SIMON CHARLES MACPHERSON - AFFIRMED

EXAMINED BY MR CLARKE-PARKER

CHAIR: You found your witness, Mr Clarke-Parker?

MR CLARKE-PARKER: Yes, safely installed. (Witness affirmed).

CHAIR: Thank you very much.

MR CLARKE-PARKER:

Q.Thank you, can you please begin just by giving your full name?

A.My full name is Simon Charles MacPherson.

Q.Thank you, Mr MacPherson, and you have prepared a brief of evidence dated 27 January 2020, do you have that before you?

A.Yes, I do.

Q.And you are also going to refer to your supplementary brief of evidence prepared by your colleague, Ms Hrstich-Meyer, dated 31 July 2020; do you have that with you as well?

A.Yes.

MR CLARKE-PARKER: As with the previous witness, we will be selecting particular paragraphs of the brief of evidence to refer to, but I just note that, of course, there is a full brief of evidence.

CHAIR: Yes, and you can take it we have read the brief of evidence, so we are familiar with it, thank you.

MR CLARKE-PARKER:

Q.Thank you, Mr MacPherson, if you can please begin reading at paragraph 1.1 of your brief?

A.Kia ora tatou, my name is Simon MacPherson. I joined the Ministry of Social Development in December 2015 as Chief Policy Adviser and am currently the Deputy Chief Executive for the Policy Branch and a member of the Senior Leadership Team. I am also on the Official's Social Wellbeing

Committee that supports the Chair of the Cabinet Social Wellbeing Committee.

CHAIR: Your evidence is being translated into sign language and is being taken down verbatim, so if you could keep an eye on the signer, thank you.

A. Sure.

CHAIR: Sorry to have stopped you, I am not sure where you were.

MR CLARKE-PARKER:

Q. Thank you, Mr MacPherson, I think you've finished paragraph 1.1 and then had some further comments to make in relation to phase 1?

A. Yep. I would like first to acknowledge the courage and strength of the survivors in giving their evidence in the first half of this hearing in the Royal Commission. I am the first of three witnesses for the Ministry of Social Development covering topics. The brief of evidence explains some of the high-level policy developments in the historic claims area. The next witnesses for MSD will be more focused on a more granular level of the previous and current processes for assessing claims.

Q. Thank you, Mr MacPherson. Can I now please take you to paragraph 1.5?

A. To the extent I was not involved in an event referred to in this brief of evidence, I have relied on the relevant material held by the Ministry, in particular, I note that much of the discussion of events prior to 1 July 2006 relates to the Department of Child, Youth and Family prior to it being incorporated into the Ministry.

Q. Thank you. And then at section 2, you give a description of the overview of how the system has changed, so can I get you to begin reading from paragraph 2.1, please?

A. The Ministry's current redress system for responding to historic claims has evolved directly out of litigation brought against the Crown in the early 2000s.

Q.Sorry to interrupt, if I can ask you to slow down, thank you.

CHAIR: The odd breath helps.

A.I'll try. The Ministry's current redress system for responding to historic claims has evolved directly out of litigation brought against the Crown in the early 2000s. The system started as a set of ad hoc responses to litigation with an emphasis on successfully defending the Crown's legal position and moved to a system by 2005 that placed more emphasis on potential resolution out of Court but still placed a heavy reliance by the Crown on available legal defences both in Court and out of Court settlements. With the greater flexibility implicit in the Crown Litigation Strategy from 2008, the Ministry established an out of Court alternative dispute resolution process which evolved towards a more claimant focused and less legalistic approach which accepted that the Crown was morally obliged to respond to claims, despite the existence of legal defences, while still being conscious of the interests of the Crown. This process was highly personalised and focused on engaging directly with claimants, hearing the claimant's story, reviewing the claimant's social work records to determine whether it was reasonable to accept the allegations so that a settlement offer could be made, acknowledging any wrongdoing and taking steps to try and put the harm right.

The system is now very different to that in place in 2005. Some of this change has been a result of deliberate review, but some of it has been more evolutionary or in response to ad hoc issues that have arisen. Over time, it became apparent that claims were increasing at a significant rate and through engaging with claimants it was evident that litigation was not the best way to resolve these claims - either for claimants or the Crown. The system as

it has evolved has been heavily shaped by the Crown's Litigation Strategy.

Along the way, we have gone from:

(a) A small team geared around supporting legal process and the defence of legal claims against the Crown, to a much larger dedicated team focused onset Ling claims directly.

(b) A function that was integrated into the legal team of the department responsible for children's care system, to (from 2006) one set up on a more arm's length basis in the Ministry of Social Development but still in the same department, to one located from 2017 in a Ministry separate to Oranga Tamariki.

(c) An approach that relied implicitly on the social work professionals to take into account the cultural needs and context of claimants to where cultural competency and a commitment to the principles of the Treaty of Waitangi has been more explicitly factored into the approach and makeup of the Historic Claims Team.

(d) Ad hoc funding arrangements, sometimes based on underspends in other areas of activity, to more regular multi year funding arrangements culminating in the recent injection by the government in 2019 of $95.2 million over 3 years.

2008 to present

Although the alternative disputes resolution process established from 2008 was effective in responding to the needs of many claimants, the time intensive nature of the assessment process and increasing claim numbers meant that the Ministry needed to reconsider the way in which it assessed claims.

To attempt to address growing delays for claimants, the Ministry implemented the Two Path Approach in 2015. The Two Path Approach was a one-off accelerated assessment approach which was a less personalised approach to each claim, trading off detailed investigations of claims against

increased timeliness. At that time, forecasting indicated that claims could be resolved by 2020, which was not borne out in fact as time progressed.

This approach was successful in settling a high number of claims but did not resolve the problem of delays because claim numbers did not significantly reduce. Instead, numbers of claims were increasing at levels that were unexpected and unplanned for.

To be more effective in addressing delays, the Ministry embarked on further review and reform of its redress system, driven by consultation with claimants that eventually led to a new process implemented in November 2018. These new processes retained important parts of listening and engaging with claimants but included a more streamlined assessment than the original process. The changes are also a significant improvement to the extent to which the Ministry is actively taking steps to ensure its commitment to the Te Tiriti o Waitangi is reflected in its process and meet the needs of individual claimants.

It is clear that the Ministry has not always got it right. However, the Ministry has always been committed to improvement, and considers that commitment is reflected in the evolving nature of its processes over time.

Throughout the development of claims processes, the Ministry's aim has been to provide a redress system that meets the needs of claimants while necessarily having to balance the interests and resources of the Crown. We have listened to claimant feedback and that of their representatives and adapted our processes to be responsive to that feedback.

The Ministry's current redress system seeks to focus on what claimants have shared is important to them and has been developed out of many years experience. The Ministry is committed to continued improvements to the process and will be guided in its work by claimants' voices wherever

possible. The Ministry values the work of the Royal Commission as an opportunity to reflect on and improve its processes in order to best meet the needs of the claimants. My brief will provide an overview of the Ministry's story and discuss events prior to the implementation of the 2008 process, along with a number of discrete issues that are relevant to the Ministry's response to historic claims over the years. My colleague Linda Hrstich-Meyer's brief will pick up the narrative with the development of the 2008 process through to current practice.

Q. Thank you, Mr MacPherson, I will have you continue reading from section 3, please, and again, a plea for a slightly slower pace.

A. The Child Welfare Division of the Department of Education had responsibility for the provision of child welfare services until it was transferred to the Department of Social Welfare which was established in April 1972. In May 1992, the Department of Social Welfare was restructured into business units including the New Zealand Children and Young Persons Service which continued to carry out the child welfare functions.

In October 1999, the Department of Child, Youth and Family Services was established as the government agency responsible for the care and protection of children in New Zealand.

The Ministry of Social Development was established in 2001 as a result of merging the Department of Work and Income with the Ministry of Social Policy to become the government's primary adviser on strategic and cross-sectoral social policy, as well as delivering operational support and services particularly around employment and income support.

On 1 July 2006, CYF was disestablished as a separate department and became part of the Ministry. The purpose of the merger was to back CYF with MSD's organisation and support following a period in which CYF had struggled to

deal with demand and budget pressures. The merger did however have a significant impact on the historic claims process.

Q. Thank you, Mr MacPherson. We will now have the next several paragraphs taken as read and I'll take you to paragraph 3.10, please.

A. In April 2015, the Minister for Social Development established the Expert Advisory Panel to review the extent to which CYF and related agencies in the care system were providing positive outcomes for children and young people and any changes required to improve those outcomes. As part of a wide ranging final report the Panel recommended establishing a separate department responsible for the children's care system, which was accepted by the government.

On 1 April 2017 Oranga Tamariki Ministry- for Children was established to replace CYF in the provision of child welfare services, and so this function separated from the Ministry. Initially, the Ministry retained responsibility for historic claims - that is, all claims relating to events prior to 1 January 2008; more recently, on the direction of Ministers, the Ministry has taken responsibility for all claims prior to 1 April 2017.

Today, the Ministry plays a key role in the social sector, working directly with New Zealanders of all ages to improve social wellbeing. It provides policy advice and delivers social services and assistance to young people, working age people, older people, and families, whanau and communities. It does not have a direct role in child welfare or child protection, with the two specific exceptions below.

The Ministry is currently responsible for setting up the Independent Children's Monitor as well as progressing the policy and legislation changes needed to give full effect to the monitor's role. The Independent Children's Monitor function is intended to transfer to the Office of the

Children's Commissioner once it is fully functional and running effectively.

The Independent Children's Monitor is a key part of the government's drive to strengthen independent oversight of the Oranga Tamariki system and ultimately will help ensure that the wellbeing of children is protected.

The Ministry also hosts the Social Services Accreditation function which reviews organisations wishing to provide community services to ensure they have both the capacity and ability to provide effective services, including organisations that deal with children.

Q. Thank you. And I now move to section 4 where you talk about the next period of time from 2000 to July 2004, so please can I have you read from paragraph 4.1?

A. Prior to 2003 the Crown had only received a small number of child welfare-related historic abuse claims and agencies did not have dedicated internal policies or processes to address historic claims.

By December 2003, CYF had received 31 complaints from former State wards alleging various forms of abuse and inadequate care in Salvation Army homes, 30-60 years prior. These claims, and the uncertainty about the number of future claims, led to the establishment of the Salvation Army project team within CYF in February 2004.

The Salvation Army project team was setup initially for a period of 6 months, with the primary aim being to address the inquiries and concerns from this group, which had by then increased to 34 people. The Salvation Army team's role was to provide information about the process, explain the contents of files to claimants, assess what assistance might be available to claimants through other government agencies, and listen to and record claimants' stories.

CYF recognised that it was almost certain that a number of complaints about historical abuse would be brought against the government in the coming decade, and therefore the

response to the Salvation Army claimants would have implications for other departments.

As well as this group of claims against the Salvation Army, claims against the Crown began to be filed in relation to psychiatric institutions. CYF had been named as a defendant in approximately 20 of these civil claims, with 22 more pending but not yet filed at that point. CYF was a defendant because some of the claimants were in State care as well as being placed in psychiatric institutions.

Accordingly, CYF worked with officials from the Department of the Prime Minister and Cabinet, Crown Law and the Ministry of Health to discuss a consistent approach across the government to historical abuse claims. The agencies supported an inter-agency project team to scope the size of the problem, examine the issues, look at the overseas models, and suggest a way forward.

Sonja Cooper and Roger Chapman were the primary solicitors representing claimants. They signalled that they anticipated filing in excess of 250 claims against CYF. It was clear that CYF would need to respond to claims in the future.

On 21 July 2004 the Executive Committee of CYF approved the establishment of a Historic Claims Team to manage civil claims that were anticipated to be filed against the Department. It was to be part of the Legal Services team, with the Chief Social Worker the instructing client.

Q. Thank you. Again, we will have paragraph 4.8 taken as read and move to 4.9, please.

A. In 2004 and 2005 the team was small, comprising a project co-ordinator, a solicitor and in 2005 a senior social work adviser and administrator.

Q. At paragraph 4.10, you note some issues relating to the naming of that team and we will have that taken as read and move on to section 5 please where you talk about the development of the team from 2004 onwards.

A. Historic Claims Team was initially established to support CYF's response to litigation and worked very closely with CYF's and then the Ministry's legal team. Prior to 2007, most claims were filed in Court and actively managed by the legal team at Crown Law.

The Historic Claims Team managed all of the non-legal aspects of historic claims. By the time CYF was integrated into the Ministry on 1 July 2006, the Historic Claims Team performed the following functions:

(a) processing information requests from lawyers, primarily Cooper Legal, and individuals who had been in care;

(b) undertaking research into policy and practice standards for residences and time periods mentioned in historical claims;

(c) providing support for the Ministry's legal team, for example file searching and providing advice on social work; and

(d) and dealing with general phone inquiries - often from people who did not want to lodge a claim but wanted access to their files and/or advice on any services that could assist them with issues arising out of claimed abuse.

In these early years, there was not a dedicated claims resolution function. Rather, the focus was on responding to litigation. As detailed in Ms Hrstich-Meyer's brief claims did not start coming to the Ministry directly until mid 2006 and then more regularly in 2007.

The legal team managed claims in consultation with Crown Law and in accordance with a detailed set of principles that were approved by Ministers in 2005 to assist Crown law and other agencies responding to claims. The general principles involved the Crown:

(a) acting as a model litigant;

(b) meeting liability if established but not paying public money without good cause;

(c) seeking to avoid establishing ad hoc mechanisms that would constitute an undesirable precedent for future claims; and

(d) using public resources efficiently in responding to claims.

Q. Thank you. And, again, we'll have 5.5 taken as read and move to 5.6, please.

A. Following these principles meant the claims would generally have had to be able to overcome obstacles to establishing liability under the Limitation Act 1950 and Accident Compensation legislation. As well as legal obstacles, many of the claims faced significant evidential difficulties. Many Statements of Claim did not have much information about the substantive allegations, and some did not even specify the time period in which they were abused, the institution in which the abuse occurred, or the alleged perpetrator. The lack of a clear evidential basis for claims made it difficult to properly assess claims to determine their credibility and the legal risk they posed. Given the above, only a small number of claims were resolved during this early period.

At the direction of Ministers, the Crown Litigation Strategy was reviewed in 2007/2008. On 21 May 2008, a new Litigation Strategy was adopted by the Cabinet. It was a three-pronged approach:

(a) first, agencies were to seek to resolve grievances early and directly with the particular individual where this was practicable;

(b) second, settlement was to be considered for any meritorious claims; and

(c) third, claims that did not proceed to a Court hearing because they could not be resolved were to be defended.

With this new strategy around attempting to resolve grievances directly with individuals and with the establishment of the Historic Claims ADR process in 2008,

there began to be a move away from relying upon limitation and Accident Compensation legislation defences if the matter was resolved out of Court, though there still needed to be sufficient information to support the claim.

Q. Thank you and again we will have 5.9 taken as read, please and move to 5.10.

A. I understand details of the development of the Crown Litigation Strategy will be provided in the Solicitor-General' evidence.

Q. And then in the following section you discuss Child, Youth and Family's investigation into previous practices and some of this material will also be covered in the brief of evidence for Mr Young, as the Commissioners will no doubt be aware.

CHAIR: Yes.

MR CLARKE-PARKER:

Q. Mr MacPherson, if I could have you read from paragraph 5.12 please.

A. In January 2006, Ms Cooper presented CYF with a paper prepared by Cooper Legal entitled "Culture of Abuse and Perpetrators of Abuse at Department of Social Welfare Institutions". Ms Cooper described the nature of her clients' allegations arising out of their time in residential care between 1960s and 1990s and named approximately 235 alleged abusers.

Ms Cooper's paper made allegations of a culture of physical and sexual abuse within state child welfare institutions.

Q. Thank you. The rest of that paragraph is matters covered also in Mr Young's brief, so we'll move to paragraph 5.14.

A. This paper was used to inform various pieces of work. As part of that, the Historic Claims Team investigated and identified that 9 staff named in Ms Cooper's paper were still currently employed by the Department.

Q. And again, we will move to 5.15.

A. Based on the information provided, for 8 of the 9 staff members, it was determined that employment investigations were not possible based on the brief anonymous summary information provided in the report. Further information was provided for one staff member which allowed an employment investigation to be completed.
The Ministry took these allegations seriously and met with Police to discuss possible investigations of criminal offending. No Police investigations were completed as Cooper Legal clients did not wish to lay criminal complaints.

Q. Thank you, Mr MacPherson. I believe you have an acknowledgment that you would like to make here in relation to a document discussed during phase 1 of the redress hearing?

A. Yes. So, this is a different document, I think in the Redress Hearing Phase 1 there was an MSD memo from 2007 which used the language of Ms Cooper's behaviour being unethical and inappropriate. I was quite taken aback to see that in a formal document going to the leadership team, the language was inappropriate and regrettable. I just want to say that.

Q. Thank you. And I just note for all of our records, that the document is MSD 2030. I don't propose to take you to that document.

CHAIR: Thank you for that, Mr MacPherson.

MR CLARKE-PARKER:

Q. Turning to the next section, Mr MacPherson, you talk about the ongoing development of the term of dispute resolution process, can I have you begin reading from 5.18 under the sub heading "Research into past practices"?

A. The Historic Claims Team in CYF undertook research into past child welfare practices in New Zealand. This was to assist in understanding abuse that had occurred and growing the team's knowledge about events that had taken place in child

welfare residences. The team interviewed current CYF staff who had previously worked in some of the residences identified in the claims in order to obtain their accounts of the practices and cultures within them. The team also performed searches of administrative and personal files to look for evidence of abuse or inappropriate behaviour by staff.

It was clear to the Historic Claims Team at the time that the past standards of care did not meet modern standards and that abuse had occurred in some institutions.

Q. Thank you. And the next three paragraphs will be taken as read and so we'll move to 5.23 under the heading, "The number of claims continues to increase".

A. By 2006, it became apparent that the number of claims of abuse of people in its care was increasing. Prior to the disestablishment of CYF on 1 July 2006, CYF regularly updated the Minister and Cabinet on the number and status of claims filed in the Courts. At 23 March 2006, CYF had been named as a defendant in 55 civil claims in Court, by the end of the year this had increased to 127.

Information from Cooper Legal, together with increases in the number of relevant Privacy Act requests and Legal Aid applications, all indicated that the number of claims was increasing. Cooper Legal advised that approximately 300 potential claims were anticipated in June 2005. This increased to 600 potential claims by the end of December 2006.

Q. I will now take you down to 5.26, please.

A. With the rising number of claims, it was clear that an alternative approach to litigation needed to be developed. In September 2006 the Historic Claims Team, now in the Corporate and Governance Group MSD, met with members of the Confidential Forum, Ms Cooper and nine of her clients. The Ministry carried out interviews with claimants in order to consider what a positive process for assessing and managing

the claims would look like. Interviews were carried out confidentially and on the basis that the information provided would be kept separate from Court proceedings brought by those persons.

The claimants said they believed that the time they spent in State care negatively affected their life outcomes. The claimants identified a range of needs in response to their claims. All identified compensation, but some said this was only a secondary concern. Claimants wanted to tell their story and be heard, to have an acknowledgment of harm done, a service response, a commitment to raising public awareness of child abuse and preventing its recurrence and an apology.

The Ministry considered the need for a fair process supported by evidence and acknowledged that where children were wards of the State, the State or Crown owed them a duty of care and had a moral obligation to provide remedies where it had failed that duty. As well as accounting for the needs of the claimants, the Historic Claims Team considered that any potential options would need to account for the following factors:

(a) the rights of alleged perpetrators to defend themselves against allegations and not suffer unnecessary trauma;

(b) the need to protect the reputation, where deserved, of staff and the Ministry/CYF;

(c) providing a timely response;

(d) financial cost and value for money;

(e) accessibility, both emotional and physical to claimants;

(f) public and political credibility; and

(g) administrative feasibility and impacts on other government agencies.

The Historic Claims Team also carried out research into international approaches to inform policy development.

Having received this feedback from claimants, by 15 December 2006 the Ministry was considering ways that claims could be resolved out of Court while achieving a fair result for all

parties. The alternative process would likely include the following features:

(a) an apology and acknowledgment of harm done;

(b) strengthened services for people who may have been abused in care - this would require work across the Ministry and other agencies to establish what services would be delivered and how;

(c) the ability for any person who had questions regarding their care to work with the Ministry, in a supported environment, to look at their care, ask questions, and where appropriate receive a personal apology; and

(d) a visible commitment to ensuring that the current system prevents and detects abuse to the extent possible, and that an environment is provided where children and young people are able to report any issues with their care.

The possibility of an out of Court payment was also being considered but the Ministry was very mindful that it was bound by the existing Crown policy on settling such claims, (that is, it would meet liability if established or where an assessment indicated that there was a reasonable prospect of liability but would not pay money without good cause). This meant applying the Limitation Act and the Accident Compensation and legislation defences. The Ministry's application of the new Crown Litigation Strategy from 2008 provided for out of Court financial payments in cases where the Ministry considered there was a moral imperative to make them, and without relying on the Limitation Act and Accident Compensation legislation defences.

Q. Thank you, Mr MacPherson. And again, I just please ask you to read slowly where possible. If I can have you resume at paragraph 5.33, please.

A. These features, along with settlement payments became key components of the Ministry's alternative dispute resolution process and continue to this day, as discussed in Ms Hrstich-Meyer's evidence.

Q. Thank you. And the final two paragraphs of that section will be taken as read and we will now move on to section 6 which is referrals of claims from CLAS to the Ministry which of course is also a topic that we've heard some discussion of this morning from Mr Knipe.

A. On 20 June 2007 Cabinet agreed to the establishment of what would become CLAS. This was at the same time that Cabinet decided to review the Crown Litigation Strategy. CLAS was officially established in 2008 and met with participants between April 2009 and 2015. CLAS provided a listening service for people who had experienced harm in welfare, health and/or education care.

The role of CLAS was to provide an opportunity for participants to talk about their care experience, provide assistance for participants to access existing services, i.e. referrals to other support services, and entitlements based on their needs and to enable participants to access information held by state agencies, which CLAS would request on the person's behalf. CLAS made 424 requests to the Ministry for social work files on behalf of participants. The standard approach was for the Ministry to process these and provide the files to CLAS who took responsibility for providing these to participants and where needed, additional supports around reading these files.

Q. Thank you, Mr MacPherson. If we could turn over the page now to section 7, litigation of the claims from 2007 onwards.

