ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter of	The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes and Ms Danielle Kelly for the Royal Commission
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	29 September 2020

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25 **Lunch adjournment from 12:54p.m. to 2:19p.m.**
26 **CHAIR:** Afternoon Ms Janes.
27 **MS JANES:** Evidence this afternoon is to be given by Ms Sonja Cooper and Ms Amanda Hill.
28 We'll start with the affirmation.
29 **COOPER LEGAL – SONJA COOPER AND AMANDA HILL**
30 **CHAIR:** We will. If I deliver one affirmation and get a double response, that I think would be
31 adequate. Do you both solemnly, sincerely and truly declare and affirm that the evidence
32 you will give before this Commission will be the truth, the whole truth and nothing but the
33 truth?
34 **MS COOPER:** I do.

1 **MS HILL:** I do.
2 **MS BEATON:** Thank you.
3 **MS JANES:** Can we start your evidence by having you state consecutively your full names?
4 **MS COOPER:** Sonja Maria Cooper.
5 **MS HILL:** And Amanda Lee Hill.
6 **MS JANES:** You've prepared a joint statement dated 27 January 2020?
7 **MS COOPER:** That's correct, yes.
8 **MS JANES:** And a reply statement 6 March 2020?
9 **MS COOPER:** Yes.
10 **MS JANES:** And you confirm that the evidence is true and correct to the best of your knowledge
11 and belief?
12 **MS COOPER:** Yes.
13 **MS HILL:** Yes.
14 **MS JANES:** And you're also relying on evidence that you gave at the contextual hearing jointly in
15 October 2019?
16 **MS HILL:** Yes.
17 **MS COOPER:** That's correct.
18 **MS JANES:** And at that point, and it may well have changed by now, but you indicated that you
19 had settled approximately 1,100 claims, there were 1,250 clients with approximately 1,400
20 open files, so you're giving collective evidence on the experience of some over 2,500
21 claims.
22 **MS COOPER:** And that will have increased since then. I don't know whether to say sadly, but
23 the reality is our client numbers have jumped significantly and every time there is publicity
24 about the work of the Royal Commission, our client numbers increase. And we have also
25 settled more claims, but I think it's the reality that our client group numbers keep growing.
26 **MS JANES:** And just before we proceed with your evidence, in terms of the lawyers available to
27 claimants who are trying to seek redress for historical abuse, can you tell us the availability
28 within the legal pool?
29 **MS HILL:** There are very few, if any, other lawyers outside of Cooper Legal who are willing to
30 do this work. There used to be one or two, but recently no others have had capacity to do
31 historic claim work. We appear to be the only firm doing this work unfortunately.
32 **MS COOPER:** And I think the other limiting factor is Legal Aid. We have made a conscious
33 decision to work through Legal Aid, but many lawyers will not work with Legal Aid
34 because the pay rates are really poor. So we've made a conscious choice that that's the

1 proper thing to do, but many lawyers won't.
2 **MS JANES:** And just for the Commissioners and anyone who is listening to the evidence, in
3 terms of the - you have the brief of evidence prepared or the two briefs of evidence
4 prepared by Cooper Legal. We're going to approach the taking of evidence as if that is all
5 read and we will be taking it in topics. So I will refer you generally to where in the brief
6 the paragraphs are that we are highlighting, but we will be doing it in a more discursive
7 style.
8 **CHAIR:** Very well. And I can assure both of you that we have read your evidence carefully.
9 **MS JANES:** Thank you. So before you go to the body of your evidence, at paragraph 952 you
10 quote Ellis J in the *J v Attorney-General* 2018 decision, noting that was possibly the first
11 judgment to explicitly acknowledge the vulnerability of those taking claims for abuse in
12 care. And you indicated Her Honour said, "Both individually and as a group the plaintiffs
13 in these proceedings are undoubtedly some of the most vulnerable people in New Zealand
14 society". Why was that such an important comment to highlight?
15 **MS HILL:** Because this was really the first time any arm of the State acknowledged that people
16 who had been in care were vulnerable. It certainly wasn't something that was really
17 reflected in any Crown statements about historic abuse claims, and it wasn't a clear
18 acknowledgment from the judiciary either. So to have this statement from Ellis J was really
19 a reflection of what we'd been saying for a long time, that on the whole, people who had
20 experience in State care were poor, they experienced poor health, including poor mental
21 health, alcohol and drug abuse. They generally have trouble finding housing, they may be
22 beneficiaries or prison inmates. Those collective things mean that they are, as a group,
23 vulnerable. Unfortunately, that's not really reflected in the way that the State redress
24 processes have treated them.
25 **MS JANES:** And we'll come back to that when we come to the processes. And then at paragraph
26 1020 you outline two concerns about redress schools and compliance with domestic and
27 international human rights instruments. And just paraphrasing your evidence, you have
28 said that none of the redress schemes, but in particular MSD, Ministry of Social
29 Development and Ministry of Education, appropriately acknowledge breaches of
30 fundamental human rights or provide appropriate remedies for those breaches. And the
31 redress schemes themselves are in breach of New Zealand's obligations under international
32 human rights instruments. What would you like to say further about those concerns?
33 **MS HILL:** Just touching on that first point, so we're quite focused on, when we talk about our
34 fundamental human rights instruments. A particular one is the Bill of Rights Act 1990. We

1 have a habit of calling it the BORA, but we'll probably use those terms interchangeably.
2 The redress schemes don't acknowledge when a breach of rights has taken place under the
3 Bill of Rights Act. While sometimes MSD will compensate for breaches, there's no
4 transparency about when that happens or how much that compensation is, and there's no
5 reporting about those breaches to international tribunals. And there's a lot to unpack in
6 there and I know we're going to get into that, but that's the gist of it. MSD is the only
7 process which attempts to deal with the Bill of Rights, the processes run by the Ministry of
8 Education, the Ministry of Health and others don't address the Bill of Rights at all.
9 **MS JANES:** And your evidence states that both MSD and the Ministry of Justice have publicly
10 stated New Zealand laws are compliant with the UN Convention on the Rights of the Child
11 and also the UN Convention Against Torture. But you don't agree?
12 **MS HILL:** No.
13 **MS JANES:** For what reason?
14 **MS HILL:** So the United Nations Convention on Rights of the Child, we have a habit of calling
15 that UNCROC, New Zealand ratified that convention in 1993. But since then the Ministry,
16 or CYFS as its predecessor was known in that timeframe, used third party providers to care
17 for children where there were sustained breaches of the rights under the UN convention,
18 and where MSD has distanced itself from its obligations to be responsible for those
19 breaches.
20 And when I talk about breaches of the UN Convention on the Rights of the Child,
21 it's things like the use of secure units and time-out rooms when the law didn't provide for
22 that. Failures to provide fundamental entitlements like education and healthcare and a
23 settled family life and obviously physical and sexual assaults. And a lot of the other
24 experiences of people in care after 1993, which was when that Convention was ratified.
25 So we don't think that the redress schemes acknowledge those separate breaches of
26 the convention. And that when you sign up to a United Nations convention it's important
27 that you not only adhere to it, but you acknowledge when you breach it. That doesn't
28 happen in these redress schemes.
29 The second United Nations convention that we want to talk about was the
30 Convention Against Torture, or UNCAT as it's sometimes called. And the Convention
31 Against Torture makes provision for obviously protection against torture and cruel and
32 disproportionate treatment or punishment. But for the purpose of this part of the
33 conversation, the redress schemes themselves are a breach of that convention and it's a
34 breach of article 14 of UNCAT, of the convention, which provides - I'm going to read it

1 because I always get it wrong.
2 "Each State party shall ensure in its legal system that the victim of an act of torture
3 obtains redress and has an enforceable right to fair and adequate compensation, including
4 the means for as full rehabilitation as possible. In the event of the death of the victim as a
5 result of an act of torture, his dependants shall be entitled to compensation".
6 So the convention provides that countries that are signed up to the convention will
7 have redress processes in place that do those things, that they provide the full rehabilitation
8 and redress in a very particular way. The State processes that we have don't meet those
9 requirements in article 14.
10 **MS JANES:** Thank you. And just for reference for the transcript, further evidence can be found
11 at paragraphs 1063 through to 1077 of the main brief of evidence.
12 You then in your reply statement at paragraphs 33 to 39 talk about the Treaty of
13 Waitangi being integral to this discussion. And you refer to the Crown stating redress
14 processes have been or currently are formed in accordance with Te Ao Māori or reflect the
15 principles of the Treaty of Waitangi. What comments do you make about that?
16 **MS HILL:** In our view, no redress process currently reflects the principles of Te Tiriti and there is
17 very little to indicate any meaningful engagement with those principles. I know
18 Mr McPherson, in his evidence for MSD, refers to a consultation in 2006 with nine Cooper
19 Legal clients and six of those clients were Maori, and he says that was a consultation
20 focused on Te Tiriti.
21 But the reality is that that consultation was really about process and the fact that a
22 significant proportion of those people were Māori was actually just reflective of the
23 demographic. I don't believe the consultation ever turned its mind or turned the
24 conversation to the issue of redress being consistent with Treaty principles or tikanga.
25 When you look at the redress processes in place, there's having a process that
26 reflects Te Ao Māori or tikanga, but also having a process that responds to loss and harm.
27 And there is nothing in any State process that addresses the loss of culture, there is nothing
28 that addresses loss of language. The inability of a child to go to kōhanga, the separation
29 from iwi, hapū, there is nothing in any redress process that responds to those things.
30 So not only is the process lacking, but the response to harm is lacking. And to my
31 mind, and you know, at the contextual hearing you heard from people who are much more
32 qualified than I am to talk to you about tikanga and Te Ao Māori, but to my mind the
33 Treaty is about partnership and equal partnership. And while you have one party that
34 makes all the decisions, holds all the information and holds all the power, then I don't know

1 if you can ever really act in a way that reflects those principles.
2 And what it also, I think when we talk about Te Ao Māori, and again there are
3 people who can have much more in-depth conversations than me, but when you want to
4 think about a more holistic redress process, and I think people have talked about this a bit,
5 we want to talk about restoring someone's mana and looking at someone's wairua and their
6 hauora and that whole person and these processes don't address those things. And so I
7 think there is a real lack of not just meaningful engagement with Treaty of Waitangi
8 principles, but a response to the loss that a significant proportion of survivors have
9 experienced, and there is an engagement with some really valuable learning and the holistic
10 approach that could come from better engagement with Te Ao Māori.
11 **MS JANES:** Taking it in periods, because processes have evolved over time and perhaps
12 enlightenment about the importance of Te Tiriti and tikanga have also evolved over time. In
13 terms of your experience, but particularly your claimants' experience, has there been a
14 responsiveness or an ability to be offered something that was Te Ao Māori compliant and
15 culturally appropriate at any stage, and take it through stages?
16 **MS HILL:** The first time that the redress process and the MSD redress process was written down
17 was in about 2014. And there's nothing in that handbook, in the guidance, and I think we'll
18 probably come to the detail of that later, that deals with the Crown's Treaty obligations.
19 And as we come through the different iterations of the Crown process, there's no real
20 meaningful engagement there. Like there are in a lot of documents, there are certainly
21 references to the Treaty. But in the practice of it, in an on-the-ground dealing with redress,
22 there is certainly no reference to it up until 2018. And I understand that there was, certainly
23 at least with MSD, and I'm really only talking about MSD at this stage, there was a claim
24 lodged in the Waitangi Tribunal in relation to redress processes. And that triggered a
25 consultation in late 2018 about how the processes could be more responsive to Māori.
26 And I know that since then there have been proposals about holding meetings on
27 marae and having a more engaged process. But to date we've not seen any change in the
28 way our clients are approached. I cannot speak to whether self-represented people have
29 had a different experience, but there's been no sort of engagement around that so far.
30 **MS JANES:** And have there been any other accommodations specifically targeted to perhaps
31 Māori or other clients?
32 **MS HILL:** Not that I've seen, no.
33 **MS JANES:** So going to our next topic which is access to justice through the civil court system.
34 Can you start please at paragraph 7, which is under your heading "Preliminary barriers to

1 establishing a claim".
2 **MS COOPER:** So do you want me to read that paragraph?
3 **MS JANES:** If you could read paragraph 7 thank you.
4 **MS COOPER:** "It remains the case that very few cases in New Zealand, whether against the State
5 or non-State parties, have yet proceeded to a full trial. The *White* case referred to in the
6 Contextual hearing and in our evidence below, was the last trial of this nature. Because of
7 that, there have been few cases in New Zealand addressing key issues, including the scope
8 of any duty of care, vicarious liability, non-delegable duties, fiduciary duties and causation
9 issues. Nevertheless, as will be seen below, these issues continue to cause barriers for
10 New Zealand plaintiffs."
11 **MS JANES:** And in that paragraph you've mentioned a range of legal principles which lawyers
12 amongst us will be very excited about, but the rest not so much. So what we're going to do
13 is anyone who wants to read it can read the brief but we'll just go through it in relatively
14 layperson's terms. So firstly, the duty of care, which you have at paragraphs 8 and 9.
15 **MS COOPER:** So stepping back, most claims still in New Zealand courts are in tort, which is a
16 particular area of law and again, negligence is the most common cause of action, again
17 that's another term of law, so what we're saying is about liability. And to establish
18 negligence you have to prove that a duty of care is owed.
19 In this - what that means is that a duty of care arises when one party accepts or the
20 law imposes responsibility in respect of another person or property. In these cases, there
21 are two contexts in which a duty of care arises. First, when a child comes to notice, so
22 that's when there are notifications that a child is being abused or neglected, and that can be
23 either at home, typically at home, or it may be in some other context. And then once they
24 are taken into care, another duty of care and an on-going duty of care arises to keep them
25 safe from harm. But I think the important thing is before any liability is owed, there has to
26 be a duty of care which is owed.
27 **MS JANES:** And then our second legal principle is vicarious liability.
28 **MS COOPER:** So I've already - obviously we've talked a bit about vicarious liability already but
29 not really unpacked what that means. To put that in layperson's terms, it's when one person
30 is legally responsible for the acts of another person and usually that will be an employee;
31 not always. In New Zealand we're a bit unusual in that it can sometimes be an independent
32 contractor, but usually it will be an employee.
33 This is important not only for legal reasons which Amanda will explain about the
34 limited scope of liability for the Crown, but also too because most people who abuse

1 children will be caregivers, so they will be employees or they will be independent
2 contractors or something of that kind like a foster parent, for example.
3 We've explained that that becomes a barrier because often the State will deny that it
4 is vicariously liable for the acts of others. When it's an employee, that is reasonably clear.
5 But for example, there might be an argument about that if the abuse, for example, took
6 place in that staff member's home, and the State might say well that's got nothing to do with
7 us.
8 So there are some very big barriers. And then of course where it's not an employee
9 and it's an independent contractor, and as Amanda explained, so many children are cared
10 for outside of the State, so it's a very big issue. The State will often deny it has any legal
11 responsibility.
12 **MS JANES:** And later in your evidence we will come to that third party liability issue and some
13 examples. So for the moment, the next one is non-delegable duties which is paragraph 12
14 to 14.
15 **MS COOPER:** So that's quite similar to vicarious liability. Essentially again, it's where one
16 person or organisation is made responsible for what happens to another person, even if they
17 delegate their responsibilities to a third party. So it's about delegation of the duties to
18 someone else, where you are principally responsible for carrying out those duties.
19 So if I can give you an example of that, we would say that when a child is placed
20 into the custody of the Department, whatever that is, but then the Department places them
21 in the care of another organisation, or a foster parent for example, we would say that that
22 would be a non-delegable situation, because the responsibilities of custody still lie with the
23 Crown, or the Chief Executive of Oranga Tamariki or CYFS, but they've delegated those
24 responsibilities to another organisation. I have to say it hasn't been a very popular cause of
25 action so far in New Zealand, or elsewhere to be honest.
26 **MS JANES:** And then we move on to fiduciary duty, which is paragraphs 15 to 17.
27 **MS COOPER:** So again, that is where there is a special relationship between two people.
28 Typically, where there is an obligation to keep somebody safe or specifically safeguard and
29 protect their rights and interests. Typical fiduciary relationships are lawyer and client, I
30 think doctor and patient often will be a fiduciary relationship. So it's usually looking at a
31 person who is particularly vulnerable and reliant on another person to protect them and
32 their rights, that will be where a fiduciary relationship arises.
33 And in the context of these cases, it will be accepted that there will be a fiduciary
34 relationship where a child is a State ward, for example, or is in custody. But what we have

