 2010 Report to the Police Executive. On the basis of that report, Mr Viv Rickard, Assistant Commissioner: Operations, advised the Deputy Commissioner Rob Pope that:

> I am satisfied that Assistant Commissioner Burgess has carried out prudent and reasonable enquiries in relation to the Lake Alice matter and, in particular, in regard to Paul Zentveld. ... Clearly there are some barriers concerning some offences that we could have considered particularly under the Mental Health Act 1969. Notwithstanding that, we have turned our minds to offences in regards to the Crimes Act 1961 and based on the investigation and legal opinion, I agree that no charges be considered.[50]

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[50] Memorandum from Viv Rickard, Assistant Commissioner to Deputy Commissioner Rob Pope, "Re: Lake Alice", 14 April 2010.

6.33 In response, the Deputy Commissioner accepted the recommendations and noted the "comprehensive investigation into these difficult historical matters".[51]

6.34 At the conclusion of my inquiry, I wrote to all the complainants advising them of the outcome of the inquiry.

UNCAT report

6.35 In 2017, Paul Zentveld lodged a complaint with the United Nations Committee against Torture (**UNCAT**) under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. I have read the report that UNCAT released in 2019.[52]

6.36 It is not appropriate or relevant for me to comment on the UNCAT conclusions and recommendations, but I would like to respond to some of the factual findings in the report.

6.37 The UNCAT Committee notes that my 2010 Report "did not clarify whether the alleged treatment was indeed applied as a punishment" (paragraph 9.4). I do not think that statement is accurate. To my mind it was reasonable to infer that electric shocks were administered as punishment in certain circumstances, by which I mean when administered in response to the victim's misbehaviour in order to modify that behaviour. However, the disputed issue was whether that could be said to be an accepted form of medical treatment in the early 1970s, i.e. "aversion therapy", as Dr Leeks and other Lake Alice staff alleged. I am not at all sure that further investigation would have resolved that issue, since there were differing medical opinions on the topic, at least in relation to the early 1970s time period under investigation.

6.38 The report states that "when confronted with several complaints in respect of the events at Lake Alice Hospital, the investigative authorities of the State party chose only a 'representative complaint for analysis'", and that choosing only one complaint "triggers the risk of ignoring the systemic character of the issue at stake and all the surrounding circumstances" (paragraph 9.8). It is simply factually incorrect to state that this is what occurred. The only time that one representative complaint was selected for analysis was when the Crown Law opinion was sought in 2003. As set out above, the Police investigation that followed analysed a total of 41 complaints. I also took into account the possibility of bringing propensity evidence if there was sufficient evidence to establish individual charges.

6.39 The Committee notes the "continuing public interest into the matter" and states that it "fails to see why there is no countervailing public interest in proceeding with a prosecution" (paragraphs 9.4, 9.5). To be clear, the fact that the media and public are interested in the events at Lake Alice is not the same thing as the public interest grounds referred to under the prosecution guidelines. The guidelines require an evaluation of a range of public interest criteria, but the overriding criterion is likelihood of a successful prosecution.

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[51] Memorandum from R J Pope, Deputy Commissioner to Assistant Commissioner: Operations, "Operation Alice", 6 May 2010.
[52] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 852/2017", 27 December 2019.

6.40 The UNCAT Committee also expresses concern that charges were only considered in relation to Dr Leeks, and that authorities should have tried to find out if somebody else could be held responsible for the alleged violations (paragraph 9.6). I have explained already that the evidence was abundantly clear that Dr Leeks was the individual primarily responsible for the treatment, either because he administered it or it was administered under his authority. However, there was a legal issue as to whether an institution could have been held responsible, as Ian MacArthur raised in his opinion.

Conclusion

6.41 Some aspects of the investigation into what occurred at Lake Alice were challenging from a professional point of view, for the reasons I have outlined in this evidence. The allegations themselves disclosed deeply disturbing practices, involving the application of electric shocks to vulnerable adolescents. I think that most people would agree that it was completely unacceptable to administer electric shocks to children as a means of modifying behaviour. However, repugnance at Dr Leeks' actions was not enough in itself to proceed with criminal charges in the face of two legal opinions to the contrary and that is why no further investigative, extradition or prosecution action was taken at the time.

DATED at GRO-C this 6th day of April 2021 GRO-C

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Malcolm James Burgess