A. A number of significant cases proceeded through the Courts in this period, addressed in the brief filed on behalf of Crown Law Office. White v Attorney-General was an extremely important case for both the Ministry and the Crown as it is the only historic abuse claim for a person in State welfare care that proceeded through a full trial since the inception of the Historic Claims Team in 2004. Although the Ministry's preference was not to progress to trial, and

attempts were made to settle the claims of the two plaintiffs, the High Court decision provided important legal findings around the Crown's liability. These findings helped shape aspects of the Ministry's assessment process around duties that the Ministry owed to children in State care. The Court also made factual findings relating to the plaintiff's concerns about the residential institutions of Epuni Boys' Home and Hokio in the 1960s and 1970s which has assisted in the Ministry's understanding of these residences and assessment of other similar claims.

The case was conducted having regard to the Crown strategy at the time which included acting as a model litigant and meeting liability if established, but not paying public money without good cause. The Crown took an orthodox approach to responding to the litigation which included pleading and relying upon applicable defences.

The two plaintiffs had their claims for abuse in care dismissed, despite factual findings against the Crown being made, including that one brother had been sexually assaulted at the institution.

Despite this decision that the Ministry was not legally liable for the abuse, it still considered it appropriate to offer a payment to the plaintiffs in the White case as they had come to harm while in the care of the State and the Ministry wanted to acknowledge this and try and put right some of the harm. A payment was offered and paid to the plaintiffs. This payment included an ex gratia payment along with a contribution to their Legal Aid debts. An amount was agreed with the Legal Services Agency which enabled the plaintiffs to retain their ex gratia payments in full.

Q. Thank you. And you go on to discuss some of the other litigation in the three paragraphs that follow but I will take you now to paragraph 7.8 where you discuss what is termed the "stopping the clock" agreement with Cooper Legal.

A. On 21 May 2011 the Ministry entered into an agreement with Cooper Legal that it would not use the Limitation Act 1950 to avoid making a fair offer to resolve the claim out of Court, and that it would "stop the clock" where claimants were engaging directly in the out of Court process. This would ensure claimants were not disadvantaged by engaging fully in the Ministry's processes for resolving claims out of Court. An addendum to the agreement was entered into in early 2015 under which the Ministry agreed not to rely on the long stop periods in the section 23B(1) of the Limitation Act 1950.

This agreement gave Cooper Legal claimants some surety that they did not need to file proceedings in Court to preserve any Limitation Act defence they might have. This agreement led to a reduction in claims being filed in Court and this continues today. Most claims from Cooper Legal are no longer filed in Court.

The Crown's approach to the use of statutory defences is discussed in more detail in the Solicitor-General's evidence.

Q. Thank you, I will now take you to section 8, which is the Ministry's commitment to Te Tiriti o Waitangi and have you read from 8.1, please?

A. As previously mentioned, the majority of claimants have Māori whakapapa, reflecting the general care population. From the origins of Historic Claims Team within the Ministry in 2006, the Ministry has sought to place a strong emphasis on the historic claims process responding to a claimant's individual needs in accordance with social work principles. The Ministry considered that these principles allowed for the expression of tikanga Māori where it was raised by the individual claimants.

The historic claims processes were originally based on social work practices which emphasised te ao Māori. The Historic Claims Team were always encouraged to be sensitive

to cultural concerns. Staff at times attended relevant training to support their ability to work cross-culturally. Ongoing evidence of cultural competency was a professional requirement for many staff who were registered social workers.

The Ministry also gave consideration to the needs of Māori claimants in its original development of the historic claims process. During the 2006 consultation with Ms Cooper and nine of her clients, six of whom were Māori, the Ministry discussed the claimants' expectations and possible concerns about an out of Court resolution process. These were used to inform the design of historic claims process. For example, the Ministry incorporated an option for providing counselling services in response to a concern that claimants' issues could affect their families and put them at risk.

This was, however, relatively informal and implicit, and the Ministry accepts that the historic claims process and its underpinning principles could have more consciously and explicitly embraced and reflected the values and principles of te ao Māori. To address this issue highlighted by the Waitangi Tribunal claims filed in 2017, the Ministry undertook significant consultation with Māori claimants. The Ministry relied on this consultation when designing the changes to the processes implemented from November 2018 which have specifically incorporated issues raised by Māori claimants. The Ministry considers that this process was undertaken in the spirit of the Treaty principle of partnership with Māori.

A number of the changes or intended changes to the historic claims operating model have been implemented as part of the Ministry's commitment to ensure that the principles of the Te Tiriti o Waitangi have been incorporated. These are discussed in detail in Ms Hrstich-Meyer's brief of evidence but include diversification of staff working on claims,

trialling initiatives to incorporate greater whanau involvement in the claims process and ongoing work to ensure continuous improvement based on feedback received from claimants.

Q. Thank you. The next section 9 relates to changes to the definition of historic claims over time. We will have that section taken as read. Now I'll take you to 10 which is the high tariff offenders question. Can you read from 10.1?

A. In 2010 Ministers expressed an interest in exploring whether a policy was needed for managing compensation payments made to claimants who had been convicted of very serious crimes such as murder, child molestation and rape. This group became known as "High Tariff Offenders".

Between 2010 and 2017, Crown Agencies and Ministers explored various options to determine whether it may be appropriate to put conditions on how this group of offenders receive and use their settlement payments which would take into consideration the particular characteristics of the group, including the interests of victims and the community. These conditions included this group being able to use their payments only for rehabilitative and reintegration purposes and various trust legislative mechanisms were considered to manage the funds. It would only apply to claimants who were to receive in excess of $10,000. This policy initiative was complex with difficult administrative, legal and financial issues to be worked through and there were a variety of Crown Agencies involved. There were also different Ministerial views as to what this policy should look like throughout the development period.

Assessment of claims by high tariff offenders was put on hold while policies were considered. Approximately 43 claimants fell into this group, some of whom had their settlement offers delayed but not denied while this work progressed.

In December 2017, the newly elected government decided not to progress the introduction of legislation that would have enabled the Crown to manage payments to high tariff offenders through a statutory management scheme. In February 2018, the Ministry began making offers to this group of claimants with many receiving an offer under the fast track of the Two Path Approach.

Q. Thank you, Mr MacPherson. I'd like to now take you to a document from December 2017 which is Crown bundle tab 82. This is the decision that you've just been referring to in paragraph 10.4, is that right?

A. Yes.

Q. And can I take you, please, to paragraph 9, which is a couple of pages further on. If paragraph 9 can be called out, please?

A. "In 2016 the Ministry of Social Development recommended that the approach be abandoned. Crown Law advice was that all options explored posed legal risk due to the differential treatment of a group of claimants. The options also involved an administrative burden for the State that could continue for the lifetime of the claimant. Ministers then told officials to design a regime to be set out in primary legislation so it could not be deemed unlawful as a result of a successful human rights challenge?

Q. Thank you. This section comes within a summary of the advice previously given, I suppose. The document is from December 2017.

And so, now if I can move to paragraphs 15-24, please. I won't take you through all of it but I just note that, again, the Ministry was here advising against this policy on a number of bases, including on human rights grounds; that's right, isn't it?

A. Yes, it is.

Q. Thank you. That's all that I needed to take you through with that document, thank you.

If we can now move on to section 11 of your brief, please, and have you read from 11.1.

A. It is not the Ministry's usual practice to use private investigators in the context of responding to filed claims of historic abuse and it is not part of the Historic Claims Team's out of Court claims process at all. However, from time to time, as cases have progressed towards trial, the Ministry has used private investigators to assist in locating witnesses and preparing for trial (for example, analysing documents). In these cases, the engagement has typically been through Crown Law who engaged these services on the Ministry's behalf.

In December 2018 the State Services Commission released their report into the use of external security consultants. The Inquiry found that in the White case that Crown Law had breached the State Service Code of Conduct by providing broad instructions to a private investigator without explicit controls to protect privacy interests. There were indications on file that the investigators used techniques involving low-level surveillance or something close to it for one person, though a definitive finding could not be made.

Q. Thank you. I now take you to section 12 which is the Ministry's referrals to other agencies and have you read from 12.1.

A. The Ministry is committed to ensuring that children in State care and in the community are kept safe through sharing information where appropriate with relevant agencies. Although the mechanisms for how the Ministry shares information with other agencies have changed over the years, the intention in sharing information has always been to prevent similar events alleged by claimants from happening to children today and in the future.

Upon receiving a claim, and through the claims process where further information is identified, a safety check is

completed to understand whether alleged perpetrators of abuse are current staff members or caregivers with Oranga Tamariki or the Ministry, or who may still be employed by an operating NGO. The outcome of these safety checks may result in referrals to Oranga Tamariki, the Police, NGOs or other government agencies.

When CYF was a service line of the Ministry, arrangements were in place to ensure that safety risks were assessed for staff members or caregivers who had allegations made against them. For example, as at 4 May 2007, the Ministry agencies process for addressing claims that made allegations against current Ministry staff included advising the staff member of the allegation and ensuring that the staff member was not allowed in a position where children in their care could be at risk. Staff were informed that the Ministry would support them and provided financial assistance for independent legal advice until the allegations could be proved one way or the other. This process was challenging to manage because most claims did not provide detailed information or refer to underlying evidence, especially in the early stages of a claim. The Ministry could not undertake a formal employment investigation without clear evidence and had to be mindful of its obligations as an employer.

In May 2016, the Ministry entered into an agreement with Police to refer allegations of physical or sexual abuse to Police, to assist Police in their prevention, detection and investigation of criminal offences, including for reasons of public safety. Some claimants of Cooper Legal objected to this practice and litigation was filed to prevent the Ministry from making these referrals. In June 2018, the High Court decided that information in Court documents relating to a collection of cases involving the Ministry and the Ministry of Health that are being managed together,

known as the DSW Litigation Group, cannot be provided to non-parties unless:

(a) leave is granted by the Court;

(b) the documents are shared for the conduct of litigation and any settlement purposes; or

(c) the documents are shared between the Ministry, Oranga Tamariki and the Ministry of Education for the purposes of ensuring the safety of children presently in care.

On 16 October 2019 the Court of Appeal confirmed the High Court decision.

Q. I will move to paragraph 12.6 now, thank you.

A. As the Ministry no longer provides care and protection services through Child, Youth and Family, Oranga Tamariki is responsible for addressing allegations made against their staff and caregivers. Similarly, NGOs are responsible for addressing allegations made against their staff and caregivers. Historic Claims' role is to ensure that information is shared with these agencies to ensure that they take the necessary step to maintain the safety of children in their care.

Q. And then I'll take you to 12.8 please.

A. Current practice for referring allegations to Police is that such referrals are only made with the claimants' consent.

Q. Thank you. Commissioners, I note the time and of course we are making quite good progress through this brief.

CHAIR: Yes, we are.

MR CLARKE-PARKER: However, as well as a few pages that are left to go, there's a further exhibit that Mr MacPherson has prepared and so I wonder if this might be a convenient place to adjourn?

CHAIR: We can finish first thing in the morning and then you can produce anything further and then we will proceed with Ms Janes.

MR CLARKE-PARKER: Thank you.

CHAIR: We will adjourn for the evening and resume again at 10.00 tomorrow morning. Thank you.

(Closing karakia and waiata)

Hearing adjourned at 4.57 p.m.

ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter	**of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions**
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes, Mr Andrew Molloy, Mr Tom Powell and Ms Danielle Kelly
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	20 October 2020

TRANSCRIPT OF PROCEEDINGS

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(Opening Waiata and karakia)

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

MS JANES: Good morning Commissioners, kia ora. We will continue with the Ministry, Simon MacPherson.

CHAIR: Good morning, Mr MacPherson, you remain on the affirmation you took yesterday.

A. Good morning, of course.

SIMON CHARLES MACPHERSON - AFFIRMED.

QUESTIONED BY MR CLARKE-PARKER

Q. Mr MacPherson, yesterday before we adjourned we were at section 13 of your primary brief, which is the final section relating to information about claimants and their claims. Can I please have you resume reading from 13.1?

A. The Ministry's data collection has improved over time, and historic claims has actively sought to develop a stronger understanding of claimant demographics. The information below has been provided as of 31 October 2019, though captures data from both closed and open claims since historic claims has been operated.

CHAIR: Please, do try and pace yourself.

A. I'll try. Although only up to 31 October 2019, the Ministry would not expect to see significant variation in this data quarter to quarter.

As at 31 October to 19, the Ministry had 3,866 historic claimants.

Over half of claimants (54%) are recorded as Māori (either as their primary or secondary ethnicity) and just under half

(45%) are recorded as New Zealand European. 4% of claimants are recorded as Pacific Island.

The gender distribution of claimants is 71% male and 28% female, with less than 1% identifying as gender diverse. The Ministry has only recently provided the ability to record numbers of claimants who identify as gender diverse, which may mean that this number is under-reported.

Historic Claims gathers the age of claimants when they first register a claim. The most common age ranges to lodge a claim with the Ministry are between 35-44 years and 45-54 years, which together account for 58% of all claims. 25% of claimants are under the age of 35 and the remaining 17% are over 55 years old.

Consistent themes of engagement with claimants and their representatives going back to 2006 are that many claimants have low income, health or mental health difficulties, difficulties finding or retaining work, are transient and some have been in prison at some point since leaving State care. Many claimants attribute the difficulties they have faced to their experiences as a child in State care. Overcoming these challenges may not be possible without an understanding and acknowledgment of that experience. Experiences in State care have also contributed to a distrust of government, and a resulting reluctance to engage with government services that may be able to offer assistance to claimants and their families.

Claims received to date cover a wide range of abuse and neglect allegations and alleged failures in the provision of care. Claimants have made allegations about sexual, physical, verbal, emotional and psychological abuse and neglect. These allegations relate to residential institutions, foster care, family homes, Ministry caregiver placements, approved church and community organisations and by staff members. Concerns also relate to decisions made by social workers, such as failing to remove a child from an unsafe family environment,

or failing to provide the necessary support to a child in care. In the early years of the Historic Claims Process, claims generally related to events that took place during the 1960s, 1970s and 1980s. Though, as time has progressed and the definition of historic has been broadened, the Ministry now has a much broader spread of claims and now regularly receives claims relating to events in the 2000s.

Q. Thank you, Mr MacPherson. At paragraphs 13.6 and 13.7 you set out some data from the Ministry's, some further data from the Ministry's claim process, and that same data was updated in Ms Hrstich-Meyer's supplementary brief of evidence at paragraphs 8.3 and 8.4. Mr MacPherson, I understand that you will be adopting those paragraphs of Ms Hrstich-Meyer's evidence?

A. Yes.

Q. And that, Commissioners, really is just to keep it consolidated.

So, if I can now turn you, please, rather than to 13.6 and 13.7 of your brief, instead turn you to the supplementary brief filed by Ms Hrstich-Meyer and have you read from paragraph 8.3, please.

A. As at 30 June 2020, the Ministry had received 4,177 claims in total.

Key data to note are (a) most years have increased year on year. The actual claim numbers can be seen in the table in the appendix, although numbers can fluctuate, on average Historic Claims receives 40 claims a month.

The Ministry has closed 1942 claims, see appendix.

As at 30 June 2020, 59% of claims were registered directly with the Ministry without a lawyer and the remaining 41% were legally represented.

Approximately 17% of claims received 30 June 2020 have been filed in Court with the remaining 83% unfiled, with or without legal representation.

As at 30 June 2020, of the 1948 claims the Ministry has closed, 43% were resolved by way of ex gratia payment and 39% by way of a settlement payment.
Further, 8% of claims were assessed but no offer was made for a variety of reasons. But common reasons include where the assessment concludes that the Ministry is not the responsible agency to respond to the abuse a person has been subjected to or there is insufficient information to support the claim.
The remaining 10% were closed for other reasons, often without being assessed such as the claimant being uncontactable, withdrawing their claim or the claimant becomes deceased and no contact being received from the claimant's estate.
Q. Thank you, Mr MacPherson. And we will now turn to paragraph 13.8, back at your brief.
Perhaps just before I move on, I'll note that also the appendix in Ms Hrstich-Meyer's supplementary brief has been updated and that is the updated version of Ms Hrstich-Meyer's brief.
Turning to paragraph 13.8, you there describe Historic Claims expenditure and there's also some graphs at the back of your brief of evidence which set that out.
Before we turn to those paragraphs though, you have prepared a further comment on budget appropriations in the Ministry of Social Development [MSD] context but also just providing some more general information. So, I have copies of that to hand up and we will go through that document before turning to 13.8.
CHAIR: Would you like to hand those up now?
MR CLARKE-PARKER: Yes. (Document distributed).
CHAIR: Do we treat this, it's not an exhibit, it's just an extra part of Mr MacPherson's brief of evidence, is that right or should it be an exhibit?
MR CLARKE-PARKER: Perhaps it makes sense to treat it as an exhibit.

Document entitled "The budget process and authorising expenditure" produced as Exhibit 4

MR CLARKE-PARKER:

Q. Thank you, Mr MacPherson. Can you now take us through this document?

A. Yes. **"The budget process and authorising expenditure**

Departments, as part of the Crown, can only spend money or incur an expense by or under the authority of an Act of Parliament.

Each year the government seeks authority for expenditure through the budget, central to which is an Appropriation (Estimates) Bill and associated Estimates of Appropriation which detail each of the appropriations that Parliament is asked to authorise. The budget covers both new expenditure (which receives most media attention) and the continuation of existing expenditure (such as paying for the expenses of operating the Police, or paying New Zealand Superannuation).

As part of good financial management, the Minister of Finance typically establishes an allowance for new expenditure in advance of each budget with some indication of the priority areas for expenditure. Ministers, advised by their departments, submit bids for new expenditure against this allocation. Usually the bids submitted amount to several times the allowance, which means that Cabinet must make prioritisation decisions across all areas of government activity. This means that some bids are declined, some are deferred, and some are scaled, as well as bids being funded in full.

The way in which historic claims are funded has itself changed considerably over the last 15 years. Initially the settlement of historic claims was funded from existing resources and out of annual appropriations.

The first money specifically set aside for historic claims through the budget process was in 2008. From 2016/2017 a separate appropriation was established for historic claims.

This was a multi-year appropriation, reflecting an ongoing commitment to the settlement of historic claims over several years allowing MSD to manage the money over a three year period. Typically, appropriations are annual. Multi-year appropriations can be varied during the period to which they apply, for example by increasing them.

As by law multi-year appropriations can be for a maximum of 5 years, since then further multi-year appropriations have been approved by successive governments and Parliaments. In 2019 Ministers bid for $125 million over three years to enable the assessment and resolution of around 2400 claims. Ultimately Cabinet approved $95 million over three years. The $95 million as a significant investment by the government in settling claims, compared to expenditure of $77 million on historic claims from July 2007 to June 2019. It represents a very significant increase in the amount available each year to settle claims. With some unspent money from previous years this gave MSD around $105 million to spend on historic claims over the next 3 years. There has been no expectation from Ministers that MSD would try to moderate claims to smaller amounts to fit inside this amount. Instead, if the amount is likely to be exhausted MSD would seek further resources through a future budget process.

Limitations on the ability of departments to incur certain expenses

A long-standing feature of the Crown's financial management regime is that Cabinet limits the ability of departments to incur some types of expenses. Two of these are relevant to the redress hearing, the third are publicity expenses. First ex gratia payments and second, compensation or damages in settlement of claims.

Departments cannot approve making an ex gratia payment of more than $30,000. Decisions to pay more than this amount can only be made by the relevant Minister for amounts of $75,000 or less, or Cabinet for amounts more than $75,000.

Departments can settle claims that are up to $150,000. To do so, the settlement needs to be endorsed as in order by either the Department's Chief Legal Adviser up to $75,000 or Crown Law for amounts between $75,000 and $150,000. Ministers, $150,000 to $750,000 and endorsed by Cabinet office or a Court judgement, and Cabinet, having considered advice from Crown Law, for amounts over $750,000 can approve higher settlements. The limits do not apply to damages and costs awarded by a Court.

In incurring such expenses departments must operate in accordance with any relevant government policy or Ministerial direction, and within the scope of an appropriation".

Q. Thank you, Mr MacPherson. We will now turn back to your primary brief and read through to the end.

A. From 1 July 2007 to June 2019 the Ministry has spent approximately $76,922,972 on the resolution of historic claims. As shown in the graph in the appendix, approximately 39% ($30,220,698) of total expenditure has gone to claimants as settlement payments and 7% ($5,599,140) to Legal Aid to contribute to claimants' Legal Aid debt. The remaining funds have predominantly been spent on operational costs and external legal fees, including Crown Law fees.

The second expenditure graph shows the historic claims expenditure by year for the same period. The two financial years where there were spikes, 2014/2015 and 2016/2017 relate to the two years where the Ministry resolved a significant number of claims through the Two Path Approach, which was a one-off initiative by the Ministry to assist in reducing the backlog of claims. This is discussed further in Ms Hrstich-Meyer's brief of evidence.

As noted, the Ministry values the work of the Royal Commission and the opportunities it provides to the Ministry in considering and improving its processes.

I'm available to answer any questions that the Royal Commission may have.

Q. Thank you.

CHAIR: Thank you, Mr Clarke-Parker, any other questions?

MR CLARKE-PARKER: No.

CHAIR: Then I'll invite Ms Janes.