1 struggled with is actually proving any breach, because typically in these cases it's focused
2 on whether there is a conflict of interest. And you might be required to prove that, for
3 example, a particular decision made has been financially motivated. We argued that in the *S*
4 case, which I'll talk about later, where we said that they hadn't made these children a State
5 ward because it would have cost more to do so. It's actually really difficult again to prove
6 that, and other Commonwealth cases have been equally unsuccessful.
7 So as I say, you would think this cause of action would be successful because this is
8 a particularly vulnerable group of children typically, or vulnerable adults. People like Paul
9 who we heard about this morning. But the law hasn't provided a remedy there yet; and
10 probably never will. The only country where it's had any traction is Canada so far.
11 **MS JANES:** And we will return to the *S v Attorney-General* case and discuss a little bit later. So
12 at paragraph 17 you say it's almost impossible to prove a breach. What does that mean in
13 practical terms for claimants seeking redress?
14 **MS COOPER:** Well I think, as you've already seen so graphically illustrated with Earl White and
15 some of the other cases and we'll come on to discuss more of those cases, it means they're
16 left without a remedy. So even if the court makes findings that terrible things have
17 happened, and they have been assaulted, that there have been breaches of duty, they are left
18 with nothing, except very traumatic experiences.
19 **MS JANES:** And does that relate to both monetary redress and non-monetary redress?
20 **MS COOPER:** Yes.
21 **MS JANES:** Turning to paragraph 42 of your reply evidence, you say the evidence of the Crown
22 repeatedly narrows the scope of the duty of care owed to claimants. Can you explain why
23 you say that?
24 **MS COOPER:** Well I was concerned, I have to say, reading the Solicitor-General's evidence
25 where, for example, there is a suggestion that the law in New Zealand is unsettled around
26 the liability for foster parents. In my mind, our Court of Appeal made a very firm decision
27 about the liability of foster parents in *S v Attorney-General*, which was a case in which
28 obviously I was involved as was the Crown on the other side.
29 And the Court of Appeal, and it was five judges on that bench and at that stage it
30 was our highest court, was very clear that in New Zealand the State will be liable for abuse
31 perpetrated by foster parents when they have placed a child in care. And what is really
32 unusual about *S v Attorney-General* is that actually *S* and his three brothers had no formal
33 status at any time. They were never taken under guardianship, they were never State wards,
34 they were never in custody, they were under what we call an informal status of preventative

1 supervision. So that was where the State recognised that there was a financial need for the
2 State to provide support.
3 And so these poor children were taken away from their family because they couldn't
4 care for them, placed into the care of two other people who were going to adopt them but
5 never did, and they separated. *S* went into care at nine months and throughout his whole
6 life until he became independent, he had no formal status. He spent his whole life under
7 preventative supervision, but the Court of Appeal still found very clearly that the State had
8 accepted responsibility for him, had made all the relevant decisions about him, had placed
9 him into foster care, had left him in that foster care placement without status and had
10 funded that placement. There were some issues around exactly what that relationship was,
11 is it an independent contractor, is it kind of like an employee, because foster parents it's a
12 difficult relationship to put a nice label on. But even still, the Court said that the Crown is
13 vicariously liable for what happened, for the abuse that *S* suffered in that family.
14 So I - it really worries me, to be honest, to have the Solicitor-General now many
15 years down the track, that decision was in 2003, saying that the law is unsettled in that area.
16 Because I would hate to think that we are going to go around the track again at some point
17 in respect of the Crown's liability for foster parents.
18 And the other aspect that I agree with, which is still unsettled but don't think it
19 should be, is the area of the NGOs or the various organisations that we've already referred
20 to that children are often placed in.
21 **MS JANES:** This is where we go to the State liability for third parties which is paragraph 18 to
22 21.
23 **MS COOPER:** That's right, yes. So Amanda's going to pick up.
24 **MS HILL:** I guess it's useful at this point to step out what we mean and often we use a short
25 phrase like, we call them the section 396 providers. I just wanted to step out a little bit
26 what that means. I think it's useful to understand what we mean when we talk about that,
27 when we talk about liability.
28 So since 1989 there's been a section in whatever legislation, the Children and
29 Young Persons Act, Oranga Tamariki Act as it is now, that allows CYFS, MSD, to approve
30 an organisation to care for children. And that's under section 396, so that's why we use that
31 phrase.
32 But what happens is that there's incorporated societies normally, or charities, which
33 put forward a plan to MSD and say please approve us as an organisation. And there is a
34 detailed assessment of just about everything in that organisation that touches on the care of

1 children. Have you got the right policies, have you got the right, you know, health and
2 safety, have you police-vetted your staff members, all of these sorts of things. It's supposed
3 to be a fine-tooth comb. It's usually done on the papers. Sometimes the approval was
4 given without ever visiting the organisation.
5 So there's the approval under section 396 and you sort of get the stamp of approval
6 which is sometimes reviewed every year or every few years. But that's only the first step.
7 Then CYFS, or MSD as it became later, has to contract with that organisation. So there's
8 the underlying approval and then there's the contract for services which says we'll pay you
9 each night. It's called bed nights, for caring for this child who may be in our custody or may
10 come to you through a Youth Court order.
11 There are hundreds of section 396 providers, the Whakapakari programme on Great
12 Barrier Island, Moerangi Treks which was run out of Rūātoki, Heretaunga Māori Executive
13 which lasted until 2010, Open Home Foundation and so on. Lots and lots of organisations.
14 They have a huge role and have had a huge role since 1989 or earlier sometimes in caring
15 for our tamariki.
16 And so this question arises where you have an incorporated society or a separate
17 organisation and MSD is paying the organisation to care for children that it's supposed to be
18 looking after. And at times the Ministry has said, Ministry of Social Development has said,
19 we're not necessarily responsible for what happens on those programmes because there's a
20 contract between us.
21 And that arises because in normal law when you have a contract with someone, say,
22 to fix your TV, then there's no link there and you can't prove that vicarious liability that
23 Sonja was talking about because they're not an employee, you're paying them for a service.
24 But what we say is that this has to be different, because of the approval scheme, because of
25 the really tight controls, bearing in mind that some of those controls failed and they failed a
26 lot of the time over the years, but they're still there.
27 So it's not like a contractor where you're getting someone in to fix your TV or fix
28 your car. You are paying an organisation to do your core job, you are paying another
29 organisation to care for children. And so there's the legal aspect, should MSD be liable for
30 their actions? And there's also a policy aspect there, you know, at what point can a
31 Government agency contract out its core job and say it's not responsible for it.
32 **MS COOPER:** Could I just add, I think that was exactly the issue that we were talking about this
33 morning with Paul Beale as well, that the Ministry of Health also has contracted out, we
34 would say, of some of its core obligations to others. It runs very similar contracting

1 programmes, again auditing can step in temporary managers, can revoke approval, and
2 ultimately make the decisions about placement and removal, so very similar. And we know
3 that it is a core issue for all of the Crown agencies.
4 **MS JANES:** And this is not a new state of affairs. If we can go to document 1 which is a Crown
5 document, a policy document from 2004, and if we can look at paragraph 92. And when
6 that comes up on your screen, if we can call out 92, if you can perhaps, one of you, read
7 that.
8 **MS HILL:** "The Department of Child Youth and Family services has experienced a growth in the
9 number of claims against the Crown arising from allegations of physical and/or sexual
10 abuse while in foster or residential care. There has been a significant increase in requests
11 for historic client files from solicitors. Coupled with the publicity from recent allegations
12 of abuse in Salvation Army children's homes, a historic claims unit has been established in
13 the Department to process requests for information and to assist in the investigation and
14 management of claims".
15 **MS JANES:** Why is this particular passage relevant to your discussion about liability for third
16 parties?
17 **MS HILL:** Because this relates to literally the birth of the historic claims team. It's had various
18 names over the years, but a series of historic claims were made against the Salvation Army
19 or in relation to Salvation Army claims. And at that time CYFS acknowledged that it had
20 some liability or responsibility for children it placed in Salvation Army homes and set up
21 its own claims unit because, if I can recall, the Salvation Army were saying to people you
22 were in CYFS care, you should go and see them. And there's a tacit acknowledgment that
23 CYFS had responsibility for children placed in this third party organisation.
24 **CHAIR:** Ms Janes, could I just ask you to tell us what that document was? It was a small extract.
25 **MS JANES:** Yes, it's a policy document, so it's Crown tab 7 and it's POL (04317).
26 **CHAIR:** It's really just what the nature of the document was that I'm -
27 **MS JANES:** Yes. It's a Cabinet policy committee paper.
28 **CHAIR:** Right, thank you.
29 **COMMISSIONER ERUETI:** Sorry, can you repeat the reference number for me? Thank you.
30 **MS JANES:** Absolutely, so it's a Cabinet policy committee paper, it's titled POL (04317) and it's
31 found in the Crown bundle tab 7.
32 **COMMISSIONER ERUETI:** Thank you.
33 **MS JANES:** We will be returning to that document later, there's a number of other matters in that
34 document that we'll -

1 **CHAIR:** It's just helpful to us if you tell us what the document is that we're looking at a tiny
2 portion of.
3 **MS JANES:** Certainly, thank you.
4 Returning to liability for third parties, what would you say the state of the law was
5 at this particular point in time?
6 **MS COOPER:** Yeah, I think complicated is probably right. When a church case came before the
7 court of - the High Court and the Court of Appeal, it was interesting that both courts
8 distinguished State liability from church liability. So in *H v Archdiocese of Wellington* -
9 sorry *A v Archdiocese of Wellington,* there was an argument that Catholic Social Services,
10 which had made decisions about placing this young girl with caregivers where she had
11 suffered sexual abuse, there was a vicarious liability argument.
12 And there the Court was very clear to distinguish between the State's liability,
13 because that's based in statute, and the Catholic Social Services liability which was not,
14 saying that ultimately the parents were still liable in terms of the decision-making, which
15 I found surprising because the parents had put their children in an orphanage where they
16 had left them and actually it was the Catholic Social Services and the orphanage that were
17 making all of the decisions in relation to these children.
18 So that's interesting to me. The fact is that our law has remained reasonably
19 stagnant, but because there have been so few cases. Whereas the Commonwealth generally
20 has moved significantly ahead and there have been, and continue to be, many cases,
21 particularly in Australia and more so in the United Kingdom, that continue to develop
22 vicarious liability in child abuse claims and vulnerable adult claims. And if we were to
23 follow them, which I don't know, I have to say, given our experiences to date I don't know
24 whether we would, but if we were to follow what the Commonwealth has done, I would
25 feel reasonably confident that at least vicarious liability should follow for NGOs, these kind
26 of 396 providers. Yeah, hard to say.
27 **MS HILL:** I'd have to add too that it really does depend on the time a person is in care. Because,
28 you know, we've just explained the section 396 providers. I mean from as - I think the
29 Infants Act 1908, the State is licensing foster homes. That's one of the reasons that CYFS
30 thought it was, you know, that it might have some liability in terms of the Salvation Army
31 was that the State licensed orphanages for pretty much all of our actual history of having
32 any form of institutionalised child care. There is a licence for orphanages. So a similar sort
33 of approval scheme just not quite as detailed I think from 1908.
34 **MS JANES:** And turning to the evidence of MSD Linda Hrstich-Meyer, this is the first statement

1 of Ms Hrstich-Meyer at paragraph 312, she takes issue with Cooper Legal's brief at your
2 paragraph 412d, 417 and 1059. She says that there may be a misunderstanding about the
3 custody orders and guardianship orders. It says:
4 "The Ministry included in consideration of its offer any allegations against that
5 provider. It is correct that some claimants placed with such providers only received a
6 $5,000 offer but this was not because they had been placed with a provider. The focus of
7 the Ministry's assessment was on the frequency and severity of abuse alleged so those who
8 received a $5,000 offer had less serious claims than others in the wider group"
9 How do you read that and what comment would you make?
10 **MS COOPER:** First, to put that in context, the discussion is about the Fast Track process which
11 we'll talk more about, where it was kind of a sniff test. So just to clear a very big backlog
12 of claims the Ministry introduced this process to clear I think about 750 claims that had
13 been held up. And $5,000 was the lowest offer that a person could get, the highest offer
14 was 50,000. And we said in our evidence that we were concerned that there had been
15 people who'd been offered $5,000, and that the only reason we could really understand for
16 that was because their claims related to a third party programme, and most of these clients
17 had been on the Whakapakari programme, where they had alleged abuse.
18 Reading Linda's evidence, she suggests that if they were under custody, a custody
19 order, then they would have been treated differently than those who had no status. So I
20 have to say I went and checked back, because we've got really good records of this, and
21 I found very quickly at least two clients, and there would be more, who had $5,000 offers
22 where the distinguishing feature was they were on the Whakapakari programme. And their
23 allegations were just as serious as people who got higher offers.
24 So the only thing was that they had been on the Whakapakari programme, but both
25 these young people had been in CYFS' custody at the time and made very serious
26 allegations about what happened to them.
27 So that evidence, in my view, is patently wrong and we can easily provide examples
28 to show that that is wrong. It just could not be justified on the basis that the allegations
29 were at a lower level. They weren't. They were serious allegations and the only
30 distinguishing thing was that they had been on the Whakapakari programme.
31 But as I said, the two that I found very quickly had both been in the custody of the
32 Chief Executive when they had been placed there.
33 **MS JANES:** And we will return to some of those other issues a little bit later and tease those out
34 further. You then also identify other hurdles, and then get to the issue of causation. So

1 again, in lay person's terms, what would you say that is about?
2 **MS COOPER:** All right. So in negligence, to actually get any damages you have to be able to
3 draw a connecting line between the abuse that's happened and any damage that you have
4 suffered. That will have to have been diagnosed by a psychiatrist or a psychologist and it
5 has to be at a level that is, you know, high enough to give you some money. And with this
6 group of clients, and I think you've already heard that from the survivor evidence that
7 you've heard, this can be really challenging because the very fact is that all of these people
8 came from abusive or neglectful home environments, because that's what got them taken
9 away from home in the first place. So you take away already damaged, vulnerable people
10 and then you take them into care where they suffer more harm and abuse. And that may be
11 in multiple placements, again, you've heard some people went through multiple placements,
12 Chassy was talking about, I think, 30 different homes.
13 So trying to unpack and connect, draw that connecting line between a particular
14 abusive act and the harm that you might have, so say post-traumatic stress disorder or
15 depression or conduct disorder or whatever, it might be very, very difficult for an expert to
16 untangle that. Because in New Zealand the way our law has developed, you have to show
17 that it is not only a material cause, but that it is a material and substantive cause of your
18 harm.
19 And I think, you know, when we were arguing these cases, we were saying well,
20 Australian and English courts, which have to deal with these claims all the time because
21 they don't have an ACC system, they've already recognised how difficult it can be to
22 untangle all of this, you know, abuse and its causes. So they had a much more, well, they
23 recognised it might be multi-factorial and said if you can show it's a material cause, that's
24 enough. And part of that development came about from the asbestos cases, for example,
25 where you had to prove where you got those asbestos-related illnesses about causation
26 there.
27 So it was recognising the difficulties around that and making it far less difficult as a
28 hurdle, but in New Zealand it still remains a very difficult hurdle. I'd like to think now we
29 know more, but we have to call such complex evidence. We have to call not only
30 psychiatrists but we have to call experts on the way that the brain develops and explain how
31 harm is caused in specific contexts, like if you're isolated or if you're kind of taken away
32 and in a place that it's all very secretive like a lot of the institutions were, or if you're
33 sexually abused or if you see bad things happen to you, we have to explain now how all of
34 those individual factors cause harm.