***

SIMON CHARLES MACPHERSON
QUESTIONED BY MS JANES

Q. Good morning, Mr MacPherson.
A. Good morning Ms Janes.
Q. Just very briefly, if we can start at that macro level that we've just been traversing. There's 4,177 claims that the Ministry has received?
A. Yep.
Q. And there are 1,942 that have been resolved?
A. Yes.
Q. So, 46% only of the claims received are currently resolved?
A. Yes, just under half, yes.
Q. And your requested budget of $125 million were awarded or granted, voted, whatever the correct term is -
A. Voted
Q. $95 million?
A. Yep.
Q. And that was intended to resolve 2,400 outstanding claims?
A. Yes.
Q. And I understand that you're currently receiving 40 new claims per month?
A. Yes.
Q. So, in terms of how the Ministry looks at the increasing number of claims on top of the already 54% unresolved claims and the reduction in the budget, what is going to happen within the Ministry that allows the timely resolution of those claims to take place?
A. Well, I think a number of things. The first I'd say is there hasn't been a reduction in the budget. The actual budget for historic claims has gone up considerably. So, the amount, we asked for $125 million, was a really significant increase in the amount we had to spend on historic claims. $95 million is also a very significant increase. So, the

budget hasn't gone down, it's gone up. So, it reflects, it's not what we asked for or the Minister asked for, because it's her bid, but it reflects a significant amount from the government to attempt to resolve claims and resolve more of them. So, it's not a reduction in the budget.
It's also, it's for a three year period and it's quite possible to see that increased at the end of that period or during the period if we make good progress. So, it's not an envelope or a fixed constraint.
So, my assumption is and expectation, as we get close to exhausting money, we will ask for more and they will give that full consideration.
I think, as I said in the brief note I did, the Minister of Finance and Cabinet will have faced three or four times the number of bids which is the money available for new expenditure, trying to fit everything in essentially. And that gives us a really good way of starting on trying to address the backlog of claims, with the ability to go back for more. So, it's not less resource, it's more than we've had in the past, just not quite as much as we asked for.
Q. And do you find it acceptable that there are still 54% of claims outstanding with more coming in each month?
A. Well, I think it's - no, it's frustrating obviously. The new process introduced in 2018 is intended to expedite dealing with claims and resolving more of them. It hasn't yet delivered on that result but I think we're confident it will do.
Q. And the 40 additional claims per month, does that take into account the impact of the Royal Commission and more people coming forward or was that pre any change from the Royal Commission?
A. It's difficult to say, Ms Janes, actually. I think since the number was calculated at the end of last year, we would have seen some, I would expect we would have seen some impact from the Royal Commission being established. Whether things

like this redress hearing produces more, I think we need to go back and look at again.
I think, given the nature of how it has evolved over the last 20 years, it's been difficult to forecast the number of claims and sometimes events like this actually prompt an increase or change in that pattern. It's quite difficult to predict in advance. But in terms of since, I think those numbers at the end of last year since the Royal Commission had been established by that point, so that will have reflected some impact, I would have thought.
Q. And in terms of decision-making power, just in terms of how the Ministry is established and where the Historic Claims Team or the Claims Resolution Team [CRT] is located, where they have burgeoning numbers of claims and issues with resources, and we will come back to resources later because that's sort of a special topic on its own, but just on the global level at the moment, they clearly are having difficulties resolving the backlog of claims, irrespective of increases in resources, increases in budgets. What can or should they do, in terms of escalating that issue within MSD so that they can actually get what is required?
A. Well, I think it is money, that resources are there and available, so there's no constraint on MSD in terms of the budget that we have. My understanding from Ms Hrstich-Meyer, is that the number of staff that she has is actually slightly more than was planned at this point now. I think there were delays in getting staff and actually delays in processing some things, some of those caused by Covid-19 in terms of actually bringing staff on board and actually processing claims. So, I think now they're actually a full complement or just above, so I think there's not a problem now with resourcing. So, it's a question of progressing those going forward.
Q. And so, those 54% outstanding claims, what is the expectation of when they will be resolved?
A. I'm sorry, I don't know that off the top of my head.

Q. Because we have heard evidence from several survivor witnesses, so for example Mr Earl White, his was 12 years in being resolved, Chassy Duncan was 13 years in being resolved, Georgina Sammons was 8 years being resolved. At what point is it unacceptable for victims and survivors to have to wait that long to get their claims resolved?
A. Well, all of those timeframes seem too long to me.
Q. What would not seem too long to you?
A. Well, I'm not sure off the top of my head again.
Q. How would you expect to get that reduced?
A. Well, as I said, I think the extra resources, both in terms of money and staff that the team has got, I think the new claims process as it rolls out will help with resolving claims much more quickly.
Q. And when a child adolescent or vulnerable adult comes into the care of MSD, they are already in a state of vulnerability; would you accept that?
A. They no longer come into the care of MSD. They come into the care of Oranga Tamariki [OT]. But yes -
Q. For present purposes I'll use MSD.
A. Yes.
Q. And so, you would have no disagreement with Justice Ellis' statement findings that these are the most vulnerable people in New Zealand?
A. No.
Q. And in December 2019, there was a Cabinet Paper, Crown Resolution Strategy?
A. Yep.
Q. And that talks about the abuse of children is particularly abhorrent, there is no public benefit in allowing perpetrators or those vicariously liable for the acts to escape civil liability.
Would that be a statement you accept would underpin what should be the process within MSD?
A. Sorry, could you repeat the question.

Q. The abhorrence of child abuse and the fact that it should not be the primary objective to enable escape from liability?
A. Oh, certainly I don't think the primary objective of a redress scheme should be to allow escape from liability. In terms of questions about legal policy, probably best addressed to the Solicitor-General. From MSD's point of view, the redress scheme isn't about allowing people to escape from responsibilities. It's more focused on the survivors than the perpetrators.
Q. And I won't take it to you but there is a letter from Mr Peter Hughes, who was at that point Chief Executive, it was in March 2007 and it talked about the MSD taking accountability for mistakes, acting fairly investigating and to settle where it was fair to do so. Would you accept all of those propositions as values that MSD holds?
A. Yes, I think so.
Q. And I'm actually now going to take you to MSC, for Committee, ending in 395, which are the June 2010 MSD principles. And as they come up, there are six principles. If we can call them out so they are a little bit bigger, thank you.
So, principles of natural justice is the first one. In terms of natural justice, there are obviously competing demands. Where would you say the priority for MSD lies in terms of pursuing natural justice?
A. Well, I think in terms of the claims process, it's focusing on the substance of what happened, rather than any of the legal offences open to the Crown and trying to focus on understanding what happened and providing some measure of redress.
Q. So, in your mind, it's very much claimant focused?
A. Yes.
Q. And that feeds very much into principle number 2, "We take each person's story at face value - no judgement is made until investigations are completed".

That taking each person's story at face value, is there a starting point where that was the overriding principle or did that evolve?
A. I think that evolved through this period.
Q. Because it goes very much to the burden of proof, doesn't it?
A. Yes, it does and it goes through whether, I think as was the case when this started with the Department of Children, Young Persons and Their Families around 2003, to whether you think you're defending a legal claim or trying to address and provide some redress for abuse outside of the legal process, yes.
Q. So, if in 2003 that was a prevailing principle, and we will talk in detail about individual cases later with you and with other witnesses, but you will have heard the evidence of Earl White and also of Keith Wiffin, and certainly their evidence will be that their stories were not taken at face value. As an overriding principle and approach, what goes wrong within the organisation that those types of cases, and they are not outliers, are able to occur under these principles?
A. Well, I think in the case of both of those cases, they were claims that ended up being defended in Court. And in terms of the Ministry is bound by the approach to legislative policy that the government adopted, which was to defend those cases in Court, using all of the defences that were available to it.
Q. Just a quick segway on that topic. Where something is in Court, MSD is the client of Crown Law Office?
A. Yes.
Q. And MSD is able to get instructions on particular litigation involving its claims?
A. Yes, although in practice it's a rather iterative process, as I understand it.
Q. When we come to the topic of the Crown Litigation Strategy, we will explore that in more detail. So, principle number 3, if you could read that out, thanks?

A. "We focus on facts and act on what's probable and credible".
Q. And who decides on what is probable and credible?
A. It's a good question. In terms of the processing, MSD does, the claims team does.
Q. And if you were going to specific functions within the team, where would those assessments and recommendations come from?
A. As I understand it, it might be a better question to address to Ms Hrstich-Meyer, the team would go to legal and provide a recommendation to the relevant Deputy Chief Executive about how that would be dealt with.
Q. Principle number 4?
A. "We take a moral rather than legalistic approach - we look beyond legal defences and the Court's view of causation when deciding whether to make a settlement".
Q. From the evidence that you've just given, are you making a distinction between what is on a trial track and what is an out of Court process?
A. I think by 2010, so I think the answer is yes and no. So, by 2010, with the Crown Litigation Strategy being in 2008, it was implicit that agencies could look beyond the legal defences and come to settlement. So, we were at that point settling claims which may not have succeeded in Court because of the Limitation Act or the ACC bar. But in terms of things that went to Court, as I understand it, we were still using those defences.
Q. In your evidence you talk about the 2005 Crown Litigation Act and one of those requirements was to act as a model litigant; do you recall your evidence?
A. Yes, I do remember that.
Q. And, at that stage, MSD had gone out and done a lot of international research; are you aware of that?
A. Yep.
Q. And, as part of that international research, they had looked at jurisdictions, such as Victoria, where the recommendations

way back in the early 2000s was to not apply the Limitation Act; are you aware of that?
A. Yes.
Q. And so, it would have been available to MSD, both under the Crown Litigation Strategy prevailing at the time acting as a model litigant and knowing what was best practice in overseas jurisdictions to not rely on the Limitation Act?
A. No, I don't think so. Sorry, I think MSD was clearly bound by government policy, in terms of the Litigation Strategy which was that we would defend claims and use any of those defences. If you look at some of the documents produced with reports to either the leadership team or to the Minister from 2005, 2006, 2007, MSD was very clear that it was bound by the Crown Litigation Strategy in terms of approach to settling claims, including reliance on any defences that the Crown had. So, no, I don't think it was open to MSD to do that.
Q. So, there was earlier Cabinet direction around the Lake Alice abuse allegations where consideration was that where there were meritorious claims there should be consideration of waiving the Limitation Act. Why was that not picked up by the Departments and used as an option?
A. Well, as I said, I don't think it was open to the Ministry. We were bound by the Crown's approach to litigation which was to defend itself in Court using available defences.
Q. And we'll come back to that. So, just on the causation point in principle 4, what do you take that to mean within MSD as to how you will look at causation? And if we counterpoint that with the High Court's findings in *White* on causation, this appears to highlight there may be a different view internally in MSD, can you just describe what you think that means?
A. Can you just clarify, what do you mean by different view?
Q. In the *White* trial, the Court held that although there had been sexual and physical abuse, the harm likely occurred in the home and prior to transfer?

A. Yes, I remember that, yep.
Q. So, you look beyond the legal defences and beyond the Court's view of causation. So, do I read it, and correct me if I'm wrong, that within MSD you will not take that strictly legalistic approach of where the harm caused? You will look if there was abuse, if there was harm, and that is sufficient?
A. I take that to mean that we will look at it in a round, in terms of making a judgement on the substance of what we saw? I am not quite sure what you're asking me.
Q. I'm really asking what your understanding of how you apply causation internally?
A. As I said, my understanding of how we applied it internally, is we look at the facts of the case, looking through the legal defence and come to a reasonable judgement about what impact it's had on the clients.
Q. And we'll explore that, I'll take you to some documents. So, just "working with your clients to right the wrong and to move on", just a brief summary of what you believe MSD needs to do to comply with that principle?
A. So, you're talking about principle 6?
Q. Principle 6.
A. Right. Well, I think in terms of complying with the principle, I think it's a range of things. Sorry, I'm just gathering my thoughts on it.
I think from my point of view, I think what it means is we endeavour to engage with claimants to understand their story, understand the basis of the claim, try and work out what we understand about their background and records that we've got, come to a view of what an appropriate settlement might be without relying on legal defences or an expectation of going to Court. We look to settle and for parties to move beyond that with an acknowledgment of the wrong that's happened and an apology from the Crown.
Q. We'll come back to the principles later as we've explored some other areas in depth.

At the moment, there's another set of principles that MSD has, and if we can go to MSC ending in 405. This is undated and you may or may not be able to help us in terms of how it fits with the 2010 because, as you will see, in particular, this one says, "Do not accept anything on face value alone - facts need to be checked". And then it goes through abuse claim, time claims for placement, term for staff, timeframe for statutes, use of secure. Practice failures need to be checked.

So, in principle 1 and 2, where does this fit with 2010 and why is this different to the earlier principles or how is it different to the principles.

COMMISSIONER ERUETI: Can I just check the date of this?

MS JANES: We are just checking the date.

A. Why are you assuming that these are later than the principles?

Q. I am asking you because it's undated we don't know.

A. I don't know.

Q. So, if you then look at the first one in 2010 which we do have a date on, which was "accept at face value", this one "do not accept anything on face value", when did that burden of proof change? Did it change? What is it now?

A. It changed I think in the period from 2008 to 2010 and I think that's the approach we adopt now, that actually we're trying to be open-minded about what's happened without expecting there is a burden of proof on the survivor to actually establish what has happened and prove it.

Q. So, the burden of proof is on the survivor?

A. No, I said the opposite.

Q. You said the opposite, sorry I misheard you.

So, in terms of the department then assuming that burden of proof, what are the steps that you take?

A. Well, my understanding is we meet the claimants', which I think happens more often, for people who are not legally represented, to understand their story and then we will look

at what evidence we've got in terms of just checking where they've been, what we know about them, in particular checking whether there were allegations of abuse associated with the alleged perpetrators of the claimant and the institution they were at. Yeah, so I think we're looking into the background without expecting the claimant to establish a high burden of proof it is what happened.

Q. The reason I'm asking this is because the 2018 new operating model talks about four fundamental changes. And it says that one of those four changes is that it now starts from the fundamental premise of accepting the story at face value?

A. Yep.

Q. But, as we've seen, that should have been the standard of proof and the approach from at least 2010, if not earlier; would you agree that's, on the face of the documents, certainly the case?

A. Yes, I think so.

Q. And then principle 3 you talk about "Be clear what failure MSD is responsible for. Consider any possible failures you identify" and then you "refer to previous examples of similar cases for guidance".

We will explore particularly the last one, looking at particular cases. Mr Young's evidence is that for the entire time that MSD has had a Historical Claims or similar section looking at historical claims, they had at all times looked at several databases and several sources of information. So, your ERDMS staff files, claimant files, database of perpetrators and what's publicly known. Do you adopt and accept Mr Young's evidence on that point as the sources that you would look at?

A. That's my understanding, yes.

Q. So, when you have a claim with an allegation, is it correct that each and every time you will look for similar cases for guidance as according to these principles?

A. Are you talking about currently?

Q. Currently, in the past, if it's changed, you tell us?
A. That is my understanding.
Q. Okay. So, the Commission can take it that through the entirety of the life of a historical claims team, whatever it was called at any time, its guiding principle is to refer to previous examples of similar cases for guidance? And it has had the information to do so?
A. I'm not quite sure what you're asking. Are you asking me - could you - are you asking me about going back to 2003 or what point of time are you asking about or all time?
Q. I'm asking you for all time and if not for all time, when did it change and why did it change?
A. So, this is an assumption. I don't know whether it's changed or at what point it changed. I would have assumed, as a matter of practice, that any function like this you would be looking at what's happened before to give you guidance of how to deal with the current cases.
Q. So, in terms of training, let's break it down a bit. In terms of training within your historical claims team, can I take it that they are all aware of the principles?
A. Yes.
Q. And can I take it they are all aware of the sources of information as outlined in Mr Young's evidence that are available?
A. Yes.
Q. And is there training about how you actually apply that information?
A. That is my understanding. My colleague, Ms Hrstich-Meyer, can probably comment on that more because she is responsible for the function.
Q. Because we've heard that there were, certainly until 2015 when the Two Path Approach came into being, there were not categories. Would it be fair, therefore, Mr Young indicated that there were no criteria; is that your understanding up until 2015?

A. I am not quite sure what you mean by criteria.
Q. Categories?
A. Well, so there is categories, so - my understanding is in terms of the two path process, that as part of the development, that an expectation of dealing with a lot more claims and much larger numbers, that work was gone on to try and provide a bit more structure to actually how people assessed the claims and to allow for moderation and comparison across the claims. I think that's part of the evolving, which claims are being dealt with. So, I would characterise that as nothing beforehand and this form out of nothing when the Two Path Approach was put in.
Q. And what would you say the level of subjectivity is able to play in the processes?
A. What do you mean by subjectivity?
Q. If you have - we've seen the categories and we've seen that there is the ability to make judgement calls about who fits into each category and who doesn't. Would you accept that there can be a level of subjectivity as to where you fit a claimant within the categories?
A. Well, I think any process that's dealing with real people with complicated and often difficult pasts and quite difficult circumstances where you're trying to fit them into a framework that allows you to try and manage that in a way that you can and in a way that's reasonable, it would involve an element of judgement. My understanding is a whole lot of effort has gone into try and moderate those claims and to make sure they fit in the right place.
Q. And then, again, there were other principles which are undated. If we go to MSC ending in 321, if you call out the "why are principles necessary?".
CHAIR: Again, no date on this document?
MS JANES: No date on this document either. So, we're going to check with Mr MacPherson if he's able to date it for us.

CHAIR: That's fine.
MS JANES:
Q. If you just quickly try and orient yourself to, if that gives you any clue when it might have come into being but it talks about the principles to guide policy work for the historic abuse claims. It talks about it not being exhaustive but there are social concerns.
CHAIR: Just a moment.
MS ALDRED: Sorry to interrupt. I wonder if the witness might be given a moment to find the full copy of the document in the bundle and then he might have a better chance of understanding its contents?
MS JANES: Absolutely.
Q. Mr MacPherson, you have the bundles in front of you, there should be one "MSC" with the tabs.
MS JANES: May I be permitted to approach?
CHAIR: Please do. (Ms Janes assists the witness). Do you want time to find it and secondly, is it a comprehensive document that you might like some time to consider, Mr MacPherson? Would you like some time to look at that before you answer any questions on it?
A. Yes, it seems to be 3 or 4 pages long.
CHAIR: Would you like some time to consider it?
A. I wouldn't mind.
CHAIR: All right. I think we should take an adjournment to allow that.
MS JANES: Absolutely.

Hearing adjourned from 10.57 a.m. until 11.11 a.m.

CHAIR: Yes, Ms Aldred.
MS ALDRED: Thank you, Madam Chair. So, we took the opportunity to make some very brief inquiries about this document.

CHAIR: Yes. This is the "Principles for policy work on historic abuse cases"?

MS ALDRED: Yes. The information we have now is limited because we just followed this up in the last few minutes, it's not clear this is an MSD document. It looks like a document providing some broad general policy or principles for policy work on historic abuse cases and it is framed in terms of a stimulus for discussion across those government departments that have responsibility. So, it may have been something that was provided on a sort of inter-agency basis and at this stage we haven't been able to identify who generated it or its date.

So, just on that basis, it may be—this witness obviously won't have knowledge of the exact content of this document or where it's from.

CHAIR: Maybe we should ask him. Do you know, are you familiar with the document?

A. Not with this document. It looks a bit like some other ones I've read before, so my assumption is it's between 2006 and 2008 for a variety of reasons, most particularly if you look at the section below the principles, flick below that—

CHAIR: Can we do that, please?

A. If you pick up under "information for claimants" and then the next paragraph under that, so if you see the first paragraph it says, "Some claims will, for example, lead to legal avenues such as criminal or civil justice systems, or other official processes for the resolution of allegations. Other claims will lead to non-legal avenues, like welfare and counselling". So, I think at that point non-legal avenues didn't involve compensation payments, so to me that

CHAIR: Sorry, non-legal avenues didn't lead to?

A. Welfare or counselling, there's no mention of non-legal avenues involving monetary payments. So, to me this is probably part of the cross agency work that led to the

development of the changed Crown litigation policy in 2008. So, that's my assumption where it's from. It looks a bit like some other documents I've seen, both cross agency documents or MSD documents, I am not particularly familiar with this one that I can remember.

MS JANES: Thank you, that's helpful. It gives us some context that it was probably—

CHAIR: Did you want to say something add?

A. Looking at the document, it looks like a think piece. It's actually thinking about how would you explore these issues and deal with them. It's not representing itself as a set of principles or anything. It's actually how do you approach the policy issues and what things do you take into account.

MS JANES:

Q. Thank you, I appreciate the effort you went to do that very quick analysis.

And you've taken us to exactly where I wanted to talk to you which is "Information to claimants", if we call out that last paragraph. "Claimants should have an understanding of their entitlements, and information about how to access them. There should also be information about how different approaches will affect them personally, and the likely outcome".

So, even if this is a think piece, would you accept that for any process, whether it be the MSD process or any historical abuse or contemporary abuse process, that is quite a fundamental proposition that a claimant should understand their entitlements and the information about how to access?

A. Obviously I would. I am unclear what is meant by entitlement here because actually since the previous sentence is about accessing existing welfare counselling, entitlements might have been accessed to a welfare benefit or housing support or ACC support, so I'm not quite sure what this is referring to but as a general principle, yes.

Q. Thanks. And if we go to MSC 655, you will be aware, Mr MacPherson, of the recent Ombudsman case decision. Brief

background, there had been resistance from MSD to provide its handbook which outlined the claims processes; you are aware—
A. Yes, I'm generally aware, yes.
CHAIR: Can we have the date for that for the record, please?
MS JANES: It was issued, I think, on the 13th of May 2020.
CHAIR: Thank you.
A. Will this be in this bundle as well?
Q. It should be in that bundle, yes. It will end in 655, if you can find that. Otherwise, it is on the screen and we can call out the particular paragraphs.
A. Yes, it means it's out of context.
Q. Yes, they're not in chronological order, although it should be in the same one as the MSC tabs that you had previously.
A. I couldn't find 655. Yeah, I've got it here.
Q. All right.
CHAIR: Just to be quite clear for your sake, you are familiar with this decision from the Ombudsman?
A. In general terms, yes. I wasn't closely involved in it but yes.
CHAIR: You were or you were not?
A. I wasn't closely involved but I was generally aware of it.
CHAIR: We are not asking you questions about something you have no knowledge about?
A. No.
MS JANES: The point is this is about access to information, so again it's going to the general point of entitlement to information.
Q. And so, just to orientate you, if you could see on the screen in front of you that it's the Ombudsman's decision about request for the MSD Historic Claims Guide Book. If we call out the headnote, it really just gives, as all headnotes do, the summary of the Ombudsman's decision. Second line, it talks about in his view "the engagements conducted on a take

it or leave it basis are not negotiations for the purposes of the OIA" and then the important part is "the possibility that release of procedures and guidance would in future prompt fraudulent or exaggerated claims was too remote". And then if we can go to the next page, and the next one, and call out that?

Mr MacPherson, if I can just have you read the first paragraph?

A. "As section 9(2)(j) did not apply, it was not strictly necessary for the Chief Ombudsman to consider the public interest in this case. Nevertheless, the Chief Ombudsman observed that claimants must have access to the rules, guidance, and policies affecting their claims to make sure they are receiving a service that is consistent and fair".

Q. And then the second paragraph?

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

Q. That's fine to end there. So, this is a very late development in the MSD making information available and transparent about rules, guidelines, categories. Going back to the early days and throughout the period up to May 2020, what was the concern that MSD had about ensuring claimants were fully aware of what the process was about, criteria, eligibility, compensation that may be possible?

A. Well, to the extent I can, I wasn't closely involved in these decisions. The first thing I should say is that, MSD has a lot of material on its website publically available about the claims process and how it works, so it's not actually a black box or hidden or anything. I think much of the content of the document in question was released in one form or another.

My understanding of the concern, which I personally felt was probably a bit overstated, was there was concern because the new process had shifted quite a long way to simply accepting claims. It said it might cause some gaming of the system. I thought that was, myself, I thought that too much weight was placed on the concern. My understanding is it was a concern.

Q. And we'll come back to that belief about exaggerated claims but, clearly, there has been a process put in place now that it has been published, that therefore an interim period there will be close scrutiny of claims.

Would it not have been simpler right from the start to make all of that information available and apply that level of scrutiny to allegations all the way through, rather than leaving claimants unaware of what the process was?

A. Well, I think a couple of things in response, Ms Janes. The first is, as I said, there's actually a lot of information on the claims process on our website, so I wouldn't say they were unaware of how the process works. But, yes, I think with the benefit of hindsight actually a different approach may be better.

Q. And just for my edification, when did the information first go on the website? I've seen 2009 and we will look at that. Was there a great deal of information available about criteria, eligibility, compensation prior to 2009?

A. I'm sorry, I couldn't answer that question. So, if you could possibly be able to—we might be able to get it to you in writing.

Q. Thank you very much. And just a proposition that came out of the discussion document, and again it doesn't matter whether it's an MSD document or not—

A. Sorry, do you mean the document we were talking about a moment ago?

Q. Yes, the one which you went and analysed very quickly, thank you. It talked about a balancing exercise that may be necessary.

A. Could you directly to which part of the document, Ms Janes?
Q. If you've got it there—
A. I have got it here, yes.
Q. It's under "Minimisation of trauma to claimants" but that's not the bit that I wanted to—
A. Sorry, which page?
Q. I've got it on page 3 in my notes.
MS ALDRED: 333 of the bundle.
MS JANES: Thank you, 333 of the bundle.
MS ALDRED: At the bottom.
A. I'm still finding it.
MS JANES:
Q. Don't worry. It talks about standard, I'll actually just read it to you rather than finding it.
A. I'd quite like to see it in the context of the document, if that's all right?
Q. Yes, absolutely.
MS JANES: Shall we take the break now and I will point him to that paragraph?
CHAIR: Yes, we are at the morning adjournment time so let's do that, rather than rushing you, Mr MacPherson.
A. Sorry.
CHAIR: No, you must have the opportunity, so we will give that to you right now and we will adjourn for 15 minutes, thank you.

Hearing adjourned from 11.25 a.m. until 11.40 a.m.

CHAIR: Ms Janes.
MS JANES: Thank you.
Q. Mr MacPherson, I was able to help you, point you to two paragraphs in this document before the break. Commissioners, we're still on MSC 321 which is on the screen. We're going to very quickly look at, if I call out the paragraphs under "Minimisation of trauma to claimants". The issue here I want

to raise, you've had a chance to read through that through the break?
A. Yes, I have, thank you.
Q. And it's really just the last sentence of what you can see called out, "A balancing exercise may often be necessary - particularly where there is little to gain in the protection of the rights of alleged abusers"?
So, this is talking about really a balancing exercise in some respects between what does the Ministry look at in terms of knowledge of allegations of abuse, contrasted with the rights of the abuser?
A. Sorry, just to be clear, are you asking a question about the document or a more general question?
Q. A more general question.
A. Okay. Well, it's probably, again it's probably a question worth asking Linda as well. My understanding having reviewed all the material at some length, looking back over the last 15 years, is it actually implicit the way we think about alleged abusers has actually changed in quite subtle ways. I think if I read the material from 2006-2008, there's quite a lot of weight put on the fact that people have a right to know they're being accused of an offence and a right to defend themselves, which is a standard right reflected in the Bill of Rights.
ARBITRATOR: You are talking about the alleged perpetrators here?
A. Yes. I think also, some of the alleged perpetrators were employees of the organisation, which had responsibilities as an employer. And also balanced against that as well, a really strong desire to stop perpetrators, particularly if they're still dealing with children, to be able to do so, so we need to manage that.
Initially, as I understand it, it was reasonably common practice to actually endeavour to talk to the alleged perpetrators to get their side of the story as part of the

redress process. But actually, I think that proved very difficult for a whole variety of reasons, not the least of which often they were dead or in their 70s or 80s.
I think over time, and term in terms of the current process, there's not the same emphasis on being able to get the alleged perpetrator's side of the story.
And that actually has less weight than the approach we've adopted probably for the last 10 years I would have thought but Garth and Linda can probably better help with that in terms of detail.
Q. In terms of that balancing exercise, my understanding is that there was a sum of $2,000 that was provided to staff members for independent legal advice?
A. Well, two things I guess. One is, just in terms of how you frame that, so you've asked me about the general approach with reference to a document which isn't obviously an MSD document and is not any sort of policy, but then you've used this balancing language which certainly I haven't used.
A bit more general point, so I'm just—if you are an employer of a staff member who you've received a serious allegation about, which might result in potentially criminal charges which may involve the Police, certainly may involve dismissal or in them being disciplined in some way in terms of mitigations of employment, an employer has to think about what its obligations are to that person as well, in terms of its duties as an employer under general law but also under the State Sector Act to be a good employer. I think there's a balance in terms of that. More generally in terms of this text here, I actually took this text to be saying we should put relatively little weight on the perpetrators, is what the meaning of the text is in its context.
CHAIR: The question was, was money provided?
A. Yes, as I understand it.

CHAIR: That's to alleged perpetrators for the purpose of them looking after their own interests where allegations were raised?

A. To staff members to seek legal advice, yes. I think around about 2006-2007.

MS JANES:

Q. That's correct. And so, when one becomes aware, and again this is a general proposition which will examine particular cases but where you become aware of an alleged perpetrator, what is the balancing act, not only to that individual claimant but other potential claimants who may have been in the same environment, same timeframe, exposed to the same alleged perpetrator. Does MSD see it has any obligation to look beyond that individual claimant and see who else might come within the ambit?

A. Again, I'm interested in the balancing act framing of this which I don't particularly understand. But my understanding in terms of our current process, is that one of the things we will look at in trying to respond to a claim, is the question of whether the survivor has complained of abuse involving a particular person or a particular institution, we will look at the records in terms of history, in terms of whether there are also similar accusations against that person or whether there are concerns expressed about the institutional place they were at. So, certainly the process that has worked recently, that is what we do.

Q. Just looking at page 4 of this particular document which talks about practice failures, and I understand that there is an accepted list of practice failures but not exhaustive within MSD. And one of those practice failures is the use of secure, can you confirm that's correct?

A. Well—

CHAIR: Can I just find out where you are referring to?

A. It's actually page 2 of the document.

MS JANES: Page 4 of the document.

A. It's page 2 of the document before me.
CHAIR: I think we only go up to page 3.
A. If you look under section 3, "The standard of care applicable", the second paragraph under heading 3.
Q. So, it says, "As a general principle, any response to historic abuse claims must recognise that past practice must be judged by the standards that applied at the time". But can you read the highlighted paragraph in the last sentence in the next paragraph?
A. "This principle is not absolute. There are some practices that, while considered appropriate or adequate at the time, are now recognised as positively harmful, and may also have been wilfully blind to their consequences. There will need to be a recognition that some cases, while falling within acceptable practice at the time, were so harmful that redress is now required".
Q. So, there's two things, one is practice of the day and whether that was what pertained. But then in that second excerpt that you read, there are some practices even if it was acceptable at the time, is so unacceptable that it should be considered; you would accept that?
A. Well, it says what it says. I think so, in general. I mean, the second half of that is both a hypothetical point, so without knowing exactly what the particular circumstances are, but yes.
CHAIR: Just before you ask your next question, Madam Registrar, we've got some noises off, have you made some inquiries?
THE REGISTRAR: Yes.
CHAIR: Thank you. Sorry, we will just have to endure whatever banging is going on until somebody manages to find the perpetrator.
A. Alleged perpetrator.
CHAIR: Alleged perpetrator, thank you. Sorry to interrupt.

MS JANES: Not at all.
Q. And so, in terms of practices of the day, irrespective of whether it was of its time, so corporal punishment for example, use of secure is something that the Inquiry has heard quite a lot about and if I can take you to MSD 2006, and just to orientate you, this is a Care Claims and Resolution Policy Statement from February 2013 but if we can call out the three paragraphs. This talks about the use of secure and it specifically refers to a 1957 Field Officers Manual and a 1975 Residential Social Workers Manual?
A. Yep.
Q. And it says, "The instructions on admission of a child or young person to a residence are clear that admission via the secure unit is not automatic or routine. Accordingly, the practice of placing every newly admitted child or young person in the secure unit as a matter of course does not fit with the practice guidelines"?
You would accept that MSD Guidelines from 2007 onwards was the use of secure was not an accepted use of practice at the time according to that Policy Statement?
A. It doesn't say that at all. I am not personal with the ins and outs of this. It says using secure as a standard way of taking children into an institution is not appropriate. It doesn't say the use of secure at all is not appropriate.
Q. No but it's the routine use of "on admission"?
A. Yes, but that's not what you said.
Q. So, if you accept that it is routine on admission not acceptable under the Field Manual, the Social Workers Manual, you accept that?
A. Yes.
Q. We have seen evidence both from Mr Wiffin and from Mr Earl White that that is what occurred to them; do you accept that was their evidence?
A. Yes.

Q. So, where MSD receives a complaint of use of secure on admission, you would accept that is a practice failure?
A. Well, several things. I'm not too familiar with the ins and outs of our secure that's worked in the past but, again, I think, as I understand it, I've actually looked at some of the field manuals from the time and also some of the files about their use, so my understanding is using it as routine without any proper reason for doing so was inappropriate and not consistent with practice. That doesn't mean that there wouldn't be circumstances where someone was admitted where you might use secure when it was provided for in the manual was acceptable but just the general use of it to manage all admissions was not acceptable.
Q. So, lining these up, you have your principles of accepting things at face value? You've got your Field Manual and Social Workers Manual that admission to a residence and use of secure immediately, if I can put it that way? What then does MS do in terms of accepting, assessing and resolving a claim for that type of allegation?
A. Well, I think, as I understand it, practice failure or inadequate practice is one of the things that we look at in terms of resolving claims. So, my understanding is that is part of what we looked at as part of dealing with the claim. But, again, Garth and Linda will be much more familiar with how that worked in practice. Sorry, can I add one point? So, this was framed as when, so a discussion about what was acceptable practice in the past and then some things might be so unacceptable—sorry, might be so problematic viewed from now that even looking back at the past you might feel a need to make redress for them. But in these circumstances we were talking about something that was then known to be unacceptable practice, so it was actually unacceptable practice at that point. So, in that sense, we're not saying it was acceptable then and now we look back and go actually it's not. At the time, it was unacceptable.

Q. But is it acceptable for MSD to put the claimant to the proof when you know that it is not acceptable? The allegations have been made, the records potentially substantiate that that is what occurred. So, if you take Earl White's case, those were the facts of his case, were not accepted, resolution was not offered. So, you've talked about the preference to settle out of Court but you've had Mr Wiffin, you've had Mr White who go through many years of waiting and those were probably the least of the allegations with the sexual and physical abuse as well. How acceptable is if for the Department, we're talking here about traumatising claimants, to put them through a process where your very own internal documents say that is not acceptable practice?
A. Well, I mean, I have read the evidence and briefs of both Mr White and Mr Wiffin, the time to settle their claims to go through Court doesn't look good, it's not great reading.
Q. Let's take Chassy Duncan who did not go through a Court process and that was also 12 years.
A. I've just lost Chassy Duncan in terms of the timeframes. I thought the MSD part of the process was relatively short. I may be confusing one claim with another.
In terms of Mr White, I think the reason that the Chief Executive offered an ex gratia payment in 2010 and a contribution to Legal Aid costs was actually reflecting the fact that MSD did not think the Court outcome left him in a satisfactory place in terms of the substance of the claim.
Q. The proposition I want to explore with you really is the whole, where does the line fall between looking at claims in a fair, reasonable, transparent way, the process and who determines that process, and whether there is even the appearance of conflict or lack of independence?
So, can we just - we will just go through a few, there's quite a lot of documents. I don't want to take you to the documents unless necessary but we can do that if we do need to.
So, if we go to CRL 16817 -

CHAIR: Just identify for the record what that is?
MS JANES: Absolutely.
Q. This is a filenote, it's the 22nd of January 2008, it's an inter-departmental group. Just checking—
A. Excuse me, will this be in this folder here?
Q. It should be, yes, it should be but there's a document—there's one bundle that has CRL.
MS JANES: With the Commission's—we may have Alex sit in the box with Mr MacPherson because she knows the documents and can quickly find them.
MS ALDRED: Just for a general matter, I wonder if we make this a general application during the hearing, if the witness is to be taken to a document on the screen that is only part of the document, I wonder whether we can make sure that they're able to access the full document in front of them by reference to the bundle at the time?
CHAIR: Yes.
MS JANES: I think that's what Alex is going to sit with Mr MacPherson.
CHAIR: As a general principle, that is absolutely the correct way of doing it. The practicalities have been defeating at the moment but I think we're going to resolve that. So, if we have the document expert sitting there. Is that all right for you, Mr MacPherson?
A. Sure.
CHAIR: She is there to assist, so I hope that helps you.
A. Thank you.
CHAIR: We will just wait, have you now got the filenote in front of you?
A. I think so.
MS JANES:
Q. Just a quick question, were you ever part of the Interdepartmental Working Group or was that just Mr Garth Young?

A. No, I wasn't part of that group, in 2008 I would have been in Treasury, I wasn't there at the time.
Q. Given the Interdepartmental Working Group, it didn't include Treasury, is that correct, or it did?
A. Not that I am aware of, I don't remember it doing so. I think at that time, just as it happens, I would have been what Treasury called the Manager for the Vote Social Development, so I would have had a bit to do with MSD at the time but I am not aware of being involved myself.
Q. This just refers a little bit to—
A. Can I just add to that? At some point, Treasury would have to be engaged at the point where they talk about money but I am not aware of being involved at this point.
Q. And there are a lot of documents that we've seen where particular proposals, it is suggested that, recommended that Treasury provide input?
A. Yep.
Q. Which is appropriate. So, this is an Interdepartmental Working Group filenote of a meeting. The issue I'd like to take you to is 3. So, if we can call out 3 and 4, and if you can just read those?
A. "David Chaplow, Director of Mental Health Act, made the point that any kind of wholesale settlement such as the "experience" payments made in other jurisdictions, would risk besmirching former employees in the health and social services sectors during the period in question and there is also a risk that we might, as in Nova Scotia, find ourselves facing litigation from aggrieved former employees. The need for balance was emphasised more than once in the meeting. There appeared to be different positions between the different departments and the approaches to the question of settlement. CHFA [Crown Health Financing Agency] understanding of the previous Cabinet decisions was to stick with the litigation approach for cases seeking financial settlements whereas going to court appears to be a last resort for MSD".

Q. That confirms your earlier evidence that Court was seen by MSD as the last resort but there was clear concern amongst the other departments about the process that MSD had in place as it diverged from theirs; are you aware of that either from this document or generally?
A. Mm, I'm not sure it's a straightforward question. I think my understanding of the material is there were a lot of engagement between departments through 2006, 2007, 2008 in terms of what the future might look like, quite a lot of discussion about different approaches. It's obvious on the face of this document that agencies have different views on that. I am not sure how high that anxiety rose, so I'm not sure how big an issue it was.
Q. Perhaps if we go to page 2, paragraph 8, and then I'll come back to paragraph 3. If we just call out that paragraph. It talks about it's desirable for the paper to outline for Ministers a set of high level principles which might apply to ex gratia payments. The issues to be resolved are significant. There appear to be significant differences in approach between departments. "Nevertheless, it would be risky not to have this policy developed as soon as possible as it does appear likely MSD will take a different approach to the question of ex gratia payments in other departments and may proceed to make payments which would not be acceptable to education, health and CHFA".
So, were you aware of that particular concern amongst the departments that what MSD was doing seemed to cause them concern about escalating levels of payment?
A. I've read this document previously and I've seen similar ones like that, so I am aware of these discussions. My recollection of the timeframe is this would have been shortly before the Cabinet signed off on the approach to litigation policy in I think May 2008, April 2008. So, in that sense, MSD is looking forward to a different world post that policy change implicitly enabling a broader approach to settling

claims, including settling claims with ex gratia payments where there was little prospect of the claims succeeding in Court.
Departments were approached using different ways. They may have been concerned about approach MSD was likely to adopt or proposing to adopt. Actually, that happens in government actually, so agencies have different approaches to things. Occasionally, you are concerned the Department will set a precedent effect which might be a problem for you. But it's difficult to comment on the other agency's view, if that's what you're asking me.
Q. Just really, yes, that clearly they had a view that diverged from MSD at the time?
A. Yes.
Q. Going back to the independence and potential conflicts, so if we can go back to paragraph 3. You may not be aware but Earl White gave evidence that Dr Chaplow was actually the psychiatrist that undertook his assessment; were you aware of that?
A. I remember reading it, yes, and an earlier psychiatrist assessed him outside the process and is now health, Dr
Q. Crawshaw?
A. Yes.
Q. Dr Chaplow was the Crown appointed psychiatrist under section 100 and at this point, this is 2008, so just after the *White* trial he is Director of Mental Health, and he has talked about the concern of besmirching former employees and the possibility of the department facing litigation from employees.
So, when you look at how you balance, I'll take a step back. When you look at how the process is run, as I understand it, the senior social workers are effectively the people who are involved in assessments of claims?
A. Yes.

Q. And, as I understand it, they are also involved in attending interviews both for briefings of trial track claims but also staff members, and certainly there's evidence that Mr Garth Young was involved in attending interviews with staff?
A. By staff, do you mean staff who were potentially alleged abusers?
Q. Yes.
A. I seem to remember seeing that, yes. Could I just ask a question? So, this document is from 2008, so Dr Chaplow did the assessment of Earl White I think in 2004, is that right? In a different capacity, he was not Director-General of Mental Health at that point.
Q. No, no, yes, we need that point, he was a consultant psychiatrist and then after the *White* trial he became the Director of Mental Health.
A. In a different capacity. A psychiatrist can't do something in one capacity and then adopt a role and do something different.
Q. Would you accept though that where a psychiatrist has done an assessment there is an interest in maintaining the position of the assessment that you found?
A. Well, I couldn't really speak to the professional obligations of a psychiatrist but what I could say is, I don't understand the 2008 document Dr Chaplow was talking about the *White* case whatsoever. That was a general point. So that, is that to say if I've worked in an area as a professional I can no longer have a role of providing policy advice because I might have some previous experience? How does that work for any profession? The legal profession, for example, to do different things, you become a Judge, you have to sit on cases where previous issues you've dealt with.
Q. What we're talking about, Mr MacPherson, though, is if you put yourself in the shoes of the claimant and you have somebody who, so you've got a social worker who is assessing

your claim. That social worker worked in an MSD residence prior to working within MSD. That happens, does it not?
A. I think so. Certainly, it was in MSD or its predecessors. Sorry.
Q. Yes. They worked within the organisation in a capacity as a social worker; do you accept—you've accepted that that's the case. They come into MSD as a social worker who assesses claims, do you accept that happens?
A. Sure and I think it's clear from Garth's evidence that that's his experience, he came to MSD as a social worker, then became leader of MSD in the 1990s, CYF, and then became involved in the process of resolving claims.
Q. And so you have been involved effectively in every step of the assessment, in terms of making recommendations, having looked at what information is available about particular institutions?
A. Yes.
Q. You then have them either accepting at face value or not accepting at face value that allegations happened or didn't happen; correct?
A. It's part of the process for determining that.
Q. And then, you have, and correct me if I'm wrong but you also have that information going into what the likely payment offer should be to the claimant?
A. Well, if somebody is involved in the assessment process, they will be involved in the proposed response.
Q. And would you accept that having gone through those processes of will go a social worker and then a claims assessor and being involved in making these decisions, there is a loyalty, primary or otherwise, to the organisation for which you work?
A. Well, so I think, I'm not quite sure what the question is.
MS ALDRED: Sorry, I don't want to interrupt. But it seems to me to be an inherently unfair question in the absence of any contextual material. For example, the

date that the social worker practised or whether they've had any dealings at all with the particular institution. It would be very difficult to answer a question like that in the absence of any context whatsoever and I just wonder if it could be re-put in a way that is a little bit fairer to the witness.

CHAIR: Ms Janes, do you wish to respond to that?

MS JANES: So, we're talking about a general proposition.

CHAIR: Yes.

MS JANES:

Q. But human nature, if I can put it in the terms—

CHAIR: I think it's clear that we're not talking about a specific individual.

MS JANES: No, we're not.

CHAIR: We are talking about general propositions and to that extent I think it's appropriate to ask the question. If it came to individuals, of course there would have to be more specific information.

MS JANES: This is very much putting yourself in the shoes of a claimant and the perception if you know what the process is end to end and who's involved in making those decisions.

Q. So, the question very much human nature is I think one has a loyalty to the organisation that employs them? That would not be—that's a general proposition.

A. Well, I think three or four things in response. So, yes, both as a general proposition but also you're an employee with obligations to your employer. Having said that, the job of a social worker in the claims team is to help resolve claims, not to in a sense try and cover things up or defend the Department or its predecessors. Social workers also have professional obligations themselves, they choose how they act. So, I don't think some sort of law to do with the organisation would be an overriding driver. The organisation has not set

the payments team up simply to protect the Department, it's actually to try and resolve claims.
The other thing I would add, there's a trade-off because you want these sort of skills to help you both understand what's happened and the sort of skills to deal effectively with people who may be traumatised and may have difficulty telling a story in a sympathetic way.
So, in a sense, you want those sort of skills.
I would also say MSD's general approach, I can't talk to the ins and outs of each case, where people have a conflict of interest they would be examined to raise that and stand aside from a particular case.
As an example of that, I have had limited contact with the operational side of historic claims, but I have signed probably a dozen letters of apologies to claimants either by acting Chief Executive or on behalf of a colleague of mine who is responsible for certain types of apology letters, but one of her family members had been, a staff member at one of the special schools, for any claims of those schools she asked me to sign the letter because she felt there was a perception of a conflict of interest. People are expected to manage a conflict of interest. Whether there is an issue of perception, I think it's a fair question. It's difficult to find a perfect solution to that, why MSD is doing it.

Q. One of the things that concerns me having read a lot of documents from the MSD, is a perception stated in the documents that claimants exaggerate their claims or that they have colluded to exaggerate their claims or manufacture their claims.

MS ALDRED: Sorry, could the witness be referred to the document?

MS JANES: Yes, he can.

Q. If we go to CRL 46254, this relates to emails relating to Keith Wiffin, and you'll see there are emails between Crown Law, Una Jagose, and MSD, Garth Young, and if you can find

Una's reply to Garth Young on the 9th of March which is on the bottom of page 1 hopefully.
A. Yep.
Q. Yes. And it says, "Also, the White experience tells us that the brief and Statement of Claim might exaggerate the real complaint".
So, clearly, there was a view in *White* that it was exaggerated and the belief that Mr Wiffin also may be exaggerating his complaint?
A. Sorry, is this Monday the 9th of March?
Q. Yes.
A. So, there's a reference to Mr Wrighte, is that Mr White?
Q. Mr Wiffin's alleged abuser or actual abuser was Mr—
CHAIR: We now have this on the screen so, it might make it easier to follow if we can refer to that.
MS JANES: Thank you, it's the very bottom.
CHAIR: This is Ms Jagose to Mr Young and others.
MS JANES: If you do the whole—
Q. It's in the second paragraph. It's talking about, and we will return to this with Mr Young, they have had a meeting and they've discussed whether any progress had been made on the merits of this case, which is Mr Wiffin's case. "It seems there are significant problems reliability, given the sexual assaults alleged by Mr White post 1974 complaints of physical assaults are ACC barred, significant problems with the Limitation Act"?
And then the redaction is Mr White. "Also, the White experience tells us that the brief and Statement of Claim might exaggerate the real complaint".
We won't look at the next paragraph, that's a matter for Mr Young.
But you will accept there, and have you seen litigation management plans for MSD trial track cases?
A. I've seen a couple.