1 And I never thought, when I first started doing this, that I would ever have to go to
2 that sort of minute level of detail to establish harm. And so as I say, it's become much more
3 complex. We have to call more expert evidence, we have to disentangle all of that as best as
4 possible. And it compartmentalises things, it fails to acknowledge this whole person who,
5 let's face it, these people are the sum of their experiences, and yet we're forced into this
6 kind of boxing their experiences into compartments of harm and, you know, compartments
7 of liability which we'll talk more about, which I just think is demeaning and it's just a way
8 of basically carving off and saying nah, not going to accept that, nah not going to accept
9 that, I'm not responsible for that.
10 So yeah, it is still a very, very difficult issue in New Zealand. Although as I say, I'd
11 like to think, now that we know more, and I think now that that would include the judiciary.
12 Now that we understand more about the way in which the brain develops, and harm can
13 happen at various times in our life, including our teenage years, that that will be not such a
14 hurdle, but I don't know.
15 **MS JANES:** Just building on that slightly, you've talked about the fact that we know more now
16 about the neuroscience of trauma, but what do we also know about the delay that many
17 experience and the Commissioners have heard about the period before they disclose?
18 **MS COOPER:** So what we learned in the Australian Royal Commission, and I think that's
19 equally applicable here, is that on average it takes 22 years for a survivor of sexual abuse,
20 and that was the only abuse they were looking at so that's why they could only comment on
21 sexual abuse to report. So if you look at that as being the average, that's a very long time if
22 you have timeframes and obviously we talk more about the Limitation Act.
23 But if you've got a very short timeframe to bring a blame, and for a survivor that's
24 the average length of time it will take before they understand enough about that link, or
25 they feel able to actually tell someone else about that, or they either have support or they
26 feel able themselves to come to a lawyer and say "I'd like you to help me bring a claim".
27 So they're, you know, when you think about that and you've heard about some of
28 those barriers in the last two weeks, just how difficult it is to disclose, how often it takes
29 years to be able to tell your story, and I'm not confident with some of our clients. I mean
30 Kerry's evidence yesterday, he's still telling us things that happened to him and he's been a
31 client for16 years now and he's still telling us things that happened to him.
32 So yeah, I think we all have to bear that in mind, and about how you need that kind
33 of trusting relationship to disclose. But also too, you've got to understand that what
34 happened to you was wrong and that you have a legal remedy for that. And I mean for

1 many of our clients, and I think that's still the case today, they were brought up in quite
2 abusive homes, you know, where being cuffed and kicked up the bum was normal and then
3 they went on to experience that and possibly still experience that now in care, and they just
4 thought it was normal. They thought it was allowed. I mean Earl said that all the way
5 through, "I thought they were allowed to do that to me. I thought that the staff were
6 allowed to kick me and slap me".
7 And I, you know, that's the truth, if that's what your life experience is, that's what
8 you understand is allowed. So, you know, there are all these barriers to being able to report
9 and to recognise that you have a legal remedy, even to know that what happened to you was
10 wrong.
11 I remember too in the early days, I was acting for a man who had been sexually
12 abused and he had been sexually abused in his family in an adoptive situation, and it had
13 become normal to him, like he actually thought that that was the way that family members
14 interacted with one another. And I remember the High Court Judge just being incredulous
15 that that was his evidence, that - "But Ms Cooper, you know, that just cannot be so". But
16 that is many of our clients' reality and I think sadly it is many of many children's reality to
17 this day. So you've got to recognise that something that happened to you is actually wrong.
18 **MS JANES:** And taking those two concepts, the moving on and the delay in recognition, given
19 that causation, as you said, is determined effectively by psychiatric evidence,
20 superimposing those on the normal timeframe for a psychiatric assessment, is that another
21 hurdle in your view, or what comment would you make about that?
22 **MS COOPER:** I think it's absolutely another hurdle. You know, I mean these assessments are
23 usually two-hour meetings with the person and I mean huge volumes of records. You are
24 talking to a person typically at a point where they've already been engaged with a legal
25 process for a while anyway. Not back at the point, you know, where it's all new. So yeah,
26 it really is another significant hurdle.
27 **CHAIR:** I think we've heard that one report is often not sufficient.
28 **MS COOPER:** That's right, I mean, I think I can think of some litigation that we've been involved
29 in where there've been three reports. I mean there will always, in full scale litigation,
30 there'll always be two reports, there'll always be - the plaintiff will have to be examined by
31 somebody we ask to examine them, because we won't get funding from Legal Aid for a
32 start to take something to trial unless they've been assessed by a psychiatrist and that
33 psychiatrist says we can get through the limitation hurdles and we can show causation and
34 we can show they've got, you know, psychiatric harm. And then of course the Crown can

1 require, can ask the court to require that their expert be appointed and so they will always,
2 if we are heading on a trial track, always be assessed by the Crown's psychiatrist or
3 psychologist as well. So there are at least two, and I think in the *White* litigation, there was
4 a third one, that psychiatrist didn't actually see either of them, meet either of them, but just
5 wrote a report based on the records.
6 So yeah, and that is gruelling. We know that some of those examinations were
7 more like cross-examinations to be honest and our clients often felt more harmed after
8 those. You know, and then obviously had the whole litigation experience still to go
9 through.
10 **MS JANES:** So in teasing out causation in the necessity to establish how the harm occurred,
11 where the harm occurred, you've talked about Donna Matahaere-Atariki who was the Māori
12 consultation facilitator, saying you can't compartmentalise trauma. You talk about it being
13 important particularly now that there is a cross-over between assessment of MSD claims
14 and Oranga Tamariki claims. So balancing the trauma to the claimant of multiple
15 psychiatric assessments versus establishing causation, what would you say to the
16 Commission about where a balance should be struck?
17 **MS HILL:** I think the first thing is if two parts of the State are trying to divide up the harm caused
18 to a single person, they're not going to be using the psychiatric tools. They're going to be
19 sort of doing it very much on a perhaps a liability or a fiscal, a money basis. It will be as
20 crude and as brutal as that. And I worry about what that looks like. Oranga Tamariki
21 hasn't even developed its complaints process yet, so one half of that isn't operational.
22 And so there's no psychiatric report, I'm assuming. I can't see them obtaining one
23 every time we get someone who straddles that 2017 barrier, so after beginning of 2017
24 Oranga Tamariki will deal with claims. So I have a worry that it will become about who's
25 paying what and it will become less about the harm caused and more about the cost without
26 any reference to the psychological or psychiatric harm that's been caused.
27 So I think a well-meaning sort of, you know, the Crown has said that whichever
28 Government - whichever part of the State feels they've caused the most harm, will deal with
29 the assessment. But I'm worried that person will bounce between those two parts of the
30 State. And I also worry that they will ask a survivor to articulate their own harm, and one
31 thing we have learned is that it's difficult to ask a person to say "Tell us how this has
32 harmed you" because, and a psychologist told me this once, a person cannot articulate or
33 envisage an unbroken version of themselves, they can't say "I would look like this if I didn't
34 get hurt". And so to ask someone to, "Tell me how we've hurt you" or "Tell me how much

1 I've hurt you", that's not going to go very well at all, and it's more than likely to cause more
2 harm than do any good.
3 **MS COOPER:** Could I just add to that. One of the things we also have, as of about a month ago,
4 is that if you were abused by a teacher now in a residence then you've got to step that little
5 bit out as well. So that's - you've got to step that bit out now to the Ministry of Education.
6 And I mean I think you could see that with the evidence of Kerry yesterday, you
7 know, just how many different parts of the State and private organisations that we've had to
8 go to on his behalf to get recognition and get some sort of remedy. And I think for our
9 younger clients, who may have been in the care of multiple NGOs as well, you know, it's
10 just a way, I think, of compartmentalising that person, minimising their experiences,
11 minimising the liability, and actually, you know, we know that the processes actually
12 expressly exclude looking at how the person's been harmed. They actually - they will
13 consider what the allegations are about the harm itself, but they actually are not interested
14 in how that's impacted on the person at all.
15 **MS JANES:** And that's a perfect time for us to take a break because we turn to the onus of proof
16 after the afternoon adjournment.
17 **CHAIR:** Thank you very much, we will take a break.
18 **Adjournment from 3.28 pm to 3.46 pm**
19 **CHAIR:** Thank you Ms Janes.
20 **MS JANES:** So the next legal principle that we'll turn to is the onus of proof and what that means
21 for a claimant who's filed a claim in court.
22 **MS COOPER:** So with civil cases, typically it's up to the plaintiff to prove their case and the civil
23 burden is the balance of probabilities. And what that means in very simple terms is that it's
24 more likely than not something happened.
25 What the courts have said is that the more serious the allegation is in a sense the
26 higher the proof needs to be. Which of course makes it really difficult when a lot of abuse
27 particularly is simply not documented. And I think the Sammons sisters who gave their
28 evidence, I think it was Friday last week, just talked about some of those difficulties and
29 that is a really big difficulty when you are dealing particularly with the older claims. And
30 also too in a situation where often anything that was about abuse or wrongful behaviour
31 was not kept on the client file, which we discovered in the *White* trial, but somewhere else
32 on another file completely. And a lot of that material just seems to have disappeared. And
33 that just creates another barrier for claimants, because it's their burden to prove it, it
34 becomes a much more difficult prospect for them to do if records are destroyed.

1 And so often that's an easy out. And particularly in a process that, you know, now
2 both, I think we can say the Ministry of Education and the Ministry of Social Development
3 processes are almost entirely document-driven, and so if something is not recorded then it's
4 denied and it's not taken into account. And as I say, typically that will be the most serious
5 allegations that are being made.
6 With criminal and civil cases, you can prove something happened, even at that more
7 serious level, if you've got other people who can talk about their similar experiences. So
8 that's propensity evidence or similar fact evidence.
9 So in the *White* trial, we called 16 witnesses who had been in the same places at
10 Epuni and Hokio as Earl and Paul. And that's really important because often in these cases
11 now that's going to be the only way you can prove to a court that something, particularly at
12 that serious level, happened. But even still, a lot of the - a lot of that material is either not
13 taken into account, or it takes years for it to be taken into account, and we talk about that
14 later on.
15 But the Ministry of Education process doesn't take into account propensity evidence
16 at all. It gives no weight to similar fact evidence and I think you heard at the very
17 beginning of last week Cheryl talking about James' experiences at Kelston and then he was
18 talking about a staff member who we had many clients who were all making allegations
19 against that same staff member, but to this day the Ministry of Education has refused to
20 accept any of that evidence. And again, you heard Cheryl explain that she made a
21 complaint at the time, and her evidence, because that complaint has got lost, was given no
22 weight. And in fact, it was made very clear to us that the only thing that would be given
23 any weight was if a staff member had documented a complaint.
24 So these are just another way, you know, this is another impossible burden for
25 claimants to reach. And in fact, actually sometimes it's easier for us, it's easier to prove
26 something in a court than it is in the redress processes, where actually the burden of proof
27 seems to us. I mean I would describe the Ministry of Education burden as beyond
28 reasonable doubt or even higher, that's a criminal standard, that's how I would explain the
29 MOE process. And the MSD one, who knows, I don't know. And there's nothing very clear
30 about what that burden is, and it seems to be variable.
31 **MS JANES:** So you've talked about that onus of proof being problematic because of access to
32 records and the process has been very much paper-based and that's confirmed certainly in
33 Ms Hrstich-Meyer's evidence at paragraph 4.15. And then you've talked about whether
34 there's acceptance of propensity or similar fact evidence. What would you say about the

1 standards of the day as being an added complication?
2 **MS COOPER:** Yes, well, the standards of the day is another argument run, in other words that
3 while that may not be acceptable now what happened, it was okay at the time. And so in
4 the *White* trial initially we had the Crown arguing that the staff members kicking and
5 slapping our - the plaintiffs and the other witnesses was part of the standards of the day,
6 that's just how it was, and that was therefore not an assault.
7 And so for us to prove otherwise we had to go back to the manuals, which
8 thankfully were very clear, that actually only very set corporal punishment was permissible
9 done at a specific level of seniority and anything else was not. So then in *White,* and you
10 see that in the decision, that the argument was then made 'oh well don't put much weight on
11 that because these were trivial.' And the judge said well no, they weren't trivial because
12 they were not only not allowed, but they contributed to this violent environment in which
13 these boys lived. And where they were not only subjected to this violence by the very
14 people who were looking after them, but it was also a kind of message of this is how you
15 can all behave. And so this whole atmosphere was an atmosphere of violence.
16 **MS JANES:** Are there any other examples that you can think of about what was considered
17 acceptable in the standards of the day which would now be problematic?
18 **MS COOPER:** That's a hard question, I could probably think of a lot.
19 **MS JANES:** We won't spend too much on it.
20 **MS HILL:** One example that we've recently come across is the really quite horrific example of
21 internal vaginal examinations on girls who were placed in girls homes in Burwood - not
22 Burwood, Bollard Girls Home and Allendale and Miramar Girls Home as well, I think. But
23 a complaint was actually raised at the time in the 70s about these internal examinations.
24 They were purportedly checking for venereal disease.
25 **MS COOPER:** Even of eight and nine-year olds.
26 **MS HILL:** Yeah and that's where the problem comes, is that one of our clients - and this is
27 certainly not the only person - was subjected to an internal examination at the age of nine,
28 and in the last year or two the Ministry of Social Development has said that that was within
29 policy in the standards of the day. And at a time when complaints are being made about
30 these internal examinations in the 1970s you think how can it possibly be that in 2019 you
31 still say that's within the standards of the day.
32 So that's a really confronting example, that's one that's very challenging for people
33 to understand about how you can say well that was the policy, so we're not liable for that.
34 **MS COOPER:** Yeah, I can think of another one too very recently where the records talk about

1 parents giving their children hidings and that very recently, and we're talking about within
2 the last month to two months, has been recast as corporal punishment, which of course
3 parents were allowed to discipline their children. And so it's this kind of minimising and
4 repackaging of documents to actually put them into an acceptable light, which means that
5 claimant survivors can never win because hidings were never allowed, even in the 70s.
6 Somebody reading that would have understood that that meant they were being beaten.
7 **MS JANES:** And just while we - I'm going to jump you slightly forward. At paragraph 271 you
8 have outlined the GRO-B-P case and at paragraph 273 you give an example of a reversed
9 onus of proof. And you say the onus was on the Crown to show that the claims must fall
10 within the leave requirement. If you were proposing a reversed onus of proof, what would
11 that look like and why would that be an advantage to a claimant?
12 **MS COOPER:** What that would mean is that a survivor's facts would have to be accepted as
13 being truthful on their face. And the onus would then fall onto the Crown to either show
14 that the facts were not correct, or that there was a legitimate reason that they could escape
15 liability. So that would mean that you start from a point of acceptance and the burden then
16 falls on the other party to disprove that. So it actually puts survivors who have a hard
17 evidential job anyway because records are so often lost or incomplete, you put them in a
18 stronger position by saying we accept these are your facts and it's up to the Crown to
19 disprove it.
20 **MS JANES:** And we won't spend too much time on it, but it would be quite useful to very briefly
21 go through, we've heard about the *White*, Chassy Duncan, Kerry Johnson and the *S* cases, if
22 you could illustrate very briefly the legal principles and why they mattered to those
23 particular cases that we've heard about.
24 **MS COOPER:** Well, *White* demonstrated many problems. We haven't talked about limitation yet,
25 but causation, which I know you'll talk a bit more just that was a failure. We were able to
26 there show quite a few breaches, but because of the failure with these other defences, they
27 got nothing. And that was definitely an example of a case where it was impossible to sort
28 of disentangle the various aspects of the abuse, well, that's what the court found at that
29 stage, even the sexual abuse apparently had no specific harm. So that was a good case I
30 think just demonstrating how we've come up against those blocks.
31 *S*, well, *S* we won so that actually was, you know, it was a case kind of back in time
32 where, as I said, he'd been taken into care at nine months, he'd been sexually and physically
33 abused by his foster mother. And causation was not an issue there, presumably because
34 he'd been in care his whole life. And those other hurdles, I mean in that case we didn't call

1 his brothers to help, it was purely based on his account and what was in the records. So we
2 were able to establish it from that very simple basis, whereas in *White*, as I said, we called
3 16 propensity witnesses, we called most of the siblings, and we were very successful on
4 establishing a lot the facts, but no remedy.
5 **MS JANES:** And just on the *White* case, if we can go to Crown tab 30 which is the High Court
6 decision. In terms of the vicarious liability aspects, there were some particular paragraphs
7 that it would be helpful to quickly look at. Paragraph 74 first. If we can call that out. And
8 part way through it acknowledges that, as "Ms McDonald acknowledged, there were no
9 fewer than 38 home visits between 1960 and 1965, as well as visits to schools and
10 relatives".
11 Then if we can go to paragraph 121 and 122 and call those out, and they talk about
12 the judge found that the plaintiff's account of the home life was compelling and CYFS
13 knew about the violence from between 1965 and 1969.
14 **MS COOPER:** Yes, that's right.
15 **MS JANES:** And then at 124, if we can call that out and I'll have you read that finding.
16 **MS COOPER:** "I address subsequently the question whether Child Welfare owed a duty of care
17 that required intervention. At this point I record my factual findings. A reasonable social
18 worker at the time would have spoken to the boys, would have learned that they were being
19 very regularly beaten, abused and neglected and would have moved for a committal order.
20 I reject Ms McDonald's submission that decisions not to intervene were reasonable by the
21 standard of the time. In my opinion, Child Welfare ought to have taken steps to intervene
22 after the boys left the Thomson's home in August 1966. Further, it became apparent about
23 February 1968 that Mr White no longer had a housekeeper and was regularly beating the
24 boys. It is a proper inference that the presence of the housekeeping was a significant factor
25 in the Court's decision to leave the boys with Mr White when their sisters were committed
26 in 1965".
27 **MS JANES:** And as you've already said, we then go to the issue of causation where despite
28 findings of 13 events of sexual abuse there was no material contribution. And then looking
29 at Chassy Duncan.
30 **MS HILL:** So we have to speculate a little bit with Chassy Duncan and with Kerry Johnson
31 because of course their claims haven't been the subject of a court hearing in the same way
32 as *White* and as *S* both have been. But when we heard from Chassy, he talked about a long
33 history in CYFS care with time spent at Waimokoia School in the middle which was a
34 Ministry of Education placement, and time spent at what I've called section 396