Q. And do you recall that many of them also talk about, a very similar statement to this, in terms of following White, a belief in exaggerated claims?
A. Well, three things, I guess. One is, this is actually a statement from Crown Law, rather than from MSD. I'm not sure if I have enough detail of the ins and outs of particular claims to comment in particular. My recollection of Mr White's case and his brother's, I presume exaggeration is not a very pleasant one, but the Court process was a finding of fact and the Court didn't accept all of the claims that were made, is my recollection of the process. Exaggeration is not a very nice term.
Q. In terms of the *White* findings, it was found there was use of secure?
A. Yes.
Q. There was physical assaults and there was at least 13 incidents of sexual abuse?
A. Yes.
Q. As I understand, that was what was claimed, so where does the belief of Mr White separately but a general belief that the claimants might be exaggerating their claims arise from?
A. Well, I find it difficult to put myself in the mind of the current Solicitor-General, in terms of what she meant 11 years ago. In terms of the case of the two brothers, my recollection which could be wrong because my memory is going as I get older, is not all of the claims were made out in terms of his brother. So, this refers to the *White* case, I think from memory.
Q. Taking a general proposition again, is there a belief within the MSD that claimants exaggerate claims?
A. Well, I think in terms of the process that we now adopt, the starting point is to accept the claims with some testing of the evidence of them. I think certainly at the time that this was talked about from 2006-2009, there was a lot of focus on the evidential difficulties of establishing claims actually,

in terms of the lack of records, in many cases people's memory of what happened was unsurprisingly not very good. So, I think there was quite a lot of discussion about evidential difficulties throughout that period.

Q. So, you're saying because we've looked at the principles and the principles we can date are 2010, take everything at face value, take the story, check the facts. So, if you took either Mr White, Mr Ansell was a convicted abuser—

A. So, sorry I was interrupting you.

Q. And if you take Mr Wiffin and the facts much that Mr Wright was also a known convicted abuser. Is the only difference that you're telling us about taking it on face value, that they were trial track claims and, therefore, they were treated differently because of the Limitation Act and ACC bar?

A. Well, noting this was 2009, rather than 2010, in terms of the email trail here which is about litigation. I go back to an earlier observation I made, the Chief Executive of MSD made an ex gratia payment to Mr White in 2010 precisely because, my understanding is he was unhappy with where it ended up in terms of the resolution of the Court case once the appeal had failed. So, from that point of view, there was an acknowledgment of wrong to some extent on the part of the government and on the part of MSD and its predecessors. So, I wouldn't take that to be a view from the part of the Ministry at the time that Mr White had exaggerated all of his claims.

Q. When a litigation management plan is devised, is that done in consultation by Crown Law and MSD or just Crown Law?

A. I'm sorry, I don't know the ins and outs of litigation management plans. I have seen a couple but I am not totally involved in those. I assume it's an iterative process between the agencies.

Q. So, are you saying that if they appear in litigation management plans, they are more the view of Crown Law than MSD about exaggerating claims?

A. No, I was making no statement at all about that. Just that they are documents that I am not particularly familiar with.
Q. If I can go to MSD 1509, and this is a document which is dated 19 October 2018, it is a joint MSD and Oranga Tamariki report to the Minister for Social Development and it talks about best practice redress processes, either when we get the paper or an electronic version.
We're going back to the issue of independence, just to give you a heads up.
CHAIR: I think there is a technical issue here. Is it going to be able to be displayed?
MS GREEN: It's currently not working but last time it had a bit of a delay and then it did pop up.
MS JANES:
Q. Mr MacPherson, if you have the actual document in front of you?
A. I do.
Q. It's page 2, paragraph 4.
CHAIR: Because we can't see it, can you say what again it is, I've written down best practice—
MS JANES: I am going to read it.
Q. At page 2, paragraph 4, it says, "Best practice redress systems require a level of independence in decision-making between the institution where the abuse occurred and the institution responsible for assessing and settling the claim. They also require timely processing of claims and transparency of process". Have you found that?
A. Yep.
Q. So, there's quite a bit to unpack in that particular couple of sentences.
Firstly, would you accept that that is best practice redress processes, to have an independent organisation separate?
A. Oh, well certainly that was the advice of MSD at the time of this paper. In general, yes. It depends on context and depends what you mean by independent.

Q. So, this particular document is in the context of the separation of MSD and Oranga Tamariki. Now that you've got the document—

CHAIR: It has magically appeared.

MS JANES: It has magically appeared, excellent.

Q. If we quickly look at the next page. No, the next page is not coming up. Yes, it is.

So, there's a cross-over, transition, just as it's coming up. This is about the transition between MSD and Oranga Tamariki processes. Originally, it was going to be 2008 and then it became 1 April 2017.

A. Which is when Oranga Tamariki was established.

Q. Correct, yep. So, we won't go into why the dates changed, just to record they did change because Oranga Tamariki wasn't established until April.

And so, this is the context of, so at the very bottom of that page we've got the paragraph that I have just read out. And then if we go to page 3, we missed that because I read it, and then if we call out the "Recommended actions". The recommended actions were "agree a single process for managing claims of abuse of children in State care is established", "Agree that MSD will be accountable for resolving, on behalf of the Crown, all claims of abuse of children in the care of Oranga Tamariki or its predecessors and Oranga Tamariki remains accountable for addressing allegations of abuse relating to children and young people who are currently in care".

So, MSD have received advice that an independent process was best redress practice, correct?

A. It seems so.

Q. And it is recommending to the Minister for Social Development that there should be one process for all claims which should be run by MSD?

A. Yes.

CHAIR: Are you familiar with this document? Have you seen it before?
A. Yeah, I've seen it before. I don't know about this particular one but I have seen it.
MS JANES:
Q. So, I guess the question is, standing back, if a single independent process is best redress process, and that is what's being recommended for Oranga Tamariki, why was it not recommended or implemented for MSD?
A. Sorry, do you mean now or in the past?
Q. In the past.
A. Well, I think there's probably a range of responses to that. As I say in my brief of evidence, the way the system has evolved is from the claim is being managed by the Department responsible, MSD, we're still in the same department but in a different part of the department. And then it's moved to being a separate agency and in principle that seems beneficial to me.
But MSD was dealing with several things, in terms of the past, and it's normally, I think it is an important thing from a policy point of view to avoid applying 20/20 hindsight to things. If I look back to 2008, people didn't know how many claims there would be. The assumption was there would be a number of claims and then they would be resolved. I think if people thought we'd face over 4,000 claims 10 years ago they might have a different approach to this. In some ways your assumption about your organisational reform is dependent on how big the job was because in the organisation it was expensive running it, it requires resources in addition to it being part of the business unit, so you have to have an annual report, you have to have a Chief Executive, you have to have a board, you have to be audited. If you assume this is a relatively short, setting up an agency takes time, if you're worried about delays, if it you take a year or a year and a half to pass a legislation to setup a new organisation, then

you put everything on hold. If you assume that the task ahead of you is going to be over in 3-5 years, then actually it's how do you manage best with what you've got because the timeframe of setting up something independent is problematic in the resourcing. With the benefit of hindsight, if you thought it was going to be a much longer process and have much more claims, you might think differently about it. There's quite practical things, I think, involved.

In addition to which, this was a job MSD inherited from the Department of Children, Young Persons and Their Families when it was put to MSD in 2006, so it was something MSD inherited. The idea of setting up a different institution wasn't on the table at that point.

The government considered a range of different ways of dealing with claims through that period. It considered getting the Law Commission to look at them, and decided not to do that. So, it's not clear to me it was actually an option on the table to setup a different organisation to do this.

I think the Government would have had to have thought about the whole landscape in a different way knowing now what it does—knowing then what it does now, would probably have a different approach. If you're going to do that, you would go to how do you think about health claims, education claims as well. So, I think on balance independence from the agency doing it is better than the alternative. That's not in a practical sense, it was just a straightforward issue.

CHAIR: Can I just ask a question because you've just touched on that? The document has vanished but there was reference there to a single agency. To the extent that you know about this document, do you know if that was referring to agencies other than Oranga Tamariki? Like, was it Health and Education and the others?

A. No, I don't think, not in the context of this document I don't think. So, my recollection is that this was partly—

CHAIR: It was just MSD?

A. Yes and I think it was partly not just the independence point but actually by the practical reality that OT hadn't setup a claims function, we needed to have a claims function and the risk that claims filed between 2008-2017, and also I think the desire to, and this was how untidy it actually is, draw a distinction between complaints and claims. So, complaints from people who are currently in care where you want the agency to own the problem, reflect on its practice and make adjustments, deal with that; and in that context, an independent complaints mechanism be setup outside of OT and its own complaints process and the claims that are more historic. As you get closer in time, the distinction actually seems to blur.

CHAIR: Thank you.

MS JANES:

Q. But it is a topic that is worth exploring while we're in here, in that there are the joint claims. Not only are there the historical and the contemporary claims that cross between MSD and Oranga Tamariki but then you also have the joint claims with, say, the Ministry of Education. And I don't know if you're aware of the information about the recent changes to the management of joint claims; is that a topic to discuss with you?

A. I'm not particularly—on very high level terms I am aware of it but I'm not that familiar with it.

Q. I did have that down for Ms Hrstich-Meyer, so I will leave that in her camp. But it does raise that issue about taking a victim or a survivor as they are, in that, as you will have seen from the evidence that we've heard, they don't just necessarily go through MSD. They have a range of claims?

A. Sure, yes.

Q. And so, it's taking the whole person and being able to deal with all of the claims of abuse and all of the harm that has eventuated and finding the best redress for them.

So, looking in the whole and taking a claimant as a person with multiple experiences and multiple trauma, not just within MSD, would you accept that an independent agency looking at all of those experiences is a good thing in terms of minimising trauma to the claimant?

A. Well, what I accept, it's an interesting proposition to consider, I can see the advantages in it. It depends quite a bit on context and circumstance.

And there are practical difficulties with setting up an independent organisation. There's not just if you have to pass legislation it will take you 18 months. Potentially, you have to then set the thing up. There's a question about expertise and are people confident, to go back to your—

CHAIR: I think you were asked whether you thought in general it was a good idea. Obviously, there are practical issues but in general?

A. It depends. So, potentially. I'm not trying to be evasive, it does depend on some of the practical questions about whether on balance it's a good idea. So, a measure of—a good measure of independence from the institution responsible to run the facilities or the processes that have led to the abuse seems like a good thing in principle to me. Whether you can actually roll everything up into one, it sounds nice but I am not sure how that works in practice. You start to get into formidable information management and privacy issues. The issues about setting up costs are not insignificant. If you think there's a small number of claims that are going to be resolved in a few years, then is it worth setting a whole organisation up? And do you take a different view for the claims MSD is responsible because it's had 4,000 claims to education dealing with. But then you have to go into questions as well. So, when I think about the evidence of the CE of Stand that you heard, are you picking up health camps? What actually care is, is a slippery concept. As you go back into history, Corrections claims in terms of abuse, you know,

facilities in terms of the Bill of Rights, for example. If I think about the education system, it doesn't deal with schools, most of the system health doesn't deal with DHBs. So, it is a question of what you include, how practical that is to manage it. Those are really big issues and it is important to avoid that kind of response because you need to be confident it's going to work well because if it doesn't work well, it may be worse than a more separating system.

MS JANES:

Q. Just really taking your point, part of it does depend on how many claims you think are in the future. So, from your knowledge of what is happening and safeguarding practices, in terms of still uplifting children and putting them in care, there are still complaints current being received, human nature being what it is, sadly abusers are likely to always remain among us. So, would it not be reasonable to say that there will always be claims that must be addressed and redressed by some organisation?

A. It is a complicated question, sorry.

Q. I suppose the question is, do you think we have finished with abuse claims or not?

A. Well, the evidence would suggest not, so—the evidence of Linda's affidavit was, brief of evidence, that we were getting 40 a month at the end of last year, so I am assuming not. In terms of your observations about the care system, probably questions to put to Mr Groom more than me. But two to three observations of the areas MSD are responsible for. The system has been extensively reinvented to try and provide a better system which both provides better care for children in the system and more focused in the system for the children at risk. And I won't go into all the complications of that. In terms of the MSD side of things, for me some absolutely fundamental aspects of the changes have been strengthening and creating a professional children's monitor to look not just at OT but other parts of the care system. So, currently the

monitor is in its early stages and it's responsible for monitoring under the care regulations and currently it's only a small set of the care regulations but to me it's absolutely fundamental to try and make the system work better in the future and providing protections safeguards.
And similarly, the independent complaints process, which is the second line the defence in terms of the Ombudsman in terms of complaints is really important as well. Because I think, it is a rather broad generalisation, reflecting on the last 70-80 years, we're sort of relearning problems with having institutions which have total control of people without much accountability. So, I think putting a lot of effort into making sure those institutions are as professional as possible and accountability and scrutiny is really important because most vulnerable people are in the country, as you put it.
Q. As just taking two points because MSD has reframed its processes at various times, both the period and one certainly was around 2015 when you looked at the Two Path Approach. But the more general suggestion I would make to you is, at that point, CLAS [Confidential Listening and Assistance Service] had issued its final report and you will recall that one of the recommendations in 2015 was that there should be an independent agency that took over resolving all claims; do you recall that?
A. Oh, I remember the report coming out. I am sorry, I don't remember all the ins and outs of it.
Q. That was one of the recommendations.
A. I think you just asked if I remembered it.
Q. I'll give evidence from the bar, if I may. So, in terms of the processes at that time, and a very strong recommendation from a body that had heard from 1103 claimants over a 7 year period, are you aware did MSD, when it looked at what process should be used going forward, was that ever a discussion to go now is a point in time to draw a line in the sand and actually do it differently because it's not working?

A. So, my recollection is a bit hazy. Since I'm reflecting on Ministerial decision-making, I'm a bit—I don't remember Ministers were particularly interested in pursuing the recommendation but that might be a miss-remembrance on my part. I think partly because they assumed the two path process was going to resolve a lot of the claims and actually it was successful in resolving a lot of claims but as more came forward, we still had a long backlog.
So, I'm not clear how seriously that was on the table as a possibility at that point but I really wasn't involved in those discussions.
Q. So, just as a point of, sort of, public policy, if you may, if somebody like CLAS makes that recommendation and the government is not attracted to it, for whatever reason, does that entirely preclude MSD from internally saying government may not be endorsing that but we have heard, listened, taken on board and think it's a good idea?
A. Well, it doesn't preclude us having that thought. I can't remember the ins and outs of what happened, I wasn't closely involved in it but if that's where the government has got to, it becomes a rather, it's an interesting intellectual exercise but it doesn't take you that far.
Q. Do you not use your budget to redesign your process?
A. But we had just used the budget to redesign the process. It got extra money through the budget process, so my recollection of the numbers the Ministry had quite a bit more to spend in those two or three years with the two path process, to it had been redesigned to try and facilitate further claims and further recommend designing it to get lessons from the two path process but KMPG engaged with survivors and other stakeholders. But ultimately, the Ministry is bound by government policy because government policy—if government policy is we are going to do something, then we are going to do it.
MS JANES: I am going to move topic, so I wonder—

CHAIR: Shall we take the adjournment? Let's not lose our 5 minutes and see if we can get back 5 minutes before the due time, say about 2.10.
Thanks, Mr MacPherson, we will adjourn and take lunch.

Hearing adjourned from 12.55 p.m. until 2.10 p.m.

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CHAIR: Before we start, Mr MacPherson, I have to say to you that unfortunately the signers have been unable to translate what you're saying because of the speed at which you're going.
A. I'll try—
CHAIR: Well, please do it because it's important that we're being watched livestreamed.
A. Sure.
CHAIR: It's important that the public get to hear what you're saying and that includes the Deaf Community, so please do try.
A. Okay.
MS JANES:
Q. Good afternoon, Mr MacPherson. Changing topics, you don't need to go to it, I'm just going to give you the synopsis,

13.2 of your brief you have talked about Māori statistics and just highlighted. As I understand the documents we've had, in 2005 and 2006, and it is in a document but rather than waste time taking you to it, it's just a proposition. So, the document for the record purposes is MSD 2030 and we will be returning to that for different reasons a bit later on. But it records that in 2005 and 2006 it was known that 65-75% of claimants were Māori and your brief talks about now 55%. I just wondered, statistically do you have any sense of why the number has gone down or is it a change in the way data is captured?

A. Sorry, I don't know.

Q. I thought you may not but it was worth asking. You then talk in your evidence about you consider the process of MSD allowed for individual expression of tikanga Māori where it was raised by the individual, that's paragraph 8.1. But was there anything publicly available at any stage that alerted claimants to the possibility that there were tikanga Māori options, processes, available for them?

A. I don't know, I'm sorry.

Q. So, how would anyone have known to raise it with the Ministry if that was something they wanted to incorporate into their process?

A. The fact I don't know whether we advertised it, doesn't mean we didn't. I am just not aware of it, sorry. My understanding of the early stages of the MSD process, was we relied on the fact that social workers were expected to be culturally competent to recognise cultural differences and to reflect and engage with those, in terms of the different claims before them to deal with tikanga issues. As I said, well sorry, Garth might be able to comment on that rather better than I can.

Q. So, just rounding that out, it was your expectation, and currently is your expectation, that somebody would tell a claimant about that process being available?

A. Yes, that would be my expectation.
Q. And what would that look like?
A. Well, sorry, I'm not—
Q. How would somebody be told? What would they be told?
A. Well, I assume that there's something on our website about it but, again, it would be probably best to ask Linda that, otherwise it would have been made clear to people at the start of the process.
Q. And you may say Linda is the person but are you aware of how often it may have been raised and utilised as an option?
A. No, sorry, I'm not, in terms of numbers.
Q. Were you aware that in around 1985, in fact 1984, there's a group of Auckland social workers published a report which argued that the DSW practised institutional racism? I can take you to the document but that's just the point in that particular document that was raised.
A. I've heard of the document, I'm not sure I've read it.
Q. Just for the record, it's MSD ending in 1593, it's a July 2010 report from Garth Young to the Minister of Social Development and it gives a very replete history but it does have that information.
A. Sorry, I beg your pardon, I thought you were asking me about the 1985 or 1984 report.
Q. I am, and what was done about it, if you know.
CHAIR: I think the confusion, Ms Janes, is are you asking Mr MacPherson is he aware of the report or are you referring to a document that Mr Young has referred to the report in?
MS JANES: A document Mr Young has referred to the report in. So, it's a very brief paragraph in a 2017 report. We can go to it, just are you aware of—
A. I don't recall the document.
Q. Are you aware that there were concerns about institutional racism within DSW in the 80s?

A. I was aware of the first report you referred to, I haven't read it but I wasn't aware of it, so yes, to some extent.
Q. I didn't—I'm not sure you answered my question. Were you aware that there were allegations of institutional racism within DSW?
A. Well, as I said, I was aware of the report from the 1980s, although I haven't read it, so yes, I was aware.
Q. Are you aware whether any action was taken or further investigations were undertaken after that '84 report?
A. Um, it's before my time but I assume that it was picked up in a major review of a range of social worker policies led by John Rangihau which was published in the late 1980s. That is an assumption I've made.
Q. And just very quickly, in terms of the new process that was designed in sort of 2016-2017, I understand MSD obtained Crown Law advice and that was based on the KMPG report around the 2015 period/2016?
A. Sorry, you're referring to the new process?
Q. Are you aware of the new process?
A. We would have already talked to Crown Law as a matter of course in relation to any significant change to the process. The change process was informed by the KMPG review that followed on from the two path process. But also there was a very extensive process of engagement, particularly with Māori but also other survivors and other stakeholders. So, I was heavily informed by litigation as well.
Q. Because that is really the discussion I want to have with you, in that in MSD 2145 it talks about advice from KMPG and consulted with Crown Law and it says "MSD has now designed a new process". So, would you accept that that document confirms that in 2016, the new process had already been designed?
A. Well, my understanding is the process was actually finalised off the back of subsequent consultation, particularly with Māori but also with other stakeholders. So, it was certainly

informed by the KMPG report and it would have been informed by Crown Law advice as a matter of course but it was also reflective of the engagement processes that took place after the KMPG report, as I understand it.

Q. You will be aware that the Waitangi Tribunal claim was filed in March 2017, prior to 615 the proceedings; you are aware of that?

A. Yes.

Q. And I assume you are aware generally of what is alleged in that Statement of Claim?

A. Can you remind me?

Q. Absolutely. So, it talks about that the Māori plaintiffs don't believe that the MSD process comprehensively addresses experiences of Māori, impact on Māori, whānau and hapū, that it's deficient in terms of tikanga Māori, the Treaty of Waitangi and human rights law. And then it also proposes that the Crown, as a Treaty partner, has a duty to provide Māori with a remedy that is meaningful, open and transparent, accountable, independent, culturally compliant and reflects Treaty of Waitangi principles. Would that accord with your understanding of that claim against MSD?

A. Yes, so that was a claim against MSD, it was one of several I think in a similar period of time, yes.

Q. And then following the WAI 2615 proceedings, if we can go to MSD 2135.

A. Did you say MSD 2135?

Q. 2135.

CHAIR: Is that coming up on the screen.

A. There's no document, it's just the front page.

MS JANES: Okay, that's interesting.

Q. If the document were there —

A. Oh, sorry.

Q. 21 June 2017?

A. Yep.

Q. On page 2 at paragraph 8 and also paragraph 16 but paragraph 8, Mr MacPherson can you see part way through paragraph 8, third line down, second line, "Consequent to claims being filed with the Waitangi Tribunal we have sought expert advice from senior Māori staff in the office of the Chief Social Worker at the Ministry for vulnerable children, Oranga Tamariki, and drafted a statement which clearly articulates how the resolution process reflects tikanga Māori and Treaty of Waitangi principles. Iwi representatives and the Crown Law Office are being consulted".
So, you'd accept that advice was sought but, as a result of that, are you aware of what changes came about or was that the Māori consultation that arose out of that advice?
A. So, my understanding is that there was a more extensive process, consultation with Māori and with other stakeholders following on from this process over the last part of that year and the start of next year.
Q. Because I put the proposition to you that MSD had concluded its new process in 2016 and it was really only at the point that the Waitangi Tribunal proceedings were filed that it recognised it had Treaty of Waitangi obligations and a necessity to consider tikanga Māori and consult with Māori?
A. Well, I can't quite remember the ins and outs of the timeframes and process.
Q. If it helps, the consultation of Māori took place in 2018.
A. It started in late 2017, I think, but I have two or three reactions for that.
One is, I think MSD understood it had Treaty obligations and we had a large number of Māori claimants reflecting the disproportionate representation of Māori in the care population. So, I would agree it just occurred to us with the claim with the Tribunal, the claim was actually unsuccessful in terms of seeking an urgent hearing, from memory, in terms of the Tribunal process.

Certainly, it prompted a question about whether we'd gone far enough in the consultation process which was part of the contributing factor to going further. I think Linda can probably give a better account of that.

Q. Just looking, once the Royal Commission had been established and the Terms of Reference finalised, if I can take us to MSC 366, this is a document in which there was a meeting in June 2018 between Crown Law, MSD, Oranga Tamariki, and it was looking at what a united or combined approach to—that's the document. We need the attachment.

So, while they're trying to find the document, that was a discussion about a Crown approach to the Royal Commission. It identified legal issues with cross-agency implications. If you take my word for it until they find the document.

A. Sorry, what was the document number?

Q. It's MSC ending in 366. It seems to have the front.

A. It doesn't seem to have anything attached to it.

Q. So, the short point, let me go around it a different way. It lists a range of things, including Limitation Act complaints processes, human rights obligations, disclosure of information but, interestingly, there is no mention of Treaty of Waitangi or tikanga Māori. Given the importance to the Terms of Reference of Māori and other vulnerable groups, how important did MSD see that, in terms of its response to the Royal Commission?

A. Sorry, I haven't got the document in front of me.

Q. No, no, I'm abandoning the document and I'm going for a general proposition. Was the Treaty of Waitangi and tikanga Māori considered essential, important, in terms of the response to the Royal Commission, given the Terms of Reference?

A. Yes.

Q. And how has that been displayed? Has anything been done since that 2018 period?

A. So, you're asking a question about the Royal Commission process?
Q. So, the same, you've had your consultation, you've got your new process, it talks about diverse workforce but given that you have said that is an important element in terms of responding to the Royal Commission, has anything other than a new process been done?
A. Well, if I can have your indulgence for a moment, if I put that in a broader context. MSD as a whole has adopted a new strategy called Te Pai Tawhiti in 2017 when Minister Tolley was Minister. A key component of that is a Māori Strategy called Te Pae Tata which is the Māori strategy we've had since the 1980s and reflects on the part of the Ministry to how we approach the work that we do to upscale our staff to deepening their relationships with Māori stakeholders to get formations with iwi to equip our staff in terms of understanding the Treaty of Waitangi and to understand New Zealand from a colonial point of view, colonisation point of view.
So, I think I would see the claims process in that context. So, there's an organisation-wide commitment to doing better in the statement and better our understanding of Te Ao Māori and our capability to deal with it.
In terms of the claims process, I think off the back of quite an extensive and different type of consultation and engagement process for us, we made some changes to the process and more are coming in terms of tikanga Māori. For example, much more extensive emphasis on cultural capability in terms of staff job descriptions, recruiting Māori staff, much more emphasis on using karakia and Te Reo Māori in terms of our engagement with claimants. We are piloting a wrap-around service which we expect might have significant implications for Māori claimants. And I think we're exploring possible options in terms of other approaches to settling claims to the ones that are for whānau based than individual ones. The process has

changed and is evolving is intended to be much more responsive to tikanga and the Treaty.

Q. And you've talked about training on the Treaty of Waitangi now but when did that start? And if recently, what has been done in terms of training up until recently?

A. Well, there's a variety of different training within MSD. When did recent training start? I'm not sure I can give you a precise date. And I'm not sure I can give you a clear answer on the earlier question about the time period.

Q. So, in the Māori consultation that took place in 2018, some of the feedback that MSD received was that, apart from the overall sense that it was not serving Māori well, there were no Māori staff or others in 2018?

A. I think so, yes.

Q. What would be the percentage now?

A. I couldn't tell you off the top of my head but Linda should be able to.

Q. Another point that was that—

A. I should just—sorry to interrupt you.

Q. Cultural—

A. In terms of MSD as a whole, I think 25% of our staff are Māori.

CHAIR: Is that—that's not in the claims?

A. No, that's general overall.

MS JANES:

Q. Because the question was how many of those—

A. I don't have a precise number.

Q. You don't have that, okay. And another part of the feedback was that cultural needs are not recognised or catered for. How has that changed since 2018?

A. As we've endeavoured to pick up in the new process and in how that develops, so my understanding is that when we engage with claimants, we are more focused on asking what sort of approach they want engaging with us, more tikanga based. That's claimants but actually the training of staff as well.

Q. And I know under the new process there were particular things that were implemented immediately and then there was a 3-4 year period where some of the other elements of the new process were going to be rolled out. Are you able to tell us whether redressing tikanga Māori deficiencies is in the immediate tranche of work or in the 3-4 year tranche of work?
A. I thought some was in the immediate tranche of work but again, Linda is probably better placed to answer that.
Q. Given that likely the same concerns that Māori have expressed in the consultation would similarly be expressed if not more so by Pacific people, what is being done internally to look at other vulnerable groups, such as Pacific people, people with disabilities, mental health needs, to make the process more accessible and available and reduce barriers?
A. Well again, it might be a question better addressed to Garth and Linda but what I could say is that in contrast to Māori who are overly represented in the claimant population by comparison under represented, whether that's because their experiences are quite different or they haven't come forward, I don't know. Certainly, we're looking to recruit people and employ people for their ability to deal with people from different backgrounds and who have had different life experiences and particularly traumatised, there's a strong emphasis in terms of the type of people we employ.
Q. So, if I came to you as say, for example, a deaf claimant, would I immediately be offered sign language interpretation services?
A. I would hope so but I think it is probably a question better asked of Linda. I would expect so but I am not closely involved in the detail of the process.
Q. Moving on to the topic at 3.4 you've talked about after—
A. Sorry, is that my brief of evidence?
Q. This is in your brief of evidence, yes. After 2006, responsibility for policy work was with the Deputy Social Services Policy. Very quickly, can you talk to us about

policy development within MSD. Given that there is a whole of government and across government approach to resolving claims. If you devise policy, what happens to it? Where does it get escalated to? How does it get cross-fertilised with the other departments and then up to Ministers for decision? Or where does discretion lie, I know that's a compound question so—

A. Are you asking me a general question or about historic claims?

Q. Historic Claims Processes. So, take, for example, the 2018 process, so you've got your KMPG report, you've got your Crown Law advice, you either do or don't have your consultation at that point. What then do you do to get that policy and process approved?

A. Right. So, sorry to be slightly complicated answer to your compound question, it's worth distinguishing between policy advice on things like legislation that go to the Ministers for their decision and organisational policies about how we do things.

So, if I think about the 2018 changes, that would have been largely operationally driven, in terms of redesigning the process, getting advice from KMPG, I think. And essentially Ministers would have been asked to signal that they were happy with that process rather than being something that went to them about making changes to legislation or something like that. The policy group had a relatively limited involvement in that and it was mainly driven out of the area that deals with historic claims, is my recollection.

CHAIR: Just slow down, please.

A. Sorry.

MS JANES:

Q. Because it really does go back to that point about where is the line in the sand that allows MSD to change policy without government? Tick?

A. Yes.

Q. Versus internally saying we now believe the process should have a reset?
A. It's not—two things. It's not a hard and fast position. As a matter of course, for any major change you are expected to discuss that with the Minister whether or not they have to make a decision about it. Even if you don't have to get them to say yes or no, a significant change you would discuss it with the Minister so that they are aware of it and comfortable with it. In the case of the 2018 process because it had significant implicit physical implications which were discussed earlier in terms of the $95 million extra that Ministers gave MSD, as a matter of course they would have had to go to Minister Sepaloni and then to the budget process. From memory, that budget process was also discussed with Minister Martin. So, in that context, the work and design of the process I think was done in the historic claims area with input from a range of other people. In terms of putting into the budget process, that would have some process in terms of shaping the budget bid and gone to our internal budget team. In terms of major physical implications, it would have to go to the Minister because it involved resource, prioritisation and possibly extra resource. If the Minister is unable to secure those resources or doesn't agree with securing those resources, you have to go back to rethink what you're doing, which is not what happened in this case. The Minister was very supportive. Or if the Minister is uncomfortable with aspects of the policy change, even if she doesn't have to decide on it, then again you think about what that meant and why the Minister was uncomfortable because ultimately as a government department we largely comply with government policy and subject to Ministerial direction.
In terms of things within MSD's remit, there's a reasonable amount of discretion how things are decided but, as I said, major changes to the way we do things, things that involve a change to government policy or a constraint government placed

upon us for a decision taken or changes to legislation or extra money or to shift resources around would have to go to the Minister and likely to Cabinet if it was a significant decision.

Q. Just taking the example where there's a request to bring $26 million forward around 2015ish?

A. Yep. So, in that case, sorry this will be a bit technical. As I said in my earlier note, essentially through the budget process the government seeks appropriation, Parliament approves those. There's some scope within the financial year, at the end of the financial year, some limits to shift some resources around. And some clear rules about what things have to go to Cabinet and what things can be decided between the Minister of Finance and the relevant Minister, in this case, the Minister of Social Development. So, without knowing the ins and outs of that process, bringing it forward probably require the Minister of Finance and Minister of Social Development to agree to it. If it was a change of policy in terms of the money spent, which was material, it would probably have to go to Cabinet. If it's simply altering the phasing and bringing it forward, probably the two Ministers could decide that themselves.

Q. And at—

A. I should just add, basically rules around this rule are available publicly if you're interested. There is a Cabinet officer circular which sets out how the financial decisions work beneath the Cabinet authority and constraints on those, which includes the constraints on the ability to incur expenses which I discussed briefly this morning.

Q. At paragraph 3.9 of your brief, you talk about MSD having a single governance across litigation and policy work. So, can you just confirm for me that effectively the MSD team, as it operated then or now, the litigation and the policy work was done alongside each other?

A. I think this paragraph is referring to roughly 2005-2006 which was, I think, when this was transferring from the then Department of Child, Youth and Family Services to MSD. I think at that stage it would have reflected the focus on litigation and responding to claims. In that context, I think the Historic Claims Team supported the legal team. It has changed quite a bit over time. When it shifted from CYF to the combined Ministry of Social Development in the second half of 2006, my understanding is the Deputy Chief Executive Corporate was given responsibility for this in general terms.

Q. So, as those teams worked together, particularly in that early 2005-2006 period, one of the issues that will have arisen because it was primarily litigation driven is vicarious liability. And if I can take us to MSC 414, this is the MSD Historic Claims Policy Statement on Vicarious Liability for Agencies. I am assuming it's circa 2013, it is undated but the other policy statements are also 2013 but the next document we look at will be a 2013 document so the date is probably not quite so critical.

If which call out the second paragraph, the first one just recognises this is the policy that reflects MSD's position in relation to vicarious liability. And it then talks here about the policy being supported by the Crown accepting in White v Attorney-General that the Ministry was vicariously liable for actions by staff of the Presbyterian Support Services Home, and you have already talked about MSD accepting responsibility for Salvation Army homes earlier. So, there is the acceptance by MSD that it has vicarious liability for abuse that occurred in homes where you placed State wards, guardians, correct?

A. I'm not sure I'm well placed to comment on legal interpretation issues.

Q. Okay. I suppose then, if you read what the policy is supported by, is there anything there that you have any difficulty accepting?

A. No.

Q. And if we can then go down to the Policy Statement—
CHAIR: Mr MacPherson, do you know who the author of this document is?
A. No, I don't, I'm sorry.
CHAIR: Is it a document you're familiar with it?
A. I don't remember it. There are a lot of documents I have dealt with. I don't remember this one.
MS JANES: We could maybe take this up with Garth Young who is the author of the next document.
CHAIR: It might be a good idea because there's not much point putting a document to somebody who doesn't know about it or can't comment helpfully on it.
MS JANES:
Q. Just rounding out that topic, is there anything in your role where you are involved in making decisions about vicarious liability for claims?
A. Not in a practical sense. So, if either something comes to the legal team—sorry, to the leadership team or to a Governance Committee which requires us to engage with an issue involving a matter of legal interpretation, what we accept as a liability, then we would be involved in that. Or if it comes up as a major policy question that might require legislative change, then I would likely be aware of it as well. But in terms of a practical day-to-day discussion, I wouldn't normally be involved.
Q. Just for clarification, if we see a document that goes to the senior leadership team, what is the level of responsibility and decision-making that we can impute that team?
A. I'm not quite sure what you're asking me but I'll give it a go. So, I mean, in terms of the Public Service Act, essentially unless specifically and individually separated to a different officer, all of the responsibility to MSD is the responsibility of the Chief Executive and she will delegate a variety of powers to various people to do things using the

delegation powers under the Public Service Act. She relies on the leadership team as both the individuals responsible for particularly major areas of MSD to make decisions within the delegated authority but also to be a team that takes overall responsibility for the Ministry as a whole.

Q. We are now going to go onto the Crown Litigation Strategy. You've said in your brief that that's covered by the Solicitor-General but just within the MSD, so one can take the Crown Litigation Strategy into Crown Law but for MSD, it was bound by the Crown Litigation Strategies at the time?

A. Yes.

Q. And 2005—

A. Sorry, can I add? Sorry to interrupt you, can I add to that? It's clear from a variety of reports to the Minister at the time and the leadership team that that was our understanding.

CHAIR: That was?

A. The understand that MSD was bound by this.

CHAIR: The understanding, yes.

A. So, I am not just assuming that, it was clearly stated.

MS JANES:

Q. And each department was responsible for determining how it was going to devise its processes in line with that Crown Litigation Strategy?

A. Yes, but each of them was bound by the Crown Litigation Strategy, yes.

Q. But there was room to manoeuvre within the general parameters?

A. Well, there was room to manoeuvre within the constraints of the strategy or the directions of the strategy.

Q. By way of example, the 2008 strategy talks about settling meritorious claims without any definition of what a meritorious claim was. So, when that Litigation Strategy came into being, how did MSD interpret how it would apply that part?

A. Well, my reading of the documents from the time and from discussing with people, is it actually - MSD took what was implicit in the Cabinet Paper itself as well as the Cabinet minute to take the meritorious included questions where the Crown may be able to rely on Limitation Act defences but actually the claim was meritorious and there was a moral value to actually looking to settle the claim, rather than relying on those defences. So, to my way of looking at it, the meaning of meritorious changed between 2005 and 2008 implicitly from a much stronger focus on meritorious in a is it likely to succeed in Court sense to is it likely to succeed in Court, and also as a second part of it, is there a substantive wrong here that actually should be addressed, irrespective of whether you could rely on the defences. So, that's the approach MSD adopted after the 2008 Litigation Strategy was agreed by the Crown, it was actually a broader definition of meritorious, is my understanding of it.

Q. And what guidance was given to the claims assessors, the senior social workers, those involved in actually assessing the claims as to what a meritorious claim looked like? What are the elements they should look for?

A. Well, the only guidance or discussion that I can remember, in terms of material I've seen, is expressed in terms of looking at which is looking beyond the question of any legal liabilities to actually what is the substance and what is involved. And I understand that the claim in front of you, in terms of what you understand actually happened, rather than what legal liability the Crown may have faced. I've seen several discussions of that in the material after 2008 but I can't recall a detailed set of criteria. It doesn't mean there wasn't any, I just haven't seen it.

Q. Justice Gallen in his report in 209 had obviously talked to MSD officials and came up with what he understood to be meritorious. We don't go there but it is the Gallen report Crown tab 46 at paragraph 164. He says, "The view which has

been taken by the Department, and the Department's advisers, is that a meritorious claim is one where there is some moral liability as a result of indisputable conclusions that abuse has taken place but that a claim in the Courts may be defeated by the limitation its which stand in the way of such claims".

A. Yes, I think that is roughly what I said.

Q. Absolutely. So, what is an indisputable conclusion?

A. I'm not sure what Mr Gallen meant in the indisputable. I'm not sure I can comment exactly what he meant by that.

Q. It's really a spectrum. So, you have a range of claims that come through, and we will be teasing out some of those with reference to the Wiffin and the *White* cases in particular because the Commissioners have heard about that. But you have a range of allegations of abuse. You have a range of records and in Crown tab 111 it's recognised that records are generally not kept of much of abuse. So, there's that conundrum for a plaintiff where the higher the allegation of abuse, the higher the standard of care but the less likely there are records to support it.

So, how do you, as MSD, manage that balancing act?

A. Do you mean by that, in terms of the middle of that, that in a sense, in serious instances of abuse, the abuse in most cases was not serviced at the time and therefore there's a particular challenge in establishing evidence? Is that—

Q. For example, Keith Wiffin gave evidence that somebody is not going to perpetuate abuse and then—actually Aaron Smale, from another claim, perpetuate abuse and then go write it in the day book.

A. Yep.

Q. So, there is a recognition that the higher the level of abuse, the more hidden it is from the Department, in terms of what's actually in the record-keeping. And you'd accept that that is the more likely human response? You're not going to record the abuse that you have perpetuated?

A. Yes, I think both from a—if abuse was commonly recorded, you would expect it would have been addressed and responded to. But, in general, I think if I think back to the early discussions from 2003-2008 about trying to respond to claims, there's a lot of discussion about the evidential problems. So, one of those is actually the records won't necessarily tell you directly what's happened, sometimes they're incomplete, so yes.

Q. But then if you take the Sammon sisters example, have you read their evidence?

A. Yes.

Q. They are the three sisters in the same placement. There certainly was evidence in the records. There was corroborating evidence from people within the same household not related to them. They could have talked to other people who would have been able to corroborate it. So, in terms of what standard does MSD require of itself to make proper inquiry where it would have been available because both of those claims were effectively denied for evidential insufficiency. How can that be fair and reasonable in a system that looks at meritorious settlement of claims without looking at Limitation Act, without looking at causation, taking the story at face value?

A. I must have misunderstood reading them because I thought they were both offered settlement.

Q. They were but they were also told that the allegations, there was not sufficient evidence in the records and so they were not accepted.

A. I'm sorry, I don't know the ins and outs of the case.

Q. So, taking the general proposition, if not the particular, that where the evidence on the face of the records doesn't disclose sexual abuse because that's unlikely to be recorded or even very serious physical abuse because that's unlikely to be recorded, how much investigation should MSD undertake in assessing its claims? Because if you're not going to take it

at face value and you're going to check facts and they're not in your records, what are you morally obliged to do?
A. My understanding of the process with our employers, is actually essentially taking what the claimants say, not necessarily exactly at face value but actually placing quite a lot of credence on what they say and actually looking at evidence from what's happened at the institution and evidence in terms of what's happened with alleged abusers in the past, rather than not.
Q. But my understanding from a document which I can find if I need to, is that there has been a refinement in the new process that up to a point you take matters at face value but where it goes into that more serious category of sexual abuse, then facts are required?
A. Yes, that's my understanding.
CHAIR: And, in that circumstance, where facts are required, on whom does the obligation lie to provide the facts? Is it on the claimant or does MSD go and do its own investigation?
A. I think both. So, we interview the claimant and talk to them about what their experience has been and we also look at the records of the claimant but also the institution they have been part of. They were obviously doing a lot of work itself I think. But Garth and Linda are more familiar with the ins and outs of that.
CHAIR: Because they are the ones that actually do this work?
A. Yes.
CHAIR: Thank you, Ms Janes.
MS JANES:
Q. Just quickly going back to the Gallen report. Is it your—my reading of the Crown evidence is that the agencies have taken that as a reassuring report?
A. Yes, I think so.

Q. And are you aware of the Cooper Legal evidence where they didn't share that view, in that there were a range of matters raised by Justice Gallen that they thought were perhaps less reassuring than they should be?
A. I don't know I do.
Q. Is that the Gallen report there? Excellent, thank you. We will just very quickly look at the Gallen report. There are four in particular of the eight claims that he looked at. The first one is at page 7, paragraph 36, which is file A. And on page 9, Justice Gallen, the only criticism he makes of that is delay, so we won't look at that one closely. But page 11, paragraph 50(c), that relates to a claimant who was in Epuni and Hokio in the 1970s, the same time as Earl White and Mr Wiffin?
A. Which page are you on?
Q. Page 11, paragraph 50, the page I'm going to take you to is page 15, paragraph 86. It's giving you a bit of context of where this claimant was. At page 14, paragraph 85, Justice Gallen has a feeling of unease about this file. "There is no doubt about the veracity of the claimant"?
A. I beg your pardon, which paragraph are you on?
Q. Paragraph 14, page 85.
CHAIR: It's up on the screen now.
MS JANES: Page 14, paragraph 85. So, the highlighted part. Again, just repeating, "I am left with a feeling of unease with regard to the veracity of the claimant, reinforced by the comment of Crown counsel on the evidence" and it talks about the complaint of abuse of a named person who had already been convicted of such behaviour but not against him and it ought to have been accepted. That was Crown counsel's view. And he said, "I also have reservations about the advice causation was in issue".

And then going to page 15, paragraph 86, Justice Gallen said, "I am level with the feeling that the experiences of this claimant were to some extent downplayed".
Now, this is not Mr Wiffin, it is a different claimant. Not very reassuring, is it?
A. No.
MS ALDRED: Excuse me, I wonder, I see that part of a sentence has been picked out of paragraph 86 there. I wonder if the whole paragraph could be put to the witness, please?
MS JANES: Sure, absolutely.
Q. After the highlighted part it says, "But having said that, I do not see how the amounts by which the matter was finally settled could be considered as out of line, bearing in mind the amounts which had been paid to other claimants whose experiences were, on the information, rather worse".
So, I wasn't asking you about the settlement amount. I was asking you about how reassuring it was that the allegations had been made. There was evidence the veracity of the claimant was not in doubt, there had been a conviction. And Justice Gallen was not reassured, except about the amount. Do you accept that?
A. Yes.
Q. And then if we go to file H, which is at page 20, paragraph 131, push. A Statement of Claim was in October 2006.
And if we go down the page, in fact I think we go over two pages, and this I believe is, I haven't confirmed it but I believe this probably is Mr Wiffin's case by reference to the facts as we know them.
And so, if we highlight 148 and the comment, sorry this is not Mr Wiffin's. So, he's had a look at this claim and there was a disquiet left "In respect of one claim there is a complaint that the investigating officer did not believe the material which had been placed before them and in the circumstances

this was an inappropriate conclusion". Justice Gallen had completely reviewed the file. Again, not reassuring, is it?
A. Well, I think it's a quite mixed comment, so I would need to look at the whole comment.
MS ALDRED: I am sorry to interrupt again but I just need to correct that that's actually not a summary of what Justice Gallen said. It's actually a reference to the complaint at paragraph 148. So, it's what the complainant has said to Justice Gallen. I don't think it could be fairly put to the witness as Justice Gallen's confusion.
CHAIR: Yes, I confess I didn't see it as that but if there's any suggestion that it was, that is in fact a description of what the complaint was, and the comment I take it is Justice Gallen from there on, is that right?
MS JANES: Yes, correct.
Q. And so, he's—they were details that involved persons, "It is plain that the investigating officers were obliged to obtain the view of those persons and weigh them against the allegations made by the claimant."
So, again, because Justice Gallen looked at just the process and not outcomes, as he says, "In the end these are factual questions which it is not possible for me to determine the processes distinct from the conclusions and the process can't be faltered".
A. It also says, "It is clear the investigation was carried out in detail and is clear and in the case of other claims were handled with sensitivity".
Q. We haven't looked at it but there is also the *Wiffin* case where there was the suggestion that that should be reviewed and we've heard the evidence that the Gallen report was one of the reasons for the review; and you are aware of that?
A. Well, I think Garth covers it in his brief, actually he acknowledges the case was not handled as well as it should have been, he apologises for that, I think.