1 programmes, the Hokianga Island programme and another programme in Taranaki.
2 And so what we would have there were several different entities owing Chassy a
3 duty of care. And so it wouldn't just be is a duty of care owed by MSD, it would be is there
4 a duty of care and how far does that duty go between MSD, MOE and perhaps those third
5 party organisations.
6 And in law we have the joint tortfeasor, what's called a joint tortfeasor - it's a funny
7 term, effectively meaning that more than one party contributed to harm. And so we may
8 end up with a situation, if Chassy's claims had gone to trial, where those different parts of
9 the State were effectively divvying up their responsibility between themselves. So that's
10 the first issue that we would have faced and we'd have the same issue with Kerry Johnson.
11 But we would also have things like the St John of God in there which ran Marylands and
12 the Ministry of Health in terms of the psychiatric hospital. So even more complicated for
13 Kerry Johnson in terms of these different parts owing duties of care at different times.
14 So much more complicated in terms of the duty. And rolling on from that much
15 more complicated in terms of causation. So we talked before about compartmentalising
16 harm and how do you take someone like Chassy Duncan and say Waimokoia caused him
17 this harm and the 17 placements before May 2000 caused him that harm, and being
18 removed from mum and from his cultural links and his iwi caused him that harm. So the
19 immense challenges that you see with these claims. If they were treated in the same way as
20 *White* was, I think it would be immensely challenging to get a remedy.
21 **MS COOPER:** One thing that we also just wanted to say is that there is a legal concept called the
22 thin skull rule which essentially is that if you already have a vulnerable person you take that
23 vulnerable person as they are, and if you cause them more harm then you are liable for that
24 harm. But again, we haven't seen that reflected in these cases. It is a well-understood legal
25 concept. So if you look at Earl and Paul, yes, they may have been damaged children at
26 home and that was known and accepted, but then they suffered more harm when they came
27 in to care. And so, you know, I think we've kind it, you know, we've made it all so difficult
28 that it becomes impossible barriers in our courts to get through.
29 **MS HILL:** And virtually every child who is removed from home by a State agency or, you know,
30 if you have to be removed from home the thin skull rule, eggshell rule will almost always
31 apply because if you have to be removed then something's not right and you're likely to
32 have suffered some harm already. So the eggshell skull rule is almost always going to be a
33 factor but you don't see it in the cases.
34 **MS JANES:** And as a firm you've been aware of a large body of information about standards of

1 the day and practices, and there is a particular document which is in the inquiry bundle it's
2 MSC for committee ending in 650. We won't actually go to it, but you do have a copy on
3 your desks. I want to talk - this is the Cooper Legal DSW culture of abuse paper.
4 **MS COOPER:** Yes.
5 **MS JANES:** Can you talk to us about how that came into being and what happened to it in 2006?
6 **MS COOPER:** So this was the - at that stage we were still hoping that we would be able to
7 resolve these claims without having to take them into court. So in October 2005 Ministry
8 of Social Development and Crown Law asked us to prepare a paper which would allow the
9 Government to consider whether an investigation or some sort of forum instead of court for
10 the claims was possible. So we were requested to provide a detailed paper which set out
11 the allegations of the client group. They weren't named at the time, but what the paper did
12 do was it identified at that stage the known perpetrators of abuse, institution by institution
13 and decade by decade.
14 We agreed to do that paper, which was a long volume of work, because at that stage
15 we were very committed to seeing the claims dealt with out of court, we were hoping for a
16 process to be put in place like the Lake Alice claimants had had, and so we agreed to
17 collate that information and provide it to the Crown. And we wanted to show that there
18 were these common themes, because we wanted to show even at that stage that abuse in
19 State care in these residential or programme settings was just as systemic as had occurred at
20 the Lake Alice Adolescent Unit.
21 And one thing we were really conscious of was that there was a big cross-over
22 between clients who had been sent to the Lake Alice Adolescent Unit and those who were
23 in State care. So many of the clients who subsequently came to us had been State wards
24 and/or they had been in residences like Holdsworth or Hokio or Kohitere which were in
25 that area, that Horowhenua area and had been sent to the Adolescent Unit from those
26 residences often for just a day to get zapped and then brought back.
27 So we were very keen to show that there were the same, you know, that there were
28 these common themes that we had clients identifying the same perpetrators and, as I say,
29 we did it decade by decade over many residences and a couple of the programmes. At that
30 stage we did the Whakapakari programme and we did Moerangi Treks.
31 **CHAIR:** What date was this, when did you do this?
32 **MS COOPER:** We sent it across to Crown Law in January 2006, so a long time ago.
33 **MS JANES:** And so in terms of looking at the claims that were filed as civil claims in court at
34 that time, this pre-dated the hearing of *White* and other cases.

1 **MS COOPER:** Yes, that's right. We only had a small handful of claims filed at that stage against
2 the Ministry of Social Development, so we obviously had the two *White* claims, and
3 because by then we'd been forced to file all the psychiatric hospital claims, which I think
4 2004 that process all fell down and we had to rush to file 200 claims then. So for those
5 claims where they were also children in State care, and again a lot of cross-over between
6 those who were placed in psychiatric hospitals and who also were in the care of the State
7 and/or State wards, we'd had to file their joint claims in 2004. But we were trying to avoid
8 having to file all the rest.
9 **MS JANES:** And if I can refer to, I think it's 176 page document, if I can refer to that as the body
10 of knowledge that you had accumulated at that time, transferred the knowledge to the
11 agencies, you've talked about the expectation or hope of what would happen to that, can
12 you just - were there discussions that also accompanied the presentation of that document?
13 **MS COOPER:** Yes, there were. I think one of the things that happened almost straight away was
14 that it was given to the police and we then had the police contacting us very, well, you've
15 heard that theme before. And we had quite long protracted discussions with the police
16 because they were wanting us to give our client names, and we said we're not going to do
17 that without their consent. So we were asked to obtain their consent and so we sent out a
18 newsletter to every single client explaining that the police wanted to look at possibly
19 investigating.
20 At that stage I have to say we were quite reluctant. There had just been the Louise
21 Nicholas trial and the St John of God trials which had both failed and we were really
22 reluctant to see our client group forced into a police criminal process when that was not
23 why they had instructed us. They were wanting their claims resolved if possible outside of
24 court, but we certainly gave them that option.
25 And so that kind of, that whole discussion sort of slowed down any substantive
26 discussions. But eventually the - we were told clearly that there was not going to be any
27 process set up to deal with the claims out of court, and we should start filing. So once
28 again, we were forced to file everybody's claims as quickly as we could.
29 **MS JANES:** And was there any discussion about why - you'd seen the Lake Alice process.
30 **MS COOPER:** Yes.
31 **MS JANES:** And you had thought that a Kohitere or an Epuni or a Hokio might present a similar
32 opportunity. Was there any discussion about why the Crown did not consider that to be a
33 viable alternative for those institutions?
34 **MS COOPER:** I think the issue that we kept seeing, and I think even to this day we see it, is the

1 determination was that this was not systemic, that it was, you know, they kept saying that
2 there was not enough evidence, that it was systemic.
3 **CHAIR:** Can I just be really clear here for ourselves and for those watching. When you say
4 "they", who are you talking about?
5 **MS COOPER:** Sorry, that message was communicated to us by Crown Law but on behalf of the
6 Ministry of Social Development. So it was always distinguished. I mean the Ministry of
7 Health had taken the same position in respect of the other psychiatric hospital claims that
8 we hadn't established enough that there were the same sorts of themes. And I think there
9 was a view that while there might be a few bad eggs, we hadn't shown that there was a kind
10 of culture. And I think, you know, now reading through the papers that we received later
11 on you see that being reported all the way through, that we had not shown and the Crown
12 wasn't satisfied all the way through that there was a culture or a system of abuse.
13 **CHAIR:** Who was that being reported to?
14 **MS COOPER:** That was being reported through to Cabinet because Cabinet, of course, was
15 having to make decisions about the litigation strategy for these claims, including whether
16 there would be options to resolve them out of court, and whether money would be put aside
17 to actually set up the necessary processes to do that.
18 **MS JANES:** It may be helpful the next document, I think, will answer some of these questions.
19 So if we can go to document 5 which is MSD for department ending in 2030. And as you
20 can see that is - it's an internal Ministry of Social Development document, but it does talk
21 about the Cooper Legal 2006 culture of abuse paper.
22 So if we can first look at page 2. We don't have the yellow highlighting, but
23 effectively three paragraphs under "Findings", so probably if you go over the next page -
24 thank you, go back to that one, the further work. So if I can have you read under
25 "Findings".
26 **MS COOPER:** "This further work has confirmed our assessment that there is no evidence of
27 systemic or endemic failure, though there is some evidence that some abuse of children and
28 young people in State care did occur. It has also confirmed the substantial difficulties in
29 establishing the facts of individual claims. Claims may be a mix of genuine experiences,
30 care that met the standards of the day -
31 **MS JANES:** If you can move pages thank you.
32 **MS COOPER:** - and inaccurate memories. The perception of likely access to compensation may
33 also lead to claims being made opportunistically. We are concerned that Sonja Cooper's
34 collection of evidence from her clients may have influenced some of her clients' stated

1 memories and that in some cases it has been unethical or inappropriate. This may do
2 damage to claimants and mean that the truth of some claims can never be known".
3 **MS JANES:** What would you say now that you've seen that it was an internal document?
4 **MS COOPER:** Have to say I was really horrified and actually deeply offended. One of the things
5 that our firm prides itself on is the highly ethical way that we work and the honest way that
6 we work. We take very, very careful steps with our clients to make sure that their evidence
7 is not contaminated, we certainly do not feed their memories, we take their accounts and we
8 give their accounts to the various Ministries.
9 **MS HILL:** I can take you through the particulars of that if you would like. So we thought it was
10 useful at this point to address this because when you have so many clients and they have
11 nowhere else to go, which is our situation whether we like it or not and we don't like it, we
12 are going to have to address this. And so what I would like to do is take you through how
13 we manage information.
14 So the first thing to know is that we conducted a face-to-face interview with every
15 client. We don't just take their accounts in writing or from secondary sources, we meet
16 with a client and assess their credibility. And so on an individual basis we do that
17 credibility assessment, and we hear their account first-hand and when we interview them,
18 we caution them about telling us only what happened to them and what they saw, and being
19 very clear about if you've received information from another source then you need to tell
20 me that so that I can be clear about what you've remembered versus what someone like
21 your brother or your sister or your whānau may have told you. So we clearly differentiate
22 between the different types of information a person gives us.
23 But more broadly than that, so there's the individual experience and we check
24 records and we, you know, we check information against other things. So we do that
25 individualised credibility and veracity check. And that happens over here and then there is
26 our bigger information picture. So after the 2006 paper was written, we started to more
27 seriously collect and collate information. We recognised that the Crown had all the
28 information and information is power, and so we started to gather. We requested
29 conviction information from known perpetrators, we - and we continue to make Official
30 Information Act requests for information about individual residences, staff members,
31 programmes. And we've over the years taken a number of claims through the discovery
32 process and obtained information through the discovery process.
33 And we take all that information and hold it in our databases, and that's held
34 securely and separately from individual client information. And so when we write an

1 individual claim document, it is done as an individual account, and we use only their
2 personal information, what's released to them under the Privacy Act, and the information
3 that they give us from their interview and we subsequently work through the records they're
4 entitled to see and their own account. So there's the client part of the claim document.
5 And when the client has seen and confirmed their instructions about the factual
6 aspects, what they can remember, that document comes back to us, and we then add to it
7 the corroborating information. We say that, say, ten other people have made allegations
8 against this staff member, or this staff member has been convicted. Now our original
9 claimant may not know that. They may not even know the correct name of that person
10 because quite often the name will be slightly different because childhood memory is not
11 perfect. But we can, when we complete the document, we say to MSD - it's normally
12 MSD - we think it's this staff member with this background. The claimant doesn't see that.
13 We also attach appendices. So over the years we've written, some of them are quite
14 long documents that set out information about lack of staffing say at Epuni in 1972, there's
15 a riot and it's shut down, or the complaints about Whakapakari which started in I think 96
16 and carried on through to 2004, we've got all of them documented. And we extract this
17 information, and we attach it to an individual client account.
18 And that is what gets sent to the Ministry, but it is not what the client sees, because
19 they're not entitled to see some of that information, it's about third parties, or because some
20 of that information might alter their memories, whether they recognise that's happening or
21 not. And so what the claimant sees as their claim document and what goes over to the
22 Ministry is different.
23 That's obviously a slightly different process than you would see in a normal legal
24 process. But it is the steps that we take, because MSD starts from a position of disbelief
25 and they say that our clients sit around and make this stuff up. And so we take every step
26 that we can to protect them from that.
27 We know that their memories are not perfect, childhood memory isn't perfect. So
28 we use the information that we've gathered to support their claims, but they don't see that
29 because that is going to do more harm to them than good. And so obviously sometimes
30 clients request copies of their claim documents, their letters of offer under the Privacy Act,
31 and so we then have a reverse process, where we redact information about third parties and
32 we take off the appendices, we undress it, if you like, before we send it back to the client
33 and we explain to them that the redacted parts in the document are things you can't see.
34 And those claim documents are used for things like sentencing and cultural reports and

1 things like that.
2 So there's the addition process and then if it goes back to a claimant there's the
3 redaction process. It's quite a process, but that is what we do to ensure that as much as
4 possible their account remains their untarnished account, and we say to claimants, don't
5 compare stories, you know, and it's really hard because you want people to talk about their
6 experiences, but not in a way that could compromise their evidence. And so we caution
7 them to say what's important is what you remember, and what's in your records and we'll
8 help build this for you, but you have to trust us that some information is stuff you can't see.
9 So there's the conversations with the claimants about, you know, you need to be
10 careful about not listening to other people. Some people will talk about their experiences,
11 that's different to yours, everyone's experience is different. So we have those conversations
12 as well. I think that covers the information.
13 **MS COOPER:** Yes, I should say that for all of the claims that are tracking to trial and we are
14 preparing witness briefs or client briefs for the plaintiffs, with everyone we say - we don't
15 tell other witnesses who the plaintiffs are ever, we don't say, we tell the plaintiffs not to say
16 that I'm a plaintiff in a trial, and we again, we caution them not to talk about it and explain
17 that that may weaken their evidence because the Crown will attack them on the basis of
18 that. So we take what steps that we can to protect the integrity of evidence. And when you
19 think about that from a therapeutic point of view it's very counter-therapeutic.
20 And I think the other thing I wanted to say is, many of our clients are in prison and
21 actually the no narking culture is so strong in prison still, it actually is really difficult for
22 clients to own what happened to them in care. And I think there is not much chat actually
23 that goes on. I mean I think there is this perception that there is a lot of chat that goes on
24 about, you know, people's experiences, but our own view of that and our own experience of
25 talking with our clients, and you heard that in a way from Kerry, is that they don't talk
26 about it, because otherwise they may be beaten up, they may be labelled as narks, if people
27 know you're a sexual abuse victim you're going to be called a homo or a faggot. So
28 actually, there are many cultures within the prison client group and that's big proportion of
29 our client group that actually stops them from talking about this stuff anyway.
30 **MS JANES:** And just to underscore some of the things that you've been talking about, if we can
31 go back to the document that we were looking at previously, the MSD ending in 2030
32 which is a February 2007, and just confirming that again predates the *White* trial. If we can
33 go to page 10 and it talks about records of genuinely abusive care or neglect may not be
34 kept, parts are missing or unclear if it can be found at all. But the important points that

1 you've been touching on are in page 11. We've jumped over what claimants want because
2 we'll come back to that.
3 So under "Concerns around collection of evidence" if we can call out that whole
4 section and if I can have you go through that please.
5 **MS HILL:** "We are particularly concerned that the collection of evidence to support the claims
6 has been, in part, unethical or inappropriate and that this is an obstacle to knowing the facts
7 of claims. There is the clear potential for this to have a detrimental effect on some
8 claimants. An argument made by the claimant's lawyers is that the normal limitation bar to
9 claims (ie a claim must be brought within a certain period of time of the abuse occurring)
10 does not apply because some claimants have only recently remembered abusive or
11 neglectful experiences.
12 This has been a common argument internationally; that trauma can cause claimants
13 to repress memories that are only recovered by therapy or counselling, or some years after
14 the event took place. There is no clear view on this by experts and it has been particularly
15 controversial in some jurisdictions. But it does seem that people are vulnerable to the way
16 in which memories are recovered and that in this process their accounts can be influenced."
17 **MS JANES:** Then can you go to bullet point 2, thank you.
18 **MS HILL:** "Many claimants also start with an unclear memory of events. They may be open to
19 suggestion around the details of what they recall and may feel that the trauma of these
20 events has seen memories repressed for long periods of time. Whether the memories they
21 recover are genuine and if so to what extent remains the subject of considerable debate."
22 **MS JANES:** And then the last paragraph we'll go to is the one under "Together these factors', so
23 just before "Concerns". Thank you.
24 **MS HILL:** "Together these factors make it unclear which of many claims may be valid.
25 International experience also suggests that where access to compensation is made easy,
26 with little testing of evidence, some claims may also be made on the basis of this access."
27 **MS JANES:** So just putting those paragraphs together about internal issues that were of concern
28 to the Crown and referencing it to the *White* trial, are there any comments up would make
29 about how they relate?
30 **MS HILL:** I think we both have different comments on this one. To me it's purely speculative.
31 Those are things that are advantageous to the Crown not engaging in meaningful
32 discussions about the claims or looking at things on an individual basis. There are all of
33 these things that stack up against claimants, like I say fairly speculative, the author isn't a
34 counsellor or a psychologist. And it really is building this feeling of disbelief, it's really

1 setting up this very skeptical view of the claimant group as being opportunistic or as
2 exaggerating or lying. And this is a view of the claimant group that has been perpetuated
3 since 2007. And in light of the *White* findings, it's very hard to maintain.
4 **MS COOPER:** And following on from that, it was a real theme of cross-examination during the
5 *White* trial, you know, that the witnesses had got together and colluded about their
6 evidence. And, you know, that was on top of the cross-examination about their criminal
7 convictions, which kind of just reinforced how damaged they were really.
8 But in the decision the judge dismissed that, I mean he actually found these
9 witnesses very compelling. And I can only think of one of the witnesses whose evidence
10 he specifically said there was one aspect of it he didn't accept. But he said, you know, their
11 evidence was compelling. And that's right, it was compelling.
12 I think the other thing that this shows is that there was at that stage a great deal of
13 suspicion about us as well. I'd like to think that that's changed, but I don't know. Yeah, so I
14 think there's all of those factors that kind of were playing into "We'll just let this play out,
15 we'll play hard". And that fed into this very litigious court-based process that we were then
16 forced into over the next four years at least.
17 **MS JANES:** And the Commissioners heard from Earl White himself about the various strategies
18 that were employed in that litigation. But is there anything else that you would like to add
19 in terms of the context of what a plaintiff seeking redress in the courts has to experience?
20 **MS COOPER:** Oh, I mean even now when I think about the cross-examination of Earl and Paul,
21 I could literally, I just wanted to sink through the floor. I felt disgusted and traumatized.
22 They were both treated as if they were criminals. Yeah, it was deeply traumatising. We
23 would now have more tools in the Evidence Act box to actually, one, object to that sort of
24 cross-examination and also two, I think to better protect our claimants like we could
25 possibly ask for screens. But as I say, we didn't have those tools, it was the old Evidence
26 Act. So that was really traumatising.
27 **MS HILL:** Can I add too, there is this idea that the claimants fabricate or exaggerate and then are
28 able to consistently maintain the fabrication over what is effectively a 10-year period. You
29 are talking about a group of people who have very poor education, very poor literacy, poor
30 mental health, alcohol and drug issues. It imputes a level of foresight and planning to
31 maintain a fabrication for a decade, to be prepared to go through the kind of
32 cross-examination that Paul and Earl White went through, nobody would set themselves up
33 for that. And I would say that the bulk of our claimant group could not maintain the facts
34 of a lie for a decade, because that is the proposition that they start out lying and they

1 continue to lie. Most of the people I have met struggle to tell their story once. To maintain
2 that, if it's a fabrication it is an act of a person with a very high degree of literacy and
3 education and memory that.
4 **MS COOPER:** And cunning.
5 **MS HILL:** And cunning that I do not see amongst our client group.
6 **MS COOPER:** And for what actually? You know, that litigation failed, so for what?
7 **MS JANES:** And that really is the next topic to go to, because as the Commissioners heard from
8 Earl White, he went through 12 years of that, the findings of sexual abuse were proven and
9 accepted, but he failed. And so when claimants come to Cooper Legal, what are you able
10 to advise them about the options, and clearly claims are still being filed in court?
11 **MS COOPER:** Yes.
12 **MS JANES:** Why is that and what is the purpose and what is the understanding of claimants
13 going through that process?
14 **MS COOPER:** So we have an agreement with the Ministry of Social Development which we call
15 colloquially a "stop the clock" agreement. So that's about the Limitation Act, so you know,
16 this is this horrible piece of legislation that says you have to file claims within either two or
17 six years, which we'll talk more about. So we have a stop the clock agreement which
18 means we don't need to file all of the claims against the Ministry of Social Development,
19 that's the only department so far that we have any agreement with. So we still have to file
20 at this stage every Ministry of Education claim.
21 And for our younger clients where the Limitation Act is not a problem, because we
22 have clients as young as 18 coming to us, we file their claims to make sure that the
23 limitation bar is never an issue because, like any agreement, the Ministry could pull the
24 plug on it at some point. And we don't want to prejudice their legal rights by not filing
25 their claim. So we still file a lot of claims.
26 I think the other thing is, although the court experiences have not been good so far,
27 I express hope. There is still a lot of law that we need to have established in this area and
28 actually at the moment the Government departments get to establish what the facts are,
29 what the law is and what the outcome is. And this has to be done by an independent body
30 and a court is the right place for that. I mean if we look at *White*, even though it was
31 unsuccessful for Earl and Paul, it actually still gave us some really valuable findings which
32 we still rely on today, I mean as we know MSD doesn't always accept those findings.
33 But we still, and the law, the legal findings were very important. We haven't yet
34 done a Bill of Rights Act case and that's really important, because we don't know yet what a

1 court might say about sexual and physical abuse, is that torture? You would think so. We
2 don't know yet what a court would say about a young person being detained on an island
3 like Alcatraz on the Whakapakari programme. We don't know what a court would say
4 about somebody being strip-searched in breach of the regulations.
5 So there are all these really important legal issues that at the moment the
6 Government agencies are the sole deciders about what they mean, where they sit, and how
7 that impacts on any compensation. So that's - we currently have claims tracking to trial and
8 we have a 16-week trial set down starting in late June next year, and that's for two of our
9 younger clients, one of whom was in Ministry of Education and Ministry of Social
10 Development care. The common factor is they were both at Whakapakari, but that's, you
11 know, and they were in a number of the same residences. But there are so many important
12 legal issues for us, and I - yeah, so there's still issues to be tested.
13 **CHAIR:** Can I just clarify again, when you say filing claims.
14 **MS COOPER:** Yes.
15 **CHAIR:** Are you talking about filing a civil action in the High Court?
16 **MS COOPER:** Yes, it was still -
17 **CHAIR:** As opposed to making a request from MSD, is that what you're saying?
18 **MS COOPER:** Yes, we still file civil claims in the High Court.
19 **CHAIR:** In every case?
20 **MS COOPER:** No, only as I say, so we file all Ministry of Education claims at the at the moment
21 because -
22 **CHAIR:** As a holding.
23 **MS COOPER:** As a holding position, yes.
24 **CHAIR:** That's because they won't stop the clock or they haven't agreed to stop the clock.
25 **MS COOPER:** Yes.
26 **COMMISSIONER ERUETI:** MOH as well?
27 **MS COOPER:** With the Ministry of Health there's a very confined parameter for their process, so
28 they will only deal with claims, we've pushed them up to I think it's mid 1993 now, they
29 publicly I think they say the end of 1992, but actually the new Mental Health Act didn't
30 come into effect until 1 July 1993, and they accept we're right on that.
31 We don't - I think once we settled that litigation against the Crown Health Financing
32 Agency, yeah, we were wary of the psychiatric hospital claims, because they've got two
33 limitation barriers, they've got the Limitation Act and then there is the immunity provision
34 which we'll talk about more. So there we don't file them, and as I've said, for all of our

1 younger clients, if we can beat the Limitation Act, we will always file their claims in the
2 court and when do, we still do it.
3 **COMMISSIONER ALOFIVAE:** Sonja, have you filed any against the MOJ as well?
4 **MS COOPER:** So Corrections claims, yes we have, we do take Corrections claims and yes, we
5 have filed and we've - Amanda's our Corrections guru, we have a number of claims on foot
6 at the moment. There, of course, you've got the prisoners and victims compensation
7 legislation which is another significant hurdle for that claimant group. We don't take
8 historic claims in respect of Corrections, or the Police, because they play the limitation card
9 very hard. And frankly, given our experiences with that, and our knowledge about how
10 difficult it would be for us to get Legal Aid to fund the necessary reports to get through that
11 hurdle, we just, as a decision, we don't take those claims on. So that's another big gap.
12 **COMMISSIONER ALOFIVAE:** Thank you.
13 **MS HILL:** You asked at the beginning of that what we - how we advise our clients, and against
14 that background I guess the big thing that we have to say to our clients which is very
15 challenging is we don't know. So "how long is this going to take?" "I don't know". "How
16 much compensation will I get?" "I don't know." "Will I have to go to court?" "Not sure."
17 "What about the Bill of Rights Act?" "Can't tell you."
18 So for all the reasons that Sonja's described, we have real challenges in terms of
19 adequately advising our clients about what they can expect, and it's really hard when people
20 who are quite damaged, you want to be able to give them certainty, you want to be able to
21 say this is what you can expect, these are the steps and this is the timeline that you can - we
22 can work with. But that's constantly shifting ground. And so unlike a lot of normal law,
23 normal legal advice, you'd be able to say this is the law, or these are the bits that are a bit
24 unclear. I tend to start my conversation with clients these days with "I can't make you any
25 promises and I'm not going to make you any promises, we are in a constantly shifting
26 thing."
27 **MS COOPER:** And "You're going to have to wait a very, very long time for an outcome."
28 **MS JANES:** Just picking up two points as we round out the afternoon's evidence, we're here to
29 talk about civil litigation and civil claims, but has Cooper Legal explored any other avenues
30 that they could direct clients towards, whether it be health related to the Health and
31 Disability Commission and then to the Human Rights Review Tribunal, or elsewhere, are
32 there other considerations that you have looked at?
33 **MS HILL:** So for people who suffered abuse in health contexts, you can make a complaint to the
34 Health and Disability Commissioner. My experience of that body is that they will not deal

1 with complaints that are very old, and so historic claims are outside of what the
2 Commissioner will deal with.
3 There's also a really high threshold to meet to get a successful outcome. And it
4 takes an educative approach, which isn't very helpful in terms of someone seeking redress.
5 It's quite a harsh gate-keeper through to the Human Rights Review Tribunal. You not only
6 have to have made a complaint to Health and Disability Commissioner, you have to have
7 got a successful outcome before you can even file a claim in the Human Rights Review
8 Tribunal. So it's an enormously long process, and Legal Aid will not often support a
9 complaint to a body like the Commissioner, although it has done because it's tied to human
10 rights - the Human Rights Review Tribunal.
11 But the number of them, it would overwhelm the Commissioner in any event. And
12 we've done group claims to the Privacy Commissioner, similar sort of thing, and we got to
13 about 150 and the Privacy Commissioner asked us, "Please don't send us anymore". That
14 was to do with records. The various investigative and complaint bodies are not resourced
15 to deal with the scale and the complexity of these claims.
16 A claimant can go to the Ombudsman, the Ombudsman has jurisdiction, particularly
17 if a claimant is unhappy with the outcome of MSD's review processes. While I think the
18 Ombudsman would look at a complaint and it has done in terms of Alva Sammons, for
19 example, and the Ombudsman makes recommendations on problems affecting the group,
20 again I think if the Ombudsman was to go to a place for large scale claims would rapidly
21 overwhelm that office. They were overwhelmed right up until recently, I think until their
22 resourcing was increased. We've waited four years before for an outcome from the
23 Ombudsman. So sending groups of historic claimants with complex claims there is not
24 going to really be a good resolution for them.
25 **MS COOPER:** I think after the, you know, we'd had the difficulties with *White* and we were
26 unsuccessful in court, we got some advice from Tony Ellis at that stage who helped us
27 really reframe our work as human rights work, so, you know, we'd been very traditionally
28 tort lawyers until then. And it actually really helped seeing our work within the framework
29 of human rights. And that gave us some other tools, I think some other complaint
30 mechanisms. So we've always actively lobbied the politicians, I mean and that's something
31 we continue to do and I mean that's how we managed to get our high tariff offenders
32 money. You know, political will. So that's something we have done. I mean I never
33 dreamed as a lawyer I'd be doing this, but this is what we have to do.
34 We made a complaint to the Human Rights Commission and Ros Noonan, who was

1 the Chief Human Rights Commissioner, gave evidence in the contextual hearing about that
2 inquiry process she undertook, and I think that was the first of that kind of inquiry in
3 New Zealand history. And as we know, that report never saw the light of day. But still, I
4 think that helped influence and change some of the ways that the Crown behaved and was
5 the start of a big change, I think, in attitude for us, which we could capitalise on.
6 I think the other thing that we did was we started to complain to the international
7 human rights body. So we regularly and all the time do shadow reports to the United
8 Nations so the Committee Against Torture, the Human Rights Commission, the Disability,
9 CERD, UNCROC. I actually went to Geneva when New Zealand was being examined in
10 2016 as a New Zealand independent observer and was able to speak with the Committee
11 about our claimant group and how that impacts now on children in care.
12 So that advocacy is another thing that we added to our toolbox and that we still use
13 now. And I think it's an important one, because you know in 2009 the Committee Against
14 Torture issued a report saying that New Zealand wasn't complying with its international
15 obligations to this claimant group. And so again, I think, you know, that sort of - that
16 observation and those findings have all helped I think in terms of starting the thinking about
17 this is as a bigger issue, a more systemic issue. Although, you know, I still don't think
18 that's accepted at departmental level. But yeah, it's certainly helped our thinking about it,
19 and has made it more public.
20 **MS JANES:** So just a final question, and I don't know if there's a quick answer, but we've seen
21 Earl Gray(sic) give evidence about, his words were "nightmare" and "brutal" as a plaintiff
22 that was his experience of the civil litigation path. And you've talked about the importance
23 of getting judicial clarity on principles. How does one balance the impact on an individual
24 plaintiff versus the need - is there another system or do you want to think about that
25 overnight and we'll come back to it?
26 **MS HILL:** There's no quick answer to that one. I think the court system and any complainant in a
27 criminal case will tell you that giving evidence in court of these kinds of things is
28 incredibly brutal and to be cross-examined on them is incredibly brutal. And to have a
29 situation where you have to find someone to put up to be the test case, that's not a good
30 feeling, it's really not.
31 There has to be, you know, when you get to that tipping balance of yes, it is
32 systemic or yes we have this body of knowledge, then really you need to be out of the court
33 system into an independent tribunal that recognises there's this large group of people who
34 need help, and taking perhaps a wider view of - than the legal framework, there's a whole

1 lot of people who are really quite damaged, let's think about a way to take them out of a
2 court system that is clearly going to damage them more and let's think about a way where
3 we can start to look at repairing or redressing or at least providing answers in a way that
4 perhaps a court cannot, in a way that is not going to leave them in a worse state than when
5 they came to it.
6 **MS JANES:** So rounding out, that was where you started with your 2006 paper on the culture of
7 abuse.
8 **MS HILL:** Yes.
9 **MS COOPER:** That's right, and I mean I think as I say I'd like to think now that there is more
10 recognition of the vulnerability of this client group, and as I say, I think there are more
11 tools in the toolbox in terms of how evidence is dealt with, which means that I would
12 sincerely hope that no plaintiff ever, ever has to go through what Paul and Earl went
13 through in the box.
14 So I think there are ways that can be managed. I know if you look at Europe there
15 is more of like a, you know, inquisitorial style where the judges lead the process, there's no
16 cross-examination, it's much more like a Royal Commission style. And you know, that
17 process has a great deal of merit I think where you're talking about this group of claimants.
18 So I think you know, that's one of the things that we advocate for, is that, you know,
19 there needs to be a process that is victim-focused, that takes into account that vulnerability,
20 but still has a robust way of, you know, getting to the truth. But not in a way that's going to
21 create and cause more harm and that's the thing that we're really keen on, is that any
22 processes don't cause more harm.
23 **MS JANES:** Thank you. We'll leave the evidence there for this afternoon.
24 **CHAIR:** Yes we will, thank you. We've had a long day, and a longer one to follow, so I think it's
25 time that everybody got some rest and a break, and we'll start again at 10am in the morning.
26 **Hearing closes with waiata and karakia mutunga.**
27 **REGISTRAR:** This sitting is adjourned.
28 **Hearing adjourns at 5.05pm to Wednesday, 30 September at 10am**
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ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