Q. So really, out of the eight, there was a level of disquiet with a number of the cases?
A. Yes.
Q. Would you accept, therefore, that looking at process only, that could be read as not as reassuring as may have been portrayed?
A. I'm not sure that I would accept that. I'd have to think about that question, I think. So, I think without disagreeing, there were several other cases where Justice Gallen raised some concerns and the general flavour is the cases were thoroughly investigated and there was sensitivity and the process was reasonable and thorough. So, given the complexity of these claims and the evidential issues, I would be surprised if you have a Judge looking at them thinking they were perfect. I think in terms of the *Wiffin* case, Garth has acknowledged that that could have been better handled and apologised for it, so I wouldn't be making that sweeping judgement, no.
Q. There was one that was even more disquieting to the Judge than Keith Wiffin's case. Are you aware of whether that was renewed as well?
A. I'm sorry, no.
Q. So, turning to MSD's relationship with Crown Law, if we could go to CRL 0022719. This is a letter from Crown Law to the Attorney-General. So, you may well not have had any involvement in this but there's just a particular characterisation that I want to put to MSD because you would likely have a view on it.
At page 1, paragraph 3, here we have Crown Law saying that their instructions, "based on Crown Law advice, are to pursue the case to a trial, even though there is a risk the plaintiffs will succeed in some of their claims. Going to trial is essential to ensure that the allegations are properly tested". Where does MSD fit in the hierarchy of instructions?

Are you the client? Do you give the instructions? Can you just talk through that process in the litigation pathway?
A. Well, I can talk about it generally. I'm not normally involved in instructing Crown Law. That would normally be done through our legal team, so this will be a very general comment.
So, Crown Law is the government's legal advisers, we are obliged to use them. It would be stupid not to, it's just basically we are in a permanent long-term relationship with them, they are a key stakeholder, we instruct them on various actions but actually we're heavily dependent on their advice in terms of how to receive it and also what instructions they are. It's an iterative process. It's not a particularly arm's length agent one.
In addition to which obviously they will advise the attorney on the Crown's legal interests, consistency with Crown policy which is litigation policy. So, as well as acting for us on our instructions but actually also advising us on what those instructions should be and how to think about the case and what the law is. But also, supporting the government to primary law offices in terms of the Attorney-General and Solicitor-General who will have views on these things. Ultimately the Attorney-General and Solicitor-General have oversight of the governance litigation.
Q. So, if MSD had a particular view that it wasn't keen on the Limitation Act in terms of its processes, how would that be communicated to Crown Law or implemented?
A. That's an interesting question. So, since the government had clearly established and installed, I think approached it, if things go to Court we will rely on available defences. In a sense, what they were thinking about that is neither here nor there in terms of our approach to litigation.
Q. If I can take you to CRL 2587—

CHAIR: Oh, sorry, we have a sign at the back saying stop. I am not sure why. Mr Powell, just let us know if we need to adjourn.

MS JANES: I think we have a little technical hitch.

CHAIR: We will take an adjournment. Why don't we make this the afternoon adjournment, would that be suitable?

MS JANES: Yes, thank you.

Hearing adjourned from 3.18 p.m. until 3.39 p.m.

CHAIR: All set to go, Ms Janes?

MS JANES: We are.

Q. Just staying with the document that we were looking at just before the break which was the Crown Law document. If we can call out the last paragraph and it says, "The result in the *White* case will assist the government in making decisions on how to deal with those other claims, as it should set parameters for dealing with both liability and quantum in future cases. The Ministry of Social Development is working

with a cross-departmental group to determine how the government should approach the wider group of claims". You'd accept that not only for MSD but for Crown Law and for the other departments, the *White* case was an important case in terms of liability and also setting quantum?

A. Yes, that's my understanding. That was one of the few cases of this sort that had come to the High Court for actual resolution as distinct from earlier processes, so yes.

Q. And just moving from there, if we can look at CRL ending 22977. This is a letter from Crown Law to Jacinda Lean who is the solicitor for Child, Youth and Family Services, it's dated 30 January 2006, so before the *White* litigation was heard in 2007?

A. Yes.

Q. At page 1, paragraph 2, this records, "This case has proceeded so far on the basis that even if the prospects of ultimately succeeding in the claims are low running this litigation (i.e. not settling) is just giving the perceived benefits of judicial clarification in several areas but particularly in relation to the quantum of damages. Judicial quantification will certainly inform future decisions to be made about numerous other claims relationship to physical, sexual and emotional abuse whilst in boys' homes"? So, very much the *White* proceedings were seen in the wider context of the post Psychiatric Hospital claims and all of the claims coming through, particularly to MSD at this point in terms of setting a benchmark and being a test case; would you accept that?

A. Look, my understanding, as I said in terms of your earlier question, was it was seen to be an important case, partly because there had been few other cases like it. It was looking into some important issues of law.

Q. And so, even though it was accepted very early, and in 2002, that the allegations against Mr Ansell were likely to be found by the Court, why was his case selected as the test case when

there were meritorious reasons that it could and should have been settled earlier?
A. I'm sorry, I couldn't comment on how that Court, that case came to be finally decided in the High Court, as distinct from—
CHAIR: Did you have anything to do with that process?
A. No.
CHAIR: Of deciding whether you settled or not?
A. No, it was before I got to MSD and I am not aware of the 2002 information you are talking about.
MS JANES:
Q. So, if we then go back to the broader proposition, given that you weren't there at the time, if there were concerns about the Limitation Act now, for example we've got the hearings in 2021, there are limitation defences available to that, if we can go to CRL 25877, and in again precedes your time but just to give you some context for your answer. This is June 2010 emails. Again, you wouldn't have any knowledge of this document but it is between Una Jagose and the Solicitor-General at the time. They talk about, at paragraph 1 if you could call out paragraphs 1 and 2. Crown Law has met with David Shanks, who is MSD, correct?
A. Yes.
Q. "... last night to discuss the MSD desire to make an ex gratia payment offer to the White brothers. We are clearly quite far apart in our views. We could not resolve it as between us". This is in 2010. The decision is in 2007 in the High Court. MSD clearly wants to resolve this matter and is having difficulties. If we could go down and call out -
A. Can I clarify something? Was this after the Court of Appeal decision, the date of this?
Q. No, it's before the Court of Appeal. So, the salient point for MSD, both then and now but you may not be able to answer the then question, at that point after that discussion and the inability for Crown Law and MSD to reach a consensus, "a draft

protocol has been discussed and that is based on MSD's since Peter Hughes' request in April that we come up with a way that we can work on claims that are old without holding up the Limitation Act as a shield to avoid looking at the facts so that meritorious cases can be resolved". So, it really goes back to who is the client, who is instructing and where do the parameters or boundaries of MSD wishes in any particular litigation lie?

A. As I said earlier, I'm not the best person to comment on that but just a few observations. One is that, the relationship between MSD and Crown Law is hardly like that between a client and a private lawyer you might instruct, so it's an ongoing permanent relationship. We are obliged to use Crown Law services by Cabinet direction, not that there's a problem with that. Crown Law also support the Crown's two chief law officers who have control over Crown litigation, we are obliged to comply with the Ministerial government policy settings. And, as I noted at the start of the day, in terms of the brief document I supplied, MSD is constrained in terms of certain types of expenses that it can incur. So, it cannot decide between an ex gratia payment of more than $30,000, the Department can't agree to do that. If we're going to settle a claim, we need to have that certified by our Chief Legal Adviser for claims under $75,000 as being an order or above that amount but to $150,000 Crown Law has to certify that but to be an order it has to be consistent with government policy and needs to be settling an accepted liability with that term being more broadly defined I think after 2008 and these claims.

Q. And we know Mr Earl White, his payment was $25,000 with $10,000 that went to his - so, well within the MSD discretion?

A. It's an interesting question. So, it's just below the MSD's discretion of $30,000, if you treat the Legal Aid contribution as a different thing. I think the Chief Executive was

probably pushing the boundaries of what he was able to do actually.

Q. And, in terms of being the model litigant, what is your moral responsibility in being a model litigant if somebody proposes that MSD behaves in a way that you don't consider as an organisation fits within that requirement? What can you do or what should you do?

A. Well, I think several things, just to put it slightly differently. I think the documentation deals with the Crown being a model litigant and up to a point that's for Crown Law and the Attorney-General to decide what that looks like. We are obliged to operate within policy parameters. I think through this period, what you're seeing is officials exploring approaches to dealing with claims that don't rely on going to the High Court and then relying on the Limitation Act or the ACC bar to deal with the claims but actually moving towards more of an alternative dispute resolution which looks at the substance of the claims and doesn't rely on those defences. I think also what you're seeing with the Chief Executive in terms of this case, is him saying actually, so we've won in Court, it doesn't actually feel like that's the right outcome, I want to do as much as I can to try and make that right to some form of payment. As I said, the $25,000 plus the $10,000 is actually pushing the limits of the chief financial officer to make decisions. Both of those things looking at the broader policy in terms of how do you approach these things and is there a better way than trying to deal with these things through Court but in this case the Chief Financial Officer did this because he thought it was of the right thing to do and was the closest to what he could do.

Q. Looking at the *White* case we can see it was a test case for the Crown broadly on liability and quantum and Linda Hrstich-Meyer's evidence is that quantum is very much on what a Court would award. You don't disagree with her evidence that that's the starting point, what a Court would award?

A. Well, my understanding is quantum, in terms of the process that we run, is based on advice from Crown Law from around about 2008-2010 in terms of other settlements, Court documents, looking at overseas comparisons and ACC but I couldn't claim to be closely involved in any of those discussions. My understanding is based on Crown Law advice from about 10 years ago in terms of drawing on a range of comparators.

CHAIR: Which might include Court judgements?

A. Yes.

MS JANES:

Q. And so, looking at just the Court judgements in terms of MSD cases there was the *W* case in 1999; you are aware of that?

A. Yes.

Q. And the Court awarded amount there was around $50,000 in damages?

A. Plus costs.

Q. Plus costs?

A. Yeah.

Q. So, it was around $376,000, I forget the exact figures.

A. Yes.

Q. It was $150,000 in damages plus costs of about $150,000. And then you had the *S* case in the early 2000s, and again similar damages; are you aware of that?

A. I am aware of the case, yes.

Q. $300,000 total?

A. Around $300,000, yes.

Q. So, given that that really was the starting point for MSD claims that have gone through the litigation process, and then you had the *White* trial which was effectively the next case to be heard and the first in relation to boys' homes; correct?

A. As far as I am aware.

Q. Yes. I will be discussing the *White* case in detail with Mr Young tomorrow because you weren't there and are not aware of the intricacies but just standing back and looking at how

quantum is determined because you look at the Lake Alice decisions which were again not as high as the *W* and *S* cases but they were certainly in that $75,000 range?
A. I think the average was about $69,000, I can't remember, yes, yeah.
Q. Some were lower, some were higher. So, you've got *S* and *W*, you've got the Lake Alice round 1 and round 2, you've got the other comparators with government payments, the Hepatitis and asbestos and various claims. There are documents where he has laid out those comparators.
So, the *White* trial comes along and pretty much the Crown has formed a view that this is going to dictate what happens to a wide range of cases that are coming through the pipeline; correct?
A. Are you asking me a question about quantum or about the approach to litigating in Court?
Q. We're looking at the *White* case being the opportunity to reset the *S* and *W* cases?
A. I'm sorry, you've been talking about quantum and then you're asking about the *White* case being a test case, if that's the way you put it. Are you talking about quantum or—
Q. Just to rewind, we've seen that the documents say *White* was a test case for liability and for quantum. So, the liability is the Limitation Act and ACC bar side of it, so we're looking at the quantum content of the importance of the *White* trial.
A. Most of the discussion I've seen on the importance of the *White* trial conversations we've had have been in terms of testing issues around evidence and around ACC bar and limitation defence, rather than quantum. So, I'm not sure I can comment on that.
Q. Okay, we've previously looked at a document that talked about liability and quantum.
A. Sorry.
Q. But we can take that up with Crown Law and others who were more closely involved.

But from an organisational perspective, would you accept that there was a belief, an understanding, because of the numbers of claims that were being filed by Cooper Legal, at that stage there were around 500 I believe, that there were a large number of claims that were coming into MSD; your understanding -

A. Yes, my understanding is we were experiencing at that time a significant number of claims, yes.

Q. And there was an expectation that they would increase the more publicity or the more it became known that these were available claims?

A. I'm not sure about what the assumptions were in 2007 about forecast numbers going forward. Certainly, we were experiencing more claims. I can't remember what assumptions there might have been about whether that was going to increase, sorry.

Q. But you certainly wouldn't be saying they were expected to decrease?

A. No.

Q. And so, you've got very high damages from the *S* and *W* cases. You now have a cohort of 500 and likely many more claims being filed against MSD. The *White* trial is the opportunity to test liability but also quantum. Would you accept that it was a fiscal driver for the government to ensure the minimum amount of damages because that would then be the expectation of other claimants?

A. I haven't seen anything that was expressed in those terms. Certainly, if I think about their work done on redress generally through that period, questions of cost to the taxpayer, cost to the Crown, fairness to claimants, were actually considered. So, there were a range of issues, one of which were costs.

Q. I think it might be helpful if we go to CRL 16524. This is a September 2006 letter from Crown Law Una Jagose QC to again Jacinda Lean at the Ministry of Social Development. You will

note in the first paragraph that it talks about a range of allegations arising in the last 10 years. So, that's just to give you some context and we'll move down to the last paragraph on that page.
And that confirms the 500 claims that I mentioned before and there may be more. "Indeed, there is a real prospect that, depending on how the first few cases are determined by the High Court, or on any alternative Court process adopted by the government or Ministry, other people who were children in the (then) Department of Social Welfare institutions and/or foster homes will commence proceedings".
So, you wouldn't dispute that was the thinking of both Crown Law and probably MSD at the time?
A. It certainly was, the Crown Law letter says.
MS ALDRED: Sorry, can I have it recorded for the record that that is a draft advice, the document that Ms Janes has put to the witness?
CHAIR: Yes, it certainly says that at the top of the document.
MS JANES: It does say that at the top of the document.
Q. And in terms of it being a draft, it would certainly set out initial thinking? We haven't seen the final but it does indicate what issues were of concern that were being communicated and discussed; would you accept that?
A. Well, not having seen the final, finals can be quite different to drafts.
Q. But drafts can also be indicative of a process of thinking?
A. It can be.
Q. And if we go to page 3, actually if we go to page 5, paragraph 22 first, thank you. 22.2.3, as you've already mentioned, it was understood there were a number of complex matters of law which would likely be appealed from the High Court, perhaps even to the Supreme Court. "However, not every case which includes the complex issues of law will require Appellate Court attention as once several have been

through the Court hierarchy we will have a body of legal authority for the lower Courts to apply in future cases (or for the Crown to use to guide settlement)".
So, you would agree again that in terms of that preliminary thinking, it was important to guide settlement as well as liability?
A. Noting it's a draft again, the paragraph you read out, I must have missed the reference to settlement but going back to my earlier comments and our earlier engagement, clearly the *White* case was seen as an important case at the time.
Q. And if we go to page 6, paragraph 24, and again the initial thinking at this stage and we will go back to the 2002 with Mr Young, "*White* is the first of the claims that will go to trial. At this stage we think it is likely that some of the allegations of sexual assaults will be successful".
So, the thinking in 2006 before the trial was that there was merit in the sexual assault allegations; you wouldn't dispute that?
A. It's certainly what this would suggest.
Q. And then if we go to paragraph 28, this document goes through the thinking of what the likely scenarios would be for a loss or a win in the *White* case.
And so, there's a concern that the Legal Services Agency will be encouraged to fund all cases. That's not a matter for you to comment but what proportion of MSD claims are legally funded, are you aware of that?
A. I think currently a little under half are represented by lawyers, most of them would be funded and supported by Legal Aid, I would have thought. It's in Linda's written evidence, it's a little under half, a significant number.
Q. So, clearly a cost is associated with 28.1. "More people are encouraged to file claims", again resources would be attendant on that outcome; you would accept that?
A. Yes, that's what it says, noting it's a draft.

Q. And there's a sense at 28.4 that plaintiffs from the same institutions or in the same timeframes would use the findings to apply to their cases or other plaintiffs. And then, "Settlement of like cases will be more expensive as the *White* high damages in this scenario raises the bar on what people expect".
So, again, the concern was that whatever the outcome in *White* was, it would have that consequential flow on effect on settlement expectations and pressure on the resources for the Department; correct?
A. Well, it's what it says, noting it's a draft but it's been discussed and the *White* case was seen as a really important case.
Q. So, if we then go to page 9, paragraph 44, so the "application of those legal rules, and we're talking about the Limitation Act ACC to other CYF historic claims does lend itself to an approach where some strategic issues warrant further litigation. In fact, almost all issues addressed below warrant closer attention". So, if you have read Earl White's evidence, he effectively says that he found himself caught in the cross fire of the Crown wanting to litigate a case, and he was the unfortunate first recipient of the next trial.
So, there was this overwhelming desire to litigate the case, establish some precedent both in liability and quantum, to, as I said earlier, reset expectations, costs of quantum. Would you accept, looking back, and you weren't involved, that that is a reasonable perception that could be held?
A. I can see why he would have that view. As I said, the *White* case was seen as really important from the Crown's point of view in terms of precedent effects.
Q. And what about for MSD?
A. Well, it was an important case from our point of view as well.

Q. Because it had major consequences for you, both in terms of budget and resource as well, didn't it?
A. Well, in terms of the process going forward I think as well.
Q. And if you look at your 2400 backlog of cases currently, that would have substantial implications for large numbers of claims?
A. Sorry, I'm not quite sure what your question is?
Q. At stage you had 500 claims?
A. Yep.
Q. There's now 2400 claims. Whatever the quantum that became the new foundation was going to have major flow on effects?
A. Potentially but going back to our earlier engagement, in terms of litigation success of claims, essentially we would be asking the government for money to pay the costs of those.
Q. And so just on the costs of litigation versus the cost of settlement at appendix I think it's number 1 of your brief where you've set out the expenditure pie chart from 2006-2019, do you want to go to that? It's on page 25 of your brief. It's a little bit hard to read there, I've actually written the numbers because I blew it up so I can read them to you, if that's helpful.
A. I can read them.
Q. Okay. So, just out of interest, from that pie chart, you have indicated that legal costs for external legal fees which includes Crown Law fees and fees for external barristers is $8.96 million?
A. Yep.
Q. Which is, I worked out at 12%?
A. Yes, it says 12% on the graph.
Q. And I can take you to it if necessary but in MSC ending in 490, which is a July 2015 MSD OIA response to Mike Wesley-Smith who had asked a lot of questions. He had been told that between the 1st of January 2006 and the 31st of March 2015, MSD had spent $5,689,306 on legal fees. So, between 2015 and 2019, there's approximately $3 million in

legal fees but there had been no cases. Are you able to just clarify—
A. No, I'm sorry, I can't. I would need to understand how both numbers were composed, I'm not sure.
Q. Okay. Because I don't think there's been any litigated cases since 2015?
A. I don't think so.
Q. And going back to your pie chart on page 25 of your brief, it talks about, I think it's settlement, numbers of 30.220 million, 39%?
A. Yes, I think so.
Q. So, accepting, just taking a step back. And the *White* case, we know was about between 1 to 1.6 million; is that your understanding or do you have a more accurate figure?
A. I can't remember the numbers, sorry.
CHAIR: Is that for legal costs?
MS JANES: Yes.
CHAIR: For the Crown?
MS JANES: The Crown legal costs, purely Crown legal costs.
A. Does that include Legal Aid? I'm sorry, I can't remember the numbers.
Q. And you were there in 2017?
A. Yes.
Q. At the point that the Whakapakari claims were settled?
A. Yes, I wasn't involved in them.
Q. The Commission has seen evidence that there was $1 million spent on legal fees in that case, are you aware of that?
A. No, I am not aware of that.
Q. So, it's probably not productive for me to take you through various evolutions of legal costs; would that be fair?
A. Yes, yep.
Q. I guess then, the general proposition to put to you at that high level, is that $9 million spent on legal fees, and accepting that Crown claimants are both entitled to have

recourse to Courts, so not questioning that there is that right, but taking a step back, if you look at your principles of timely resolution, taking things at face value, checking facts, as a lay person or a claimant I might say, "Goodness, $9 million would have gone a very long way in settling some claims"?

A. Well, as you say though, the Crown was entitled to get legal advice or get legal advice irrespective of whether it's engaged in litigation in Court or not. So, we would have got a lot of legal advice from Crown Law about the redress process without any involvement in or any suggestion of a Court process.

On one level, and this is true of anything, any money that goes in running a process rather than actually delivering, the outcome is frustration. So, from a lay person looking on, it looks like a lot of money.

Q. When you actually looked at Earl White's evidence, where prior to the trial, his lawyers Cooper Legal wrote saying MSD is changing its processes anyway, so where is the utility, these are not their words, I can get you the exact but effectively where is the utility in setting legal precedence which are not going to apply to your new process. With the underlying question being why is the Crown putting the claimant to the trauma, the Crown to the cost, the Legal Services Agency to the cost, the Court to the cost, when there is an alternative dispute resolution process literally months away? Can you see why that could be perceived as a problem?

A. I'm trying to think that through. Can you repeat the question, Ms Janes?

Q. So, prior to the trial there was, in fact let me get it, at paragraph 90 of Earl White's brief of evidence he talks about "Sonja Cooper wrote again on the 27th of October 2006. She mentioned the possibility of the government looking at options to settle these types of claims through an out of Court process with the recommendation expected by April 2007". And

you will be aware that the trial was held at the end of June, so—
A. Yeah.
Q. So, a decision was expected before the trial took place?
A. Yep.
Q. And in the letter Cooper Legal have said, "Within that context, it is difficult to understand what is hoped to be achieved by forcing Earl and Paul White to litigate their cases. If government is intending on embarking on an out of Court process for resolving claims of this client group, the relevance of establishing some legal precedent appears to be fairly limited".
So, the question really was, in the context of MSD's principles, and also the fact that its processes had moved on in the 6 years that the claim had been outstanding, why at that point, when it could have settled the claim out of Court, did it not?
A. I'm sorry, I don't know. I know there was some discussions about settlement at various points before but I don't know why the claim didn't settle, I'm sorry.
Q. And if one were making fiscal decisions, would you agree that spending say $1.6 million on litigation which is not going to set a precedent because you have another system in place, seems redundant and not the best use of taxpayer money?
A. Not necessarily but, as I said, I don't understand the reasons for it not settling at the time.
Q. Have you read the *White* decision?
A. Yes, I think so. I can't remember. I've certainly looked at it.
Q. This may be an unfair question and don't answer it if it is, but if you put yourself in the shoes of a claimant or even an ordinary New Zealander, stepping back and looking at the facts of the case and the outcome of that case, do you individually as a person have any disquiet about it?

A. Well, I'm here as a senior manager of MSD, rather than as an individual person.
Q. In that capacity then, do you have disquiet about it if it were to happen today?
A. Well, I think if I put that in a more general way, if that's all right? So, I think if I look back over the events of the period from 2005-2010, I think it's amply demonstrated that trying to deal with claims of historic abuse through the High Court is actually not the best way of doing it, so actually to me that would strongly reinforce the need for a different process which doesn't rely on going to Court because it's expensive, it's difficult for the claimant and the Crown. In general terms looking at those cases it reinforces the sense of any litigating in the High Court is not the right approach.
Q. And it's not for you because you weren't there at the time but that was the information known to MSD right back at the start, in terms of when they were looking at the international research back in the early 2000s, there are documents that say exactly what you've just said, that litigation is actually not the best way to resolve these cases. So, that has been established elsewhere and thank you for sharing your view on that.
Just noticing that we are dashing towards time, apologies if I may just turn to that. Before I do that, disparities of payments better dealt with by Linda?
A. Sorry, do you mean within MSD claimants or between MSD and other payments like health or education or—
Q. Within MSD only.
A. Yes, I would have thought so, yes.
Q. Okay. I'll park that for Ms Hrstich-Meyer.
So, turning to apologies. If we can have a quick look at CRL 1687. Just speaking generally, we've heard from various witnesses that apologies appear to be templated. I don't know whether you would share that view but do you want to just tell

us what your view about MSD's approach to apologies is and how you go about drafting them?
A. Again, it's probably a better question directed at Garth and Linda in terms of the actual ins and outs of how that works. But just a couple of comments, the apologies are quite difficult things actually, in a sense, to get exactly right what you want to say to actually give a sense of understanding and reflecting the circumstances of the claimant I think and at the same time achieving a level of consistency, so I think they're actually, if they're going to be meaningful, they're actually quite a difficult thing to write.
Q. Given that you've got this very delicate balance between timely resolution and we have heard evidence from different claimants they want a quick outcome versus those who—
A. Thorough investigation.
Q. Yeah.
A. Yep.
Q. So, how do you deal with that, particularly apologies because if you've gone down the fast track route, which is a brief assessment, not a comprehensive assessment, how do you balance what can and cannot go into your apology and what's meaningful to that claimant?
A. I still think it's quite difficult and actually, as you said, the process potentially involves trade-offs in terms of how deep the assessment has been, how specific you have been and what you can say, so it's quite a trick.
Q. So, what is the answer or what are you doing currently in those circumstances, say for the fast track? I think you've got the standard and the comprehensive they're now called?
A. Yeah, in terms of there's the—it's the standard process where people can choose to opt for a more detailed process. And for some particular claims, we may think they should go through a particular process anyway. I am probably not best to comment on that in terms of the actual ins and outs of that.

Q. So, looking at this particular document, and it is a document from 2014, and it's between Crown law and MSD. You will see that Ms Hrstich-Meyer is one of the recipients but it's actually a broader policy level, so you may be the appropriate person to address it to. If you can call out, in fact, the whole top email?
A. You want me to read that out?
Q. No. Beforehand, a letter of apology drafted by MSD has been sent to Crown Law, did you see that? Otherwise we'll—
A. No. It's an operational matter that I wouldn't expect to see.
Q. Okay. So, a general proposition though, MSD sends an apology letter to Crown Law because it's going to be settling a filed claim. Crown Law has come back in this particular case and has amended the MSD apology letter and they have set out in the reply email the reasons why they have amended it and that's the issue that I'd like to look at. Is that enough context for you?
A. Sure.
Q. So, if we call out the top email? They say "here is my suggested redraft of the apology letter. Kristy has reviewed this", that is referring to Kristy McDonald QC "but wants to give it one more read this morning. In the meantime, we wanted to get it to you to consider". They have attached the Ministry's version for ease of comparison.
So, the salient point in this is the second paragraph, "You will see it is quite different in terms of content - it describes more", I will let you read it actually.
CHAIR: You are running out of voice.
MS ALDRED: Excuse me, I need to add something. I don't think it can be taken for granted that that reference to Kristy is Kristy McDonald.
CHAIR: We won't make any assumptions about who Kristy is at this stage. Would you like to read it, please, but

read it clearly and slowly. Thank you, you're getting the message?
A. "You will see it is quite different in terms of content - it describes more what Mr [ ] has reported and broader concerns rather than zone in on any acceptance of specific instances of social work failure or abuse at residential placements. Our version is deliberately kept at a high level so statements made within can't be used to undermine any defence the Ministry may pursue with respect to its ultimate liability for failings at Whakapakari or other placements for the purposes of the [ ] and trial. We are conscious to protect the Ministry's position in this regard given Cooper Legal is still attempting to challenge all of the Whakapakari history, including from the time of Mr [ ]'s 2003 placement in the [ ] and trial because despite the settlement of Mr [ ]'s claim. On the other hand, we believe it is still a genuine expression of regret for Mr [ ] for any harm that he may have suffered".
Q. It goes on to say, "I appreciate this approach is a little different to what the Ministry is used to in its apology letters".
So, in terms of—two things arise for me by way of general proposition. One is, MSD determining what it wants to apologise for. Is it the fact that where there is a filed claim, Crown Law needs to effectively approve apology letters?
A. Well, I'm not sure whether it's approving it or commenting on it. That may be a rather movable feast. And, again, in terms of anything else, it's probably better directed to Linda or Garth. But what I can say is that, as we discussed earlier, Crown Law is our legal advisers. We run many significant things past them and we have to be mindful of the advice they give us. So, the Ministry isn't a free agent separate from anybody else, we're part of the government.
Q. And that's actually, just going back to the discussion this morning about an independent agency because, as you read that,

there is certainly a more overriding by the Crown litigation concern about protecting itself from future trials in terms of how it words it's policy. I don't believe that's an unfair—

A. Apologies are actually quite difficult things to draft. Is there another question sorry?

Q. So, it's really the independence. On the one hand, you've got the wider Crown Litigation Strategy to take care about what it acknowledges about certain institutions or residences versus, on the other hand, providing something that might be meaningful in acknowledging the actual facts for a particular claimant?

A. Well, it's actually a really interesting question and just abstracting a bit from the current letter. If you talk about independence, it's a question of independent from whom? So, do you mean independent from the agencies that have been responsible for running services that are the cause of complaints and allegations, substantive examples of abuse have caused people harm, would you mean independent from the government, which is quite a different thing.

So, independence, the question of independent from whom and for what reason. So, if it's going to be quite independent of the Ministers, then some other issues to think about are if it's going to cost a lot of money, it's going to increase, we need to have enough confidence in that to be willing to consider to back that. If you need to change legislation for that purpose, again nothing gets into the house if there's not administrative people doing that. There's the question of accountability of money and the powers being used. If you're not going to change legislation, then the interaction between the independent body and the Crown's approach to litigation becomes really important which takes you back, in some ways, to the same place. In some ways, you could think about mitigating it, I would have thought. So, you might, and this would be a government policy decision, and this is just speculating because this isn't an MSD view, you might do

something like a think has ended up with the Legal Aid authority cases, whereas in some cases you don't, then go to somebody else than Crown Law for advice. That's speculation from my point of view. It doesn't take you away from how does it interact with the way the Crown conducts litigation? The redress process we run is actually, in a sense, almost a flipside of the Crown litigation approach. And if the Crown adopts a different approach to litigation, entirely of what it has sought, then that's going to affect the redress approach the independent body is running. There is a question of independent from whom and what purpose and then how you deal with the consequences of that in a practical sense that doesn't cause a whole lot of problems.

Q. The very key word you used was trade-offs and going back to the discussion this morning, with no criticism because it just is what happens with departments, that there are so many divergent interests that have to be taken into account in a redress process where effectively you have social workers who were in the institutions, social workers who are doing the assessments, you have budgetary constraints, you have litigation strategies that can't be compromised because other departments would be affected by it. Is really the simple answer not that these claims, as we said this morning, should not be administered by an independent agency that doesn't have all of those complex trade-offs that it has to make?

A. So, this is not an MSD view, this is just a personal iteration on my part. I think it's a really interesting question and looking at the number of claims that might be part of the answer but whatever the answer is, it's not a simple answer. You won't deliver yourself from those trade-offs, you shift the trade-offs from different places. So, an independent body quite separate from the government, I'm not sure how you deliver yourself from budget constraints. Unless you're going to provide some sort of separate ongoing pool of money separate from that, then actually, and you can

deliver yourself from that, Ministers have to answer questions about the use of that money. You can assume government changes don't deliver you from trade-offs, they shift the boundaries, that may make the trade-offs better and certain things better to deal with, but you can't get away from them.

Q. So, I am conscious of the time and the Commissioners may have questions and your counsel may have some follow-up questions, so if you - because you have the ability that you came to the organisation in 2015 and you have a sort of over-arching view of what has happened in the last 5 years, and I'm sure you will have formed some views as the organisation has evolved, if you were taking a step back and reflecting on what you have seen, heard, learned, not only in your roles within MSD but what you now know the Royal Commission is hearing, what would you suggest be done differently?

A. I think a range of things. I think, these are my personal observations again because it is not an MSD position. Going back before the redress process, I think the process of making the system for dealing with the care of vulnerable children as robust as possible, as well resourced as possible, in terms of the quality of people in the systems and the accountability for that and oversight of that is crucially important to minimise the risk of this happening in the future.

And in some ways, one of the most important challenges we face as a country, I think, in terms of the redress process, as I said, reflecting on the last 15-20 years, I think trying to deal with these things through the High Court is not a particularly productive process. With the benefit of hindsight, if you knew you were going to have 4,000 claims 15 years ago and you would have an alternative dispute resolution process, neither of which were clear to the people at the time, you might have adopted a different approach.

As I said in my brief of evidence, I think the movement from having the claims function closely part of the department that

actually ran the institutions and did the work, to part of the department where it was separated and another part of the department but not really independent, to actually being a separate agency is actually a positive move in general but not with withstanding my points about trade-offs.
And I think MSD is obviously, a lot of history now with the redress process which, in a sense, probably colours some of the attitudes to it. MSD is a successor organisation to previous organisations that were responsible for those children care systems. So, the question about MSD as an organisation, I guess. As I said, there's a big question about independent from whom and for what purpose? And I think there's a real question about if you are an independent body, whether you try and bring everything in or you try and make it a range of things. A more limited range of things to do that because actually, the more things you have in, the more complicated the role is and the more they are making trade-offs within that and you get the risk the organisation is so over-burdened with different things it can't make progress and it's worse than before. Not a reassuring thought.
And sorry I lost my train of thought.
Q. That's all right. And I don't want to be flippant but there is a sense of the frog that starts in the cold water and ends up in very hot water. If you look back to 2005 when there was the suggestion that it be sent off to the Law Commission for high policy level research and study and framing back recommendations about what a process could or should look like, which included an independent agency. With the luxury of being able to roll back 15 years, redress processes may look very different but they're iterative. And so, I suppose really my last question is, in 10 years time or 15 years time it would be unfortunate to look back and say "we wish we had done something different back in 2020". So, what could or should happen to make sure that that isn't the question? That

we don't just keep tinkering with existing processes or refining existing processes. We've known right from the early days what claimants wanted and needed, it hasn't changed from that 2006 feedback to the 2018 feedback, and they are still not working for claimants. Big question, probably can't answer it in the time you've got.

A. It is a big question. I'm not sure I can answer it off the top of my head. So, I think there are aspects of what we've done in the last 15 years that you really want to keep. So, I think you'd want to keep a process that's focused on redress, rather than on the Court system but still allow people access to the Courts if that's what they want. You have a real question if people settle through that process, how you think about their future rights to go to Court, are they extinguished or not?

I think that a claimant focus is really important. I think there's that, you need to decide what's the balance between trying to make people better and trying to provide redress for past wrongs. They haven't tried to do both of those but actually I think the weight you give to one rather than the other will probably affect how you setup the process. To me, the exploration in that sense of wraparound services which MSD has talked about but actually, I think the delivery has been underwhelming I think. We've often offered counselling but we haven't had a lot of take off. It's been a standard offer but if you look at what we've spent, it's like—

Q. $79,000.

A. But actually, I think moving further in that space, I think the exploration of whānau based approach to redress is potentially quite important but would involve its own trade-offs. It won't work for all whānau. I think the risk is shifting quite different discussions is quite fragile. Trade-offs in that space when I think that through.

I think the Ministry was tardy in thinking through the Treaty obligations that it had and the practical implications of

having a lot of Māori, people with Māori whakapapa in its redress system. I think we're trying to address that now. I think that is the key process going forward given the nature of New Zealand and the nature of the care population and how that's flowed through into the populations. That is just off the top of my head thoughts but happy to give you a more considered view at some other point.

MS JANES: Thank you, I will now turn it over to the Commissioners first.

CHAIR: We will ask maybe some questions, I'm not sure, do you have any questions?

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SIMON CHARLES MacPHERSON
QUESTIONED BY COMMISSIONERS

COMMISSIONER ALOFIVAE: Actually I do but I'm looking at the clock and I'm looking at Crown here as well and I'm thinking some questions are probably better answered by your colleagues but it was actually just taking the comment, your last comments, if I may, just through the Chair. Mr MacPherson, thank you, I think at the very end of the day in terms of your own personal reflections we connect. So, you're the top policy person in MSD and you would have equivalence in your other ministries. Certainly from what we've heard this afternoon, there has been over the last decade or so some real intent to get to resolution. And I'm still trying to understand what the real blocks are in the system. So, thank you so much for your comments around the discretion that's used and we appreciate everything takes time but I'm wondering if you might be able to give a personal reflection on that?

A. Two or three thoughts, rather than one. So, I think, and you can see that in the CSRE evaluation of the process from about 2012, which is in the documents somewhere, a lot of claimants find the process, this is 7 or 8 years ago, actually very helpful and it works well for them. I think reflections from the engagement that we had, the conversation we had in late 2017-2018, and again Linda or Garth will be able to comment on this better than I am, probably emphasise the need for better communication, better understanding of people and their actual context, including their cultural context. A process that's easier to engage with.

So, whether that's tinkering in terms of Ms Janes' term, I think potentially it's quite a different system we can move

to, particularly with piloting wraparound services and exploring different ways of settlement.

COMMISSIONER ALOFIVAE: Do you think it has anything to do with your vote budgets as well?

A. Um, well, again, two or three responses to that. One is nothing can deliver you from—sorry ex-Treasury Officer—nothing can deliver you from budget restraints. In a sense, all of us have to deal with fixed budgets and a whole lot of things to do with the Social Security Act that Ministers would like to change but it's expensive. If this is a process using public money, and substantially it has to be, there's questions to address in terms of NGOs and faith-based institutions which might be different but that's public money, it would be hard to how you can deliver yourself from a budget restraint.

The other thing I observe to flip that around, when MSD asked the then National Government for extra resources for the Two Path Approach, they were willing to put some extra money into that. As I said in response to Ms Janes' question this morning, the $95 million we got wasn't a budget cut, it was an increase. In fact, we can get $125 million, I didn’t take as any indication the Minister of Finance didn't think it's important. He didn't think he needed to give us all the money now, we can come back for more.

But the budget is actually quite an interesting thing as well. Initially this was funded out of money for other things, under-spends, corporate overheads, and it's moved to being funded on a more regular basis and now has a substantial amount of extra money. It's a multi year appropriation which is quite an unusual type of appropriation set out to give you flexibility to manage over a 3-5 year period.

COMMISSIONER ALOFIVAE: So, they are trying to find the money as opposed to ringfencing?

A. Yes.

COMMISSIONER ALOFIVAE: Thank you, Mr MacPherson.

MS ALDRED: Excuse me, sorry, Madam Chair, I wanted to let you know that at this stage we don't have any questions arising from Ms Janes' questioning.

CHAIR: We can take a whole 10 minutes.

MS ALDRED: Sorry, I thought I'd better tell you that.

CHAIR: That's very kind, thank you for letting us know, Ms Aldred.

COMMISSIONER ERUETI: Tena koe, Mr MacPherson. Coming back to the Treaty, it's clear we have a large number of Māori who are in the claimant cohort?

A. Yes.

COMMISSIONER ERUETI: If I go back to the two, yeah my questions are about the engagement with Māori throughout the different iterations, if you like, different plot points throughout the development of the HTC process. There seem to be a number of key events. The 2006 one where you are developing the fundamental principles seems to be an important plot point, if you like. And in that case, Cooper Legal provides nine claimants who have gone through that process and apparently six are Māori?

A. Yes.

COMMISSIONER ERUETI: I wondered, was that your intention to seek out to speak to Māori or was it just a matter of Cooper Legal provided a range of claimants who six happen to be Māori?

A. I think somewhere in-between, I think. The expectation was some of them would be Māori given the nature of the claimant population, I think, but I would need to check that.

MS JANES: Certainly, Cooper Legal evidence was it was incidental that they were Māori.

COMMISSIONER ERUETI: Okay. And do you know if there are any other efforts to talk to Māori beyond these clients of Cooper Legal?

A. Sorry, I can't remember. I would need to check.

COMMISSIONER ERUETI: Okay.
A. I'm reasonably familiar with the 2017-2018 process but I would need to check.
COMMISSIONER ERUETI: You describe that latter 2018 process is, I think in your brief of evidence you say it's giving effect to the principle of partnership, the Treaty principle of partnership, words to that effect, the later process in 2017. So, I wondered whether you would apply those, would you feel the same way about the 2006 process?
A. Not in the same way, no, I wouldn't. As in my brief of evidence, I think engagement with Māori has been much more thought about recently than earlier on.
COMMISSIONER ERUETI: Yeah. And I wasn't clear in your evidence, so you say this process of engagement was influenced in part by the Tribunal claims that were lodged?
A. That's my recollection, yes.
COMMISSIONER ERUETI: Yes, okay. And looking at the report, I think it's called the Matahaere report that came out in this process, there's lots of thought about a whanau and collective approach, and you've voiced your ideas about that, but there's also a strong theme for the process to be independent by Māori as well. It may not have just been the Māori participants as well because it wasn't only Māori you were engaged with. It's coming to this question, is this independence. I know you talk about the degrees of independence, who funds it, the composition of the redress scheme Panel, adjudicators, if you like, but to your mind the process at present, to what degree do you think it is independent?
A. I think it depends on what you mean independent from whom and for what reason? Currently, MSD has no significant practical operational delivery functions, in terms of child

welfare outside of the general running the benefit system, providing some housing support, which is in some ways more household focused but actually takes children into account. The specific functions that we have that relate to children in an operational sense are developing the independent —the Independent Children's Monitor function for the Oranga Tamariki system which is we're setting up an in principled decision the current government made —sorry, the government before the election, current government, is that will transition to the Children's Commissioner at some point in the reasonably near future and we have run an accreditation service for a range of different providers. In that sense, MSD now has no major functions in terms of the vulnerable children system, so in that sense the function is separate from departments like Oranga Tamariki that actually provide those functions. Obviously, it's still part of the Crown and MSD has a long history in terms of the redress process and being a successive agency at some points has been responsible for the vulnerable children system. So, there may be a perception about whether MSD is really independent in that sense and also, as I said, we are still part of the Crown and subject to government policy.

COMMISSIONER ERUETI: Yeah. As the claimants put it in their Matahaere report, their perception is you're both Judge and jury.

The last thing I wanted to ask you about in terms of time, it doesn't seem to me there's been a lot of external evaluations of the redress scheme, the HCT redress scheme. There's Sir Rodney's report I think around about 2010 and then you mentioned recently just before the CSRE evaluation?

A. That's the Research Evaluation Unit in MSD, so that's separate from the function but it's not an independent report. And then there have been reviews by KMPG and Allen + Clarke but those were commissioned by MSD so not separately commissioned reports by agencies outside MSD working for us.

COMMISSIONER ERUETI: Even looking at the Terms of Reference themselves, there just seems to be constraints, it seems, with what they're able to comment on?

A. To put that differently, I think, if I think of the Allen + Clarke report and KMPG report, they are focused on how to make the current system work better, how do you modify it to work better? Not asking some more fundamental questions like should it be delivered by somebody else but actually, there would have been no particular mandate for Ministers to explore the question at that point, I would have thought, in terms of the Historic Claims Team approach to that.

COMMISSIONER ERUETI: The last question is about the CLAS process. 1100 claimants come forward and give their experience, including their experience in the redress scheme, and we know we have Judge Henwood's report as a result of that. But I wondered whether MSD, the HCT team itself had looked at those accounts as a means of getting a sense of reforms that could be made with the HCT process?

A. My understanding is they did but actually, it's probably better to ask Linda that question in terms of how they use the report.

COMMISSIONER ERUETI: Okay, thank you, Mr MacPherson.

CHAIR: You will be relieved to know that I have no questions and all I need to do, and if there's nothing arising?

MS JANES: No.

CHAIR: All I want to do is thank you sincerely on behalf of the Commission and Inquiry team for being prepared to sit there for a day and more answering questions. It's much appreciated and it will be very helpful in helping us reach the very difficult recommendations that we're going to have to. You have carefully underlined the difficulties, so we have listened to those carefully and

appreciate your views, so thank you very much for your evidence.

A. You're welcome.

CHAIR: I think we now —

MS JANES: That is the end of the day.

CHAIR: That is the end of the day.

(Closing karakia and waiata)

Hearing adjourned at 4.57 p.m.