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

TRANSCRIPT OF PROCEEDINGS

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1 **Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei**
2 (10.03 am)
3 **REGISTRAR:** This sitting of the Royal Commission is now in session.
4 **CHAIR:** Ata marie ki a koutou katoa, nau mai haere mai tēnā koutou, tēnā koutou, tēnā ra koutou
5 katoa. Good morning Ms Janes.
6 **MS JANES:** Good morning Commissioners, tēnā koutou katoa, we will continue with the
7 evidence of Sonja Cooper and Amanda Hill this morning.
8 **CHAIR:** You remain on your affirmations that you took yesterday, thank you.
9 **QUESTIONING BY MS JANES CONTINUED:** Thank you. Yesterday we were discussing
10 access to justice through civil claims in courts. In terms of the principles that you
11 discussed, would you describe it as being a level playing field for the claimants that you
12 represent?
13 **MS COOPER:** No is the short answer. To explain some of that, first of all, records are a big
14 issue. I think accessing them is difficult even if we're in a court context, as we will explain,
15 they often come in in a very segmented way and we had the experience in trial of getting
16 them through trial and after trial.
17 Funding is a big, I think a big issue in terms of making the playing field not even.
18 And you've already heard some of the constraints on that. But I think having to constantly
19 ask the State for funding, you've heard how that's played out in real people's lives. So that,
20 whereas the State, the Crown has whatever resources it needs and it can contract in, it can
21 hire other people to help, it can utilise what other resources it needs. So that's definitely an
22 issue.
23 I think then there are the, I suppose I would call them the tactics (and that's
24 something we can talk about a bit more and we will talk about more in our evidence), that
25 the Crown can employ to hold things up or to make it difficult for claimants and witnesses.
26 And just brief examples and again things we've already seen in the evidence, you know,
27 very late in the piece deciding to refer the matter to police, which can obviously have a
28 catastrophic effect on a trial that's set down if the police become involved. Even things like
29 using private investigators to track down witnesses, including whānau of plaintiffs, and
30 your own witnesses, that's quite intimidatory and again it's a resource that the Crown has
31 that is not available.
32 **MS HILL:** So some of those, the things that Sonja's talking about create a power imbalance that is
33 very difficult to address. So when Sonja talks about things like funding and Legal Aid, it's
34 not just to ensure that you have a lawyer. Legal Aid also acts as a shield for a plaintiff in

1 court proceedings. That's really important to recognise, that a plaintiff, even if you've got a
2 lawyer working for you for free, you are exposed to costs, you've got to pay court costs. So
3 the costs of actually going to court, some people think you should just go to court and it just
4 happens. You have to pay tens of thousands of dollars to use a courtroom and have a judge
5 there. And those are things that you don't have to pay if you are in receipt of Legal Aid.
6 And so, a person without Legal Aid who is poor is in a really financially scary place,
7 because you could end up with an enormous debt at the end, even if you win, your court
8 costs and the cost of things like getting a psychiatrist to do an assessment, those sorts of
9 things. So Legal Aid isn't just funding things, it protects a plaintiff from costs awards and
10 things like that. And that's why it's also really important to have in place.
11 **MS COOPER:** If I can just add to that too, it actually allows these vulnerable people to access the
12 courts in the first place. Amanda's talked about the court hearing fees. I think daily to use
13 the court it's around about $1,200 a half day. And I remember with the *White* case, the
14 hearing fees alone were over $100,000 because we had eight weeks scheduled.
15 Now nobody could afford that, and that's an upfront cost. So most of this client
16 group, I would have thought 99.9%, I mean only a, you know, a commercial client could
17 afford that sort of level of hearing fee. No-one else could. So Legal Aid provides that very
18 basic right of access to the courts, because without that nobody could even get to court.
19 You couldn't even do a half day hearing, most of our clients.
20 **MS JANES:** And we'll return to Legal Aid, but before we just – in terms of the impact on the
21 claimant, what I'm hearing you saying is that while Legal Aid is a shield, there is still a
22 potential chilling effect on a plaintiff or claimant. Could you just expand on how your
23 clients feel about that discussion about accepting Legal Aid versus the potential debt to
24 them.
25 **MS COOPER:** Well, I think, you know, this is the importance of Legal Aid really, is that
26 knowing it is there, and you heard about – you've heard about that from some of the
27 witnesses, knowing it is there to help your lawyers continue on with the work that they
28 need to do so you can get your rights is absolutely fundamental. And it's very
29 disempowering. And again, we heard direct evidence about that, it's very disempowering,
30 and disheartening when you're told that your funding is being withdrawn or it's, you know,
31 you've got to step through all these hurdles for your lawyers to get the next bundle.
32 And it creates that sense of real vulnerability and disempowerment, which also is, you
33 know, it's kind of that feeling am I actually ever going to get justice. And I think you heard

1 quite, you know, poignantly in some of that evidence, it's that sense of if the funding's not
2 there it's like well, you know, this is just about wanting me to go away. And that's the
3 impact, it very much makes people give up. And again, you've heard that in the evidence
4 where the funding issues have literally forced people to give up.
5 **MS JANES:** And before we move on, because we will be returning to some of these issues, was
6 there anything else that you wanted to talk about in that level playing field?
7 **MS HILL:** Yes, one of the biggest things in my mind that reflects that power imbalance I'm
8 talking about is the ability to legislate or introduce policies that are advantageous to the
9 Crown but not advantageous to claimants. And there's lots of examples that we'll talk about
10 in the next couple of days.
11 So after the *S v Attorney-General* case the Government of the day changed the
12 ACC [Accident Compensation] law to cut off cover that had been exposed in that case. A
13 lot of the Government policies around claims and payments of compensation have a built-in
14 Crown discretion. So it's always at the Crown's choice about, you know, the
15 Attorney-General has a discretion as to whether to pay compensation under the United
16 Nations Convention Against Torture. And as I'll come on to shortly, there's the Crown
17 Proceedings Act 1950 which is a legislated advantage and a shield for the Crown against
18 liability.
19 So the legislative scheme sets out that imbalance in a really formal way. And one
20 thing I wanted to address before we moved on, was how that reflects in my – some of my
21 first comments I made yesterday around the Treaty of Waitangi. Because when you
22 legislate a power imbalance and you act in a way which reflects that power imbalance, we
23 need to think really carefully about can that reflect the partnership obligations of Te Tiriti
24 when one party holds so much power and the ability to create more power through the law.
25 And to my mind you cannot be a good Treaty partner when you're holding all the
26 cards. And so even with the best will in the world, from the people involved, I think there
27 is a serious breach of the Treaty of Waitangi there when we look at that imbalance to my
28 mind. And in our international obligations there's the United Nations Convention on the
29 Rights of Indigenous People which we recently signed up to which imposes similar
30 obligations around fair processes and redress for loss and, you know, improving health and
31 well-being statistics for Maori which in Aotearoa are awful.
32 So stepping back from the intricacies of that power imbalance we need to look at
33 how we're fulfilling the obligations that Te Tiriti imposes and, in my view, I think that of
34 just about anything, that imbalance means I don't think it ever can.

1 **MS JANES:** And I won't jump you to the very end of your evidence, but you have given some
2 thought about proposals that may address that. Do you want to very briefly talk about the
3 point of how you could address that imbalance?
4 **MS HILL:** The key thing that we think will address that, and we'll come back to this quite a lot in
5 the few days, is an independent Tribunal or fact finder, or something that takes all of these
6 processes out of the Crown and places them in an independent position. And that
7 independent body should hold all the information, it should be the repository for all of the
8 records that we talk about, so individual's records from their time in Child Welfare or in
9 schools, it should be the place where people are able to go, understand the process to have
10 someone help them work out what happened to them because that's important, and to make
11 decisions about what does redress look like for them. It should be a place where they can
12 go to for help in their, I think Chassy Duncan called it, 'real world problems'. And that has
13 to come out of the Crown.
14 One thing I always think about, we have tribunals like this to deal with things like
15 leaky homes, but we don't have tribunals to deal with the harm that we've done to children
16 in care and I think there's a real imbalance there. If we can have a Tribunal for buildings
17 that leak, why can't we have one for these claims. It seems so unbalanced to me that we
18 prioritise something like leaky buildings over our children.
19 **MS JANES:** Thank you. You did mention the Crown Proceedings Act, so we will go back to
20 that, and that's at paragraphs 31 to 42 of your evidence. So in December 2015 the Law
21 Commission issued a report reviewing the Crown Proceedings Act, which in simple terms
22 outlines how the Crown can sue and be sued. What changes did they recommend and how
23 were they relevant to claimants seeking redress?
24 **MS HILL:** So the Crown Proceedings Act is an incredibly dry and painful document to begin
25 with. It's also incredibly confusing, it's far out of date. So that was one thing that the Law
26 Commission focused on. It's not fit for purpose, it was written in 1950, our governance
27 structures have moved on.
28 And one of the things that it addressed was the central purpose of the Crown
29 Proceedings Act is to allow the Crown to sue and be sued in the same way as any other
30 company or person, except for one important point which I'll come on to and the
31 Commission said well that probably shouldn't be the situation anymore. And the
32 Commission provided a draft replacement bill for the Crown Proceedings Act which made
33 it readable and it responded to what our Government actually looks like.
34 And so the report set out the problems with the Crown Proceedings Act and

1 proposed a solution which was a replacement Act. The one point that I mentioned before,
2 and it's a critical one, is that the Crown Proceedings Act protects the Crown from being
3 sued in direct negligence. So when Sonja was talking yesterday about the different types of
4 causes of action that we use in court, we talked about vicarious liability and negligence, and
5 direct negligence is something that a person can use when they sue anybody except the
6 Crown. But the Crown Proceedings Act says you can't sue the Crown in direct negligence,
7 you have to sue it in vicarious liability.
8 So a claimant coming to a court has to point to a Crown servant or a Crown
9 employee, they have to find a person to hang their hat on and say the Crown is liable for
10 that person's actions. So they have to sort of divert to a person to get to the Crown. And
11 that's really hard for a claimant to do. A lot of times people who have been in care won't
12 know who was making decisions about them, they may not remember the names of staff
13 members or the staff members' managers, because back in the day in Social Welfare there's
14 many, many layers of management and decision-makers at that point.
15 And so how do you make out that claim if you don't know who your State employee
16 is, there's no-one to hang your hat on. And if it was any other entity, you'd just be able to
17 say direct negligence is the way to go, but we can't with the current Crown Proceedings
18 Act.
19 **MS COOPER:** Sorry, I was just going to also interpolate there, often what we're talking about in
20 these cases are policies and systems and actually having to attribute that to an individual,
21 and that's one of the things that the report highlighted, is actually impossible, because it's,
22 you know, it's part of a group of people who've made a decision and sometimes you won't
23 actually know where that decision has come from. I mean, for example, if you are relying
24 on the policy documents, the manuals, you won't know who's authored that, because you
25 can't actually sue directly, that can create really significant limits on liability.
26 **MS JANES:** And taking you to paragraph 34 and 35 of your evidence, there are a couple of
27 quotes there that are probably good summaries if you would like to just read those.
28 **MS HILL:** Certainly. So the Law Commission noted that currently someone who wants to sue
29 the Crown in tort must fit the case into one of the categories prescribed in section 3 of the
30 Crown Proceedings Act. And the Law Commission explained it in this way:
31 "The Crown Proceedings Act effectively establishes a bar against suing the Crown
32 directly in tort with the exception of the very limited classes of claims available under
33 sections 6(1)(b), 6(1)(c) and 6(2)". This bar is felt most sharply in the cases of negligence
34 claims but applies equally to other torts. The Crown can only be held vicariously liable in

1 tort for the acts and omissions of Crown employees. Consequently, in order to sue the
2 Crown in negligence, a potential claimant must identify a particular Crown employee and
3 allege that he or she has committed a tort.
4 However, if no particular Crown employee has committed a tort, or it is alleged that
5 the Government department as a whole has failed, or its claimed that a number of
6 Government departments have collectively failed, a person harmed in circumstances where
7 there would otherwise be legal redress may be left without any redress against the Crown.
8 And the Commission went on to make another really important point:
9 "Immunity for the Crown may not be justified where it leaves a person who has
10 been harmed no remedy in tort".
11 And just dealing with immunity for a second, the State Services Commission Act,
12 or its precursor legislation, almost as boring as the Crown Proceedings Act, immunised a
13 lot of public servants against these kinds of claims. And when I had to explain this to
14 someone in a simple way the immunity is catching. If the employee has the immunity, then
15 the Crown gets it too. And so if your employee – and this is a very simplified version – if
16 your employee has immunity then the Crown is protected as well.
17 So it's another form of shield there through the State Services Commission Act.
18 **MS JANES:** Then there's also an issue with exemplary damages.
19 **MS HILL:** Yes, so we haven't talked a lot about the type of damages, some people find it
20 interesting. For the purposes of today there's two types of damages that we talk about,
21 compensatory damages which put you back in the place you would have been had you not
22 been hurt. Now the ACC scheme says you're not allowed those damages if we're talking
23 about a personal injury after 1974. It's much more complicated than that but we don't have
24 that kind of time.
25 Exemplary damages are damages designed to punish. They are on top of
26 compensatory damages. You can still get those, even if compensatory damages have been
27 barred by ACC. Now the Crown Proceedings Act says you can't sue in direct negligence,
28 you've only got vicarious liability. But the Supreme Court has said if you sue in vicarious
29 liability we're not sure you'll be able to get exemplary damages.
30 So not only does the Crown Proceedings Act cut off that avenue of direct
31 negligence where you can also get exemplaries, but it forces you down this route of
32 vicarious liability and the law in New Zealand, it's not entirely clear, but the Supreme Court
33 were not very enthusiastic about exemplary damages for vicarious liability. So you're cut
34 off there again.

1 So it's like you're going through a little funnel and it gets tighter and tighter for a
2 claimant and it's because the Crown Proceedings Act is just – is cutting that off and
3 protecting the Crown.
4 **MS JANES:** So where is this currently, the Law Commission's suggestions for change?
5 **MS HILL:** Well, the Law Commission proposed change in 2015 and the Government rejected the
6 proposed changes, in particular it rejected the suggestion that the Crown should be able to
7 be sued in negligence. So it expressly said we don't want that, and since that time it's gone
8 nowhere, it's just sitting there. The Bill's still perfectly good, but the Government has
9 decided not to implement any of those recommendations.
10 **MS JANES:** And you've probably explained it, but if there's anything else you want to say about
11 why that has an impact on claimants seeking redress for abuse.
12 **MS HILL:** It's a cleaner, like direct negligence is a cleaner and more honest way to approach it.
13 And why should the Crown be different to any other entity in New Zealand? It's one of
14 those built in unfair things that places claimants at a disadvantage. If a claimant had been
15 in say Catholic church care, they could sue the Catholic church in direct negligence but
16 because they've been in the care of the State they can't. To me that seems terribly unfair.
17 **MS COOPER:** Particularly I should add too given that most children and vulnerable people in
18 New Zealand will have been in State care rather than in private care.
19 **MS HILL:** It's not a big concession is the last thing. A claimant still has to get through all of the
20 other barriers. They've still got to address ACC, they've still got to make out their claim,
21 they've still got to get through the Limitation Act, they've still got to do all of the other
22 things. So it's not an enormous concession, it's just a levelling of the playing field.
23 **MS JANES:** And at paragraph 42, if you can just look at paragraph 42 and then you propose a
24 solution at paragraph 43. And while you're finding that in your brief, at this point I'll also
25 ask you to then go to paragraph 30 which provides a wrap-up solution for your yesterday's
26 evidence.
27 **MS HILL:** So at paragraph 42 we'd talked about how many of our clients are the victims of
28 systemic negligence. This idea of wholesale failure at levels of Government and they can't
29 identify specific individuals, or where lots of people have contributed to wrongdoing and
30 you think about Chassy Duncan, for example, all those different people in his life.
31 Where if you claim in direct negligence, it sets out the claim more clearly and more
32 honestly than the sort of artificial way of dealing with it in terms of vicarious liability. So a
33 solution is really, really simple, it's to implement the draft bill that the Law Commission
34 wrote for the Government five years ago to amend the Crown Proceedings Act to remove

1 that protection for the Crown.
2 And we can go to paragraph 30, unless you have any other questions for me on that.
3 **MS JANES:** No.
4 **MS COOPER:** So this is stepping back to some of the other barriers that we were talking about
5 yesterday and we have proposed that there is a purpose-built statute and I think that's
6 something we'll talk about quite a bit in our evidence to deal with claims of this nature.
7 And that's something obviously there's already the Australian model that this Commission
8 can look at, but we would ask that it address, first of all imposing a duty of care on the State
9 and at least those contracted to the State to provide services to make sure that there is a
10 strict liability, and we're not – I mean I think the Commission will need to decide whether
11 that's non-delegable or vicarious.
12 I think secondly what we would say this statute should do is reverse the burden of
13 proof, which is typically on the plaintiff, reverse that to the defendant when we're looking
14 at whether there has been any breach of a duty that's owing. And also finally in
15 establishing causation, so that line between abuse and its harm, that again the burden should
16 be on the defendant to show that the abusive conduct did not cause the damage. So
17 reversing again that burden. And that, again, will be factors which obviously are almost
18 insurmountable problems now, will just put that burden back where we say it should
19 properly lie given all those other difficulties.
20 **MS JANES:** Can I just tease that very gently and very quickly. Reversing the onus of proof or
21 establishing a very strict balance of probabilities, because you talked yesterday about there
22 were disparate burdens of proof. In your view would one equate to the other or is one
23 preferable for any particular reason?
24 **MS COOPER:** I think actually the preferable way is to have the reverse burden. I think just
25 recognising that the starting point for this claimant group particularly, taking into account
26 their own personal vulnerabilities and then all those other issues that they confront like
27 records missing, lost, unavailable, witnesses potentially unavailable, and if we look at all
28 those other barriers that there are standards of the day arguments.
29 I mean just if we look at the practicalities of the burden of being able to prove the
30 case, I think what we would say is if you've reached that burden, which you already start
31 from a difficult point of view as a claimant in this area, then it should be up to the Crown to
32 show that actually there's been no breach, or that actually the harm that you've suffered
33 hasn't been caused by that acknowledged breach. And again, I just think that that levels the
34 playing field, it's already, from my recall, it's something that the Australians legislated as a

1 consequence of their Royal Commission and I think, you know, that's again kind of
2 recognising the realities of how difficult litigation is.
3 I should emphasise that this is just for these kinds of claims and not saying that that
4 should be universal, but I think, as I say, it's specifically about this particular claimant
5 group. So we're talking about obviously children who are in care and vulnerable adults, so
6 those who have been in psychiatric hospitals and psychopaedic, so vulnerable people is
7 really where the focus of this is.
8 **MS JANES:** And we now move on to the indivisible Crown. Amanda, would you like to tell us
9 what it means and what impact it has for claimants.
10 **MS HILL:** Certainly. I should explain the term "indivisible Crown" is a nickname we gave to
11 this issue in the kindest possible way because it was just the way it came about.
12 So the nature and the history of the claims has meant that at times different issues
13 have presented themselves and we've had to try and find ways to address it. And one issue
14 that came up was caused by some clients having two claims, one against the Ministry of
15 Social Development and one against MOE [Ministry of Education], education. And
16 sometimes they've been started at different times, so often a claim about a residential school
17 had been either filed in the court or raised later than the MSD [Ministry of Social
18 Development] claim. And so that created issues in terms of different, potentially different
19 Limitation Act periods and the clock that Sonja was talking about the ticking stopping at a
20 different time. That's a reasonably small group of people in the scheme of the claimant
21 group.
22 The second issue that is the background to this was the establishment of Oranga
23 Tamariki which initially was going to deal with historic claims where people were in care
24 after January 2008. That's since changed but that was the situation for a while.
25 And so with that date we said well, Oranga Tamariki needs to be a defendant for
26 some of our younger clients, because sadly we have clients who were in care coming to us
27 after 2008. And we said we'll start to name Oranga Tamariki as a defendant. I won't get
28 into how you name different defendants in court proceedings, that's not necessary, but the
29 prospect of a third Government Department being named in court proceedings was the
30 issue.
31 And the Crown responded with a view that we should name the defendants in
32 proceedings differently, that instead of doing the Attorney-General in respect of the
33 Ministry of Education and so on, it would just be the Crown as a single entity. Because all
34 parts of the Government are really just part of the Crown.

1 And quickly we just started calling it the indivisible Crown argument and that's why
2 it –
3 **MS COOPER:** Or the one Crown to rule them all.
4 **MS HILL:** We try not to use that. And the point was that Crown Law came to us and said just
5 name the Attorney-General on behalf of the Crown and we'll decide which parts of the
6 claim relate to which parts of the State and we'll decide what discovery to give you and
7 we'll just decide about that on the basis of what's in the claim document.
8 That was a bit challenging for us because part of the power of putting, you know,
9 filing claims in court is obtaining discovery and knowing who you're getting discovery
10 against. So this idea of one large Crown, this amorphous thing and they decide who gets
11 the information, that didn't sit well with us.
12 While I acknowledge that it was a proposed solution to deal with the issue of
13 claims, it would have helped a small group of people, but been detrimental to the wider
14 group. We viewed it as a way for things to become less transparent. And also we didn't
15 think it accorded with the law as it sat at that time. The Court of Appeal had been
16 presented with a similar argument in the Dotcom, one of the many, many cases about Kim
17 Dotcom, and the Court of Appeal had said no, that's not appropriate, you need to name the
18 part of the Government that you are dealing with.
19 And it came up as something that the Crown wished to address and really it came
20 down to what name do we put on the front of court proceedings. And Justice Rebecca Ellis
21 at that point said how does this resolve the claims, what does this do to resolve the claims?
22 And my conclusion at that point was not much. It was something that was going to take us
23 more time than needed to deal with and it had no real effect.
24 But one of the things that became clear is that we were not willing to deal with a
25 single Crown because in reality the Crown doesn't act like a single entity. We've got
26 processes with the Ministry of Social Development, with Health, with Education, they're all
27 different. So this reasonably academic idea of the indivisible Crown in practice for our
28 clients didn't work.
29 So it was something that, it's still sitting there as an issue, but in reality we saw no
30 practical use in it and we've since found a way through for the joint claims. It was another
31 thing we had to respond to and put time into, it took us away from the substantive claims.
32 But until the Crown starts acting as a single entity, we weren't prepared to treat it as one.
33 **MS COOPER:** I should also add to that that each of the Crown entities has their own lawyers as
34 well. And whenever we've been involved in litigation, the different lawyers from the

1 different departments are involved as well. So that adds to that sense of it all being divided
2 amongst itself anyway.
3 **MS JANES:** In terms of consistency approach as between Government Departments and how
4 they deal with claims, was there a concern of potential impact, you've talked about the
5 transparency issue.
6 **MS COOPER:** I think it was -- we were particularly concerned about documents to be honest.
7 And also too, so that's the discovery if the Crown was deciding which parts of it were
8 potentially liable, it also got to decide what documents we might get. And, you know, our
9 ability in court proceedings to get all of the relevant documents is absolutely critical.
10 I mean documents are just critical for this client group in terms of proving their claims and
11 has become more so.
12 So that was a concern for us. There was another thought that flashed into my head
13 but has flashed out, but it may come back to me and I'll think about that again.
14 **MS JANES:** You just subconsciously process that. We are going to be talking about the *N v*
15 *Attorney-General* case, but it does seem at this point it would be quite a useful diversion
16 because you've been talking about the reason for filing claims is access to records. Just a
17 very thumbnail sketch, can you outline why that case was important and what it means in
18 terms of filed and unfiled records?
19 **MS HILL:** So *N v Attorney-General* came about because the records we were receiving for clients
20 were heavily redacted. Some were so badly redacted, blacked out, that you couldn't make
21 sense of it. And this was for people who had received court-ordered discovery as well.
22 There's different rules that apply. Obviously for information received under the
23 Privacy Act or information received under discovery. So there's different rules there.
24 But we applied for particular discovery because we said that the redactions weren't
25 in accordance with the rules. MSD was making decisions, and this is about MSD rather
26 than MOE or Health, MSD was making decisions about what was relevant to our client's
27 claims and saying well, if you have any concerns about what we've blacked out, just let us
28 know. But if you can't see it you can't tell them you're concerned about it. So that was an
29 unusual challenge to try and guess what was under the redactions.
30 And what we discovered, because sometimes we act for people who are related, or
31 we have – so we had some brothers, or sometimes the person redacting just isn't very good
32 at it and forgot to redact some parts. So what we could see is the clearly relevant material
33 was being redacted by MSD, even though under court-ordered discovery you shouldn't
34 really be redacting for relevance at all.

1 So we took that to the High Court and the result was the decision in *N v*
2 *Attorney-General*, which I think is certainly in the materials provided to the Commission.
3 **MS JANES:** Yes.
4 **MS HILL:** And Ellis J, who manages the, what we call the DSW [Department of Social Welfare]
5 group, issued a decision saying that clearly relevant material had been redacted, that we
6 couldn't be expected to identify what was important because we couldn't see it, and that she
7 directed that we received two versions of the documents, counsel-only version, so we call it
8 the clean copy that only the lawyers can see, and then a redacted copy which we could
9 release to our clients without breaching anyone else's privacy. In terms of court-ordered
10 discovery that's been the way we've operated since then and it's been very helpful to be able
11 to see what's under the redactions.
12 We've got other issues coming out of that. The redaction of all court documents,
13 because there's issue around who owns those documents, MSD says it does not own them,
14 so they have to redact them. We're taking issue with that and we're seeking –
15 **CHAIR:** What do you mean by "court documents"?
16 **MS HILL:** So say –
17 **MS COOPER:** Social work reports, psychological reports, so it's particularly those documents, so
18 documents particularly under the Children Young Persons and their Families Act, now the
19 Oranga Tamariki Act.
20 **CHAIR:** These are documents ordered by the court?
21 **MS COOPER:** Yes.
22 **MS HILL:** Yes. Owned by the court.
23 **MS COOPER:** So they're produced for the court as part of Family Court and Youth Court
24 processes. There were similar reports under the Children and Young Persons Act 1974.
25 They are critical documents for us, because they tell us about the family, more importantly
26 they tell us what State knew about the family, what it's done so far, what its intentions are
27 moving forward, what, if any, court orders there are, because often all of that court stuff is
28 now redacted so we don't know what status a client has at all. And trying to pin liability
29 when you can't actually figure out what's happened, what status is is really, you know,
30 again it's another really significant barrier.
31 And I think our point is that except for the psychological reports which are clearly
32 court-ordered, and there will be often very good reasons and those of us in this room who
33 are youth advocates and Family Court lawyers will understand even now there may be good

1 reasons why a court should think about whether they should be released.
2 But social work reports, there is actually a presumption in the legislation that they
3 are released, but they are still being withheld from us. And this is after we went around this
4 circle in 2016, at that stage it was a reliance on the Family Court rules, legislation, and we
5 said yes, but a lot of the documents we want actually are from the Youth Court. And most
6 of them are.
7 And so we started to get them all again for a while and then it's only been, I think
8 probably, certainly since the Royal Commission has been underway, that's been reviewed
9 again, because we asked for all those documents that had been redacted to be re-released to
10 us and that process is underway, but they've all been redacted again. So that's just -- it's a
11 real impediment to us and survivors understanding what their history is, what the State
12 knew, which at the end of the day is the most important part of this, what interventions they
13 were supposed to do, and also too, as I say, status.
14 **MS JANES:** It's probably useful because we're so deep in this subject, let's actually go to number
15 37, the *N v Attorney-General* decision. We'll have a look at some of the paragraphs,
16 because Ellis J made some fairly firm findings in this judgment. And then as we do that I'll
17 also then ask you what has happened subsequently.
18 So this is the *N v Attorney-General* decision, Ellis J on 4 February 2016. And if we
19 can first go to paragraph 1 and 4. The only issue I want to make in paragraph 1 and just
20 have you confirm is that this was really a representative.
21 **MS HILL:** Absolutely.
22 **MS JANES:** So it was not confined to these three plaintiffs?
23 **MS HILL:** No.
24 **MS COOPER:** No, it was right across the client group but we use these to illustrate the general
25 difficulties we were having.
26 **MS JANES:** Thank you. Then we'll go to paragraph 4. Thank you. That just confirms what
27 you've been saying that up until the end of 2013 the Ministry was providing Cooper Legal
28 with the full personal and family files of the claimants without redaction.
29 **MS COOPER:** Correct.
30 **MS JANES:** Then if we go to paragraphs 7 and 8. Perhaps if I get you to, one of you to read the
31 next paragraphs as I call them out.
32 **MS HILL:** You want me to read these ones?
33 **MS JANES:** Yes.
34 **MS HILL:** "But it appears that in the context of addressing the discovery applications and in light

1 of the 2012 amendments to the High Court Rules dealing with discovery, in late 2013 the
2 Ministry reviewed its disclosure processes. This resulted in the Ministry taking a narrower
3 approach to relevance which, it considered, was in keeping with those new rules. So, a
4 letter from Crown Law to Cooper Legal dated 12 December 2013 advised:
5 'You therefore may notice more redactions in the documents that you will receive in
6 discoveries. Of course if those redactions raise any concerns with you that there may be
7 information that you consider to be relevant that has been redacted, then please let me
8 know. The Ministry is happy to consider any explanation you may have as to why that
9 further information may be relevant in terms of the test in Rule 8.7'.
10 There is perhaps something of a catch 22 aspect to the suggestion that plaintiffs'
11 counsel should explain to the Ministry why they regarded information they had not seen as
12 relevant.
13 **MS JANES:** Then if we can go to paragraph 11 and 12.
14 **MS HILL:** I also –
15 **CHAIR:** Can we also, for the record, note this is the judge speaking.
16 **MS HILL:** Yes.
17 **MS JANES:** Yes, paragraph 8 was the judge speaking.
18 **MS HILL:** "I also record at this point that my own comparison of a sample of the redacted
19 documents with the original of those documents (an exercise helpfully facilitated by the
20 provision of a bundle of such documents by counsel for the Ministry) gives me some
21 concern that some of the material redacted is plainly relevant to the claim of the particular
22 plaintiff concerned. Again, that is not meant as a criticism of the effort or bona fides of
23 those charged with the disclosure, but rather as an indicator that the redaction of parts of
24 otherwise relevant documents can be fraught with difficulty. There is also the point that the
25 content of the documents in question by and large constitutes personal information related
26 to the particular plaintiffs themselves. Absent some clearly articulated and contestable
27 claim for third party confidentiality, it is difficult to see how the redactions could be
28 warranted.
29 The court is therefore faced with a situation where not only is there no sworn
30 affidavit of documents and accordingly no presumption in favour of the validity of the
31 redactions, but one in which there is an actual basis for doubt in that regard".
32 **MS JANES:** And then finally we'll go to paragraphs 16 and 17.
33 **MS HILL:** "Although I urged counsel to reach agreement about some form of pragmatic solution,
34 that did not prove to be possible". Do you want the whole paragraph?

1 **MS JANES:** No, just the highlighted ones thank you.
2 **MS HILL:** "In the end I consider that the most just, expeditious and inexpensive way forward is
3 for the Ministry to provide a set of documents to counsel for the plaintiffs which contains
4 both a redacted version and a clean copy of each of the disputed documents. The clean
5 copies are to be provided strictly on a counsel to counsel basis only".
6 **MS JANES:** Can you then talk about what took place after this judgment was received and up to
7 the present day? Because I understand it is an on-going discussion.
8 **MS HILL:** It is, and so for some time after the decision was issued, whenever we received
9 discovery for an individual claimant, as I said, we've received these two different versions,
10 in the last year or two we've had an increase again in the amount of redactions. So Sonja
11 has explained the issue around court documents, and there was also – sorry, I've lost my
12 thought, train of thought, there was something else that was redacted that shouldn't have
13 been redacted.
14 **MS COOPER:** I think we gave an example of a recent file. Yes, so we're back to redacting for
15 relevance again. And what we're seeing is when we finally do get the clean copies of the
16 documents that yet again, clearly relevant material is being redacted.
17 **CHAIR:** Sorry, you're saying that you're still receiving the clean copy on a counsel-only basis?
18 **MS COOPER:** That's only when we push.
19 **CHAIR:** So you're not getting that as a matter of course?
20 **MS COOPER:** No, even – and I mean we specifically are filing some claims to get the clean
21 copies, and we're getting pushback.
22 **MS HILL:** The other thing too is that this is – the *N v Attorney-General* only applies to discovery,
23 we still have most of our clients who don't have their claims filed in court and we still have
24 the issue of Privacy Act, which is enormously redacted, and I think –
25 **CHAIR:** You don't have the same principles applying to that because it's not related to the court?
26 **MS HILL:** Yes, it's not under discovery orders.
27 **CHAIR:** Yes, I see.
28 **MS HILL:** So we get very, very heavily redacted records under the Privacy Act, so there's quite a
29 disparity between the clients who are filed in the court, and discovery also is
30 time-consuming and expensive, so there is that impact on the time and resource to do that
31 versus the Privacy Act requests heavily redacted, and due to the Ministry's change of
32 position we're now going through this second cut, if you like, where they review and
33 unredact some parts. So we go through the documents twice sometimes.

1 **MS COOPER:** And it takes years for this to happen, it's another significant delay. At the
2 moment they are giving us back documents that we say they wrongly redacted back in 2016
3 and 17, and it will take, you know, three or four years to get those documents sent back to
4 us again. We now know that the court documents are being re-redacted so we have to go
5 around that circle again.
6 **CHAIR:** Have you suggested to the Crown that they treat the privacy documents in the same
7 manner as the court, as – and what was the response to that? You both nodded, for the
8 record. And what was the response to that?
9 **MS HILL:** The Ministry declined. Their view was that that was not consistent with the Privacy
10 Act, although –
11 **CHAIR:** We won't take anymore time on this, I think we've got the point that you're making thank
12 you.
13 **MS JANES:** So really just for clarity, you have the filed claims that come under the discovery
14 order supposedly governed by *N v Attorney-General*, and then you have the unfiled claims,
15 and just quickly summarise better, worse, what would you like to see done differently?
16 **MS HILL:** We'd like to see much cleaner copies of the Privacy Act information. We still see
17 relevant material redacted. If you want an example of that, in our evidence in reply we talk
18 about a claimant called MN and there's an example in our reply brief about the type of
19 redactions you will see in a Privacy Act release. That might be helpful to illustrate the
20 point.
21 **MS JANES:** And just quickly, you may be able to say yes or no, but the Commissioners have
22 seen an example of redactions in the Sammons evidence and that would have been an
23 unfiled claim?
24 **MS COOPER:** No, I think they were – one was filed and one wasn't, so Georgina was filed,
25 you'll remember we had a judicial settlement conference for her, Tanya not, from recall,
26 because she would have – she came to us later and is caught by the stop the clock
27 agreement, so we didn't need to file her.
28 **MS JANES:** And we did see Georgina, so 45 out of 90 were under a court discovery process.
29 We're now going to go back to where we were previously and we're going to talk about
30 Crown use of defences in civil litigation. Just quickly foreshadowing where we will go
31 with that evidence, firstly we will look at the ACC, then the Limitation Act, then very
32 briefly the immunities mental health legislation. And an issue that arose in the Earl White
33 evidence was contributory negligence, so I will also ask you to briefly talk about that.

1 But firstly, with the ACC, before looking at, as we go through each of the State
2 redress schemes, ACC is a possible avenue for redress both monetary and non-monetary
3 since 1 April 1974, particularly in relation to sensitive claims of sexual abuse.
4 But what would you say in terms of historical abuse in care and the relevance of
5 ACC as a process?
6 **MS HILL:** I would say that ACC – it is an enormous block on people obtaining redress and the
7 whole idea of ACC being able to replace what you get in a court or what you could get in a
8 court, that's not the reality of what a person receives through the ACC scheme. So it blocks
9 your ability to receive compensation, but it does not deliver what you should be getting in
10 response, which was the whole point of the scheme.
11 **MS JANES:** And we will hear from the Crown, Linda Hrstich-Meyer, at 3.9 of her evidence talks
12 about ACC and redress schemes being entirely separate processes.
13 **MS HILL:** Yes.
14 **MS JANES:** Would you have any comment about your experience, if that is the case or not?
15 **MS HILL:** Certainly as we work through the documents that deal with particularly MSD
16 settlement processes, and ACC is often referred to as a reason not to grant compensation,
17 but currently, ACC has been there so long it has deflated compensation across the board
18 anyway.
19 But the entitlements under ACC, yes, they're separate to redress, but they're really
20 just so inadequate. So you used to be able to get lump sum payments. Very few people
21 qualify for them anymore. Most people who can access ACC entitlements do so through
22 what's called independence allowance, which requires you to go through a fairly brutal
23 assessment with an ACC assessor who will tell you your percentage of disability and so
24 you're broken down to a percentage and you have to be, I think, more than 10% to get any
25 financial assistance at all. And that's usually given over time, it's not a lump sum. And
26 certainly those percentages will be thresholds that ACC use. They favour physical trauma
27 over mental trauma, so there's a higher percentage allocated for physical trauma over
28 mental trauma.
29 I think Chassy Duncan touched on this the other day when he gave evidence, the
30 counselling that is available when you lodge a sensitive claim, that's only for sexual abuse.
31 There's no counselling available for victims of physical abuse or witnessing trauma or
32 solitary confinement. Even though some of the – a lot of those things are covered by ACC,
33 so you can't get compensatory damages for them, there's nothing available under the ACC

1 scheme for you.
2 **MS JANES:** Just going back to your point about what used to be available by way of lump sum,
3 we actually have an article from The Dominion in 25 April 1996. Could you just read the
4 highlighted part and then I want to contrast that with Earl White's findings.
5 **MS HILL:** "A woman who was coerced by her psychologist into having sex with him 17 times
6 will get up to $170,000 in ACC compensation after a landmark decision by the Accident
7 Compensation Appeal Authority. The Appeal Authority, Peter Cartwright, has allowed her
8 appeal against an ACC decision that all of the sexual abuse was a single act, entitling her to
9 a maximum $10,000 lump sum pay out".
10 **MS JANES:** So coming back to Earl White, the findings in the High Court were that there were
11 13 incidences of sexual abuse, and a 17% impairment for the purposes of ACC. So what
12 comment would you say about what you have seen through your involvement with
13 claimants and what happens with ACC entitlements, recognising that this is a difficult topic
14 and there will be a whole round-table on it.
15 **MS COOPER:** Well, I think it's exactly as you've said. Now, you know, once upon a time each
16 separate assault was treated as such, and you received compensation for each individual
17 injury. Now it's all lumped together as one injury and you have to meet this threshold
18 before you're entitled to ACC at all. It's only sexual abuse, as Amanda's pointed out, not all
19 of the other abuse that will have impacted on you. And then you get the small amount I
20 think quarterly or annually, but that has to be reassessed every three to five years to see
21 whether you're still sufficiently damaged to continue to get this small lump sum payment.
22 So it's really not what ACC was meant to do, it was meant to replace the damages,
23 the compensatory system that was available in the courts but it hasn't done that at all. And
24 there were deliberate policy documents. Again, it's one of those things that this, you know,
25 a political decision as so much of this area is, it was a political decision to specifically make
26 it more difficult for victims of sexual abuse to get lump sums for a start, and also to make it
27 harder for them to get big lump sums.
28 **MS JANES:** So in terms of claimants coming to you with degrees across physical, sexual abuse,
29 neglect, what would you say about the inequities that may or may not exist relative to the
30 ACC system and redress processes?
31 **MS HILL:** It's enormously inequitable. I think if you go back to the whole reason for ACC in the
32 first place was so that people didn't have to go to court to get a remedy for personal injury.
33 But then you see what has replaced it and it's just a pittance.
34 And then there's all these things that aren't covered by ACC and I'll come on to the

1 decision in *Taylor v Roper*. So things like solitary confinement, that's not covered by ACC
2 at all, but still have to go to court for that part. It's immensely complicated as well, it's
3 inaccessible, it's unworkable.
4 **MS COOPER:** And the redress processes are built on this basis that there is a functioning ACC
5 system that actually, you know, will give you that proper compensation. So they're also
6 lower level compensation and they also compartmentalise and minimise and lump together
7 assaults, you know, so, you know, repeated sexual assaults will just be sexual abuse and
8 repeated physical assaults will be, you know, just all lumped together and deflated and
9 minimised and then represented in small amounts of compensation or ex gratia payments
10 that are offered under the redress processes, and that's again built on this premise that we
11 have this functioning ACC system that we don't.
12 **MS JANES:** So you've talked about the difficulties and inequities of access to ACC entitlements,
13 and then we go back to the ACC bar that then applies in civil claims. So just talk us
14 through that part of the process.
15 **MS COOPER:** Well, yeah, I mean we saw that graphically illustrated I think in *White* where –
16 I mean we had, you know, these were two claimants who'd actually never had treatment,
17 but as a result of the win in *S v Attorney-General* the legislation had been, you know,
18 passed to apply retrospectively and we were saying yes, but they've never had any
19 treatment so how can it actually apply?
20 But it was deemed to have applied and then because they would have had cover
21 when they were in care, at least post-1974, for all of their other abuse, so because the 1972
22 and 1982 acts were very expansive and covered everything, they covered, you know,
23 physical, sexual, psychological abuse. So in effect their whole claims were covered by
24 ACC.
25 But, of course, you can't retrospectively apply for ACC if you've missed out, if
26 you've missed out because you didn't actually know you had a right to apply for ACC. The
27 only thing that you can retrospectively apply for is in respect of sexual abuse, but every
28 other aspect of abuse you've suffered it's still covered by the ACC bar, but you can't
29 actually claim ACC for it anyway because the provisions say that if you don't make your
30 claim in time you don't get it. So there's a double whammy there.
31 **CHAIR:** There's a limitation in the ACC legislation as well.
32 **MS COOPER:** Yes.
33 **CHAIR:** What is that limitation time?
34 **MS COOPER:** What it says is that if you had cover, say, under the 1972 Act, you had to make

1 your claim within the timeframe of that legislation.

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

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

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

11 **CHAIR:** A policy decision, yeah.

12 **MS COOPER:** It has to be legislated.

13 **CHAIR:** Legislative.

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

17 **MS COOPER:** That's correct.

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

19 **MS COOPER:** No.

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

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

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

1 ensure that he got legal advice, and on top of that – and that obligation was on-going, even
2 once the wardship was concluded.
3 And the High Court also said was that that obligation was to give correct legal
4 advice, not incorrect legal advice. And so because he'd got incorrect legal advice,
5 essentially that obligation continued. And so his claim was found to be not limitation
6 barred because he'd got this incorrect advice and that obligation was on-going, and so he
7 was able to get damages from the Commonwealth for this injury.
8 And we actually have that in every one of our claims that we file in court in reliant
9 on that *Bennett* case.
10 **MS JANES:** And in terms of a lot of claimants having already suffered deficiencies in terms of
11 education and cognition and knowing where to go to find out where their rights are, not all
12 of them will seek legal advice. If there was a responsibility for information about
13 entitlements, where would you say that should arise?
14 **MS COOPER:** Well, I think with, it arises with the State. You know, I mean that *Bennett* case
15 was very clear about that. Again, it might depend a bit on status, so but certainly if you're a
16 State ward or you're in the State's custody, I would have thought there is a clear obligation
17 then. And that's also to get, you know, to ensure you get ACC when you are entitled to it.
18 **MS HILL:** I have a slightly different view to Sonja on this. So this independent Tribunal that
19 I mentioned earlier, that should also have an advocacy role for people who have been in
20 State care. There is a long history of Crown entities not telling people what they're entitled
21 to, there is a lot of media around MSD not advising people of their benefit entitlements,
22 ACC not advising people about, I think, loss of potential earnings and things like that.
23 So if the Crown is going to do that, I think I have concerns about that. And so part
24 of the independent Tribunal that I envisage that I would love to see would have that holistic
25 approach to helping people access what they're entitled to as a result of being in care.
26 A final point, Hanne – I know you want to move on – the practical realities of
27 ACC, even if you're entitled to counselling, there aren't enough counsellors, you can't get
28 them in prison. And like Chassy Duncan, he had an assessment in prison two weeks before
29 he was released and there was no follow-up. Often we see people transferred away from
30 counsellors that they're using. The practical realities of the counselling regime under the
31 sensitive claims, it's immensely inadequate, particularly in our prison system where it's
32 needed the most.
33 **MS COOPER:** And also too, of course, when you're a prison inmate, while you may be entitled

1 to counselling, all other entitlements are halted.
2 **MS JANES:** And you have some possible solutions that you outline at perhaps 139 to 142 of your
3 brief. If you would just like to summarise those.
4 **MS COOPER:** Well, we have a number of potential solutions. One is to amend the legislation
5 specifically for this group to allow them to claim for compensation, and to balance that any
6 Accident Compensation they have received can be offset against any compensation that a
7 court might award. So that prevents a double-dip and that was effectively what happened
8 in *S v Attorney-General*. He had to account back to ACC for the money he'd received from
9 ACC and back from his compensation.
10 If the legislation is to continue, then I think there needs to be serious consideration
11 to extending cover, so that it covers all of the impacts of abuse in care and that's physical
12 assaults and the mental health aspects of that and psychological abuse and trauma.
13 I think we're very clear that lump sums should be re-introduced specifically for this
14 claimant group. And it's interesting, we know when we get reports from actuaries, and
15 I just want to bring this in now, when we get reports from actuaries about the economic loss
16 suffered by this client group because of the impact of their abuse on their ability to work to
17 actually have, you know, productive sustained lives, we are talking in the hundreds of
18 thousands. I've not seen a report from an actuary that has been lower than about $400,000.
19 And some of the figures are considerably higher.
20 So the economic impact of abuse on this client group is profound and ripples
21 through the generations because of, you know, the poverty that then carries through the
22 generations. I think that's a point worth noting. When you quantify their loss, it's hundreds
23 of thousands of dollars.
24 **MS JANES:** Just before we finish –
25 **MS COOPER:** Sorry, the last – so the last suggestion we had was that to get rid of the
26 amendment that was made to retrospectively cover for sexual abuse. So if we are going to
27 have legislation that starts from 1 April 1974, that should be the starting point and if you're
28 pre that it should all be out, not some in and some out.
29 **MS JANES:** We're going to move on to the Limitation Act, so this is probably a good time to –
30 **CHAIR:** Good time to take the break. We'll take the morning break at this stage.
31 **Adjournment from 11.23 am to 11.45 am**
32 **CHAIR:** Thank you Ms Janes.
33 **MS JANES:** Thank you. Ms Cooper and Ms Hill, we're turning to paragraphs 66 to 78 of your

1 evidence, the Limitation Act. Recognising that it is a very complex piece of legislation, can
2 you briefly, in lay person's terms, talk about what it is, how it affects claimants who are
3 seeking redress.
4 **MS COOPER:** So the main purpose of any Limitation Act is to stop stale claims being brought.
5 And that's so that defendants have some surety about the timeframe within which they
6 might have to face claims, and that affects insurance and all sorts of things. So it sets up a
7 timeframe in statute by which you have to have brought a legal claim, that means filing a
8 claim in court.
9 It's important for this claimant group because, as we've explained, the research from
10 Australia shows that on average it takes 22 years for somebody to realise that they have a
11 claim, or to be able to talk about what's happened to them. And the way that the law works
12 is that's going to mean that it's already way out of time.
13 So the law has been specifically developed to address claims of this kind. I should
14 say before that that the Limitation Act is a choice for a defendant. And that's actually really
15 important, and I think particularly when it's the Crown that's on the other side. So a
16 defendant can choose whether to raise the Limitation Act as a defence or not. So it could
17 just say no, we're not going to rely on that. And so what the Limitation Act does is it bars
18 any remedy, so you can still bring a claim and you can still have findings made about your
19 rights, but you just don't get any remedy as we saw in the *White* case.
20 So as I say, the law has developed to accommodate these special kinds of claims,
21 and just stepping back a bit, this is really a new area of law. It wasn't even until the late
22 1980s that psychologists and psychiatrists realised that Post Traumatic Stress Disorder
23 applied to this claimant group. So when you think about it, that's actually not very long
24 ago. Because that was specifically developed for war veterans, so they recognised that
25 people coming back from the war obviously had trauma.
26 So as I say, it wasn't really until the mid to late 1980s that it was applied to victims
27 of child abuse and that started only with sexual abuse. So these claims really only started in
28 the 1990s. And, of course, limitation acts are typically older. Ours is 1950, so these kinds
29 of claims weren't even in contemplation, of course.
30 So there are two ways that an abuse victim might get through the Limitation Act.
31 The first is what we call reasonable discoverability. So that's when you reasonably
32 discover that you have a claim. That actually developed from the hidden cracks cases. So
33 these were the cases where people had defects in their houses that you couldn't find. So
34 there might have already been a defect for 20 years, but it wasn't until the cracks started to

1 show that you realised that you had a defect in your house.
2 And so they applied that thinking, so in other words an abuse victim hadn't realised
3 that they had suffered some harm or that the person who had caused them harm was the
4 defendant and so that was how reasonable discoverability developed. So, as I say, that was
5 only from the mid-1990s was the first time that was being considered in the
6 Commonwealth and New Zealand. I think the first time I argued it was 1995 or 1996.
7 The other way that you can potentially get through the Limitation Act is if you are
8 under disability. So the law automatically says that until you are 20, so as a minor you're
9 automatically under a disability, so in fact the Limitation Act doesn't start kicking in until
10 you turn 20. Now of course with the new Limitation Act that's down to 18, because the age
11 of majority now is 18 instead of 20.
12 So what disability means is that because you've had, and that has to be a recognised
13 psychological or psychological condition, that has meant you have been unable to instruct a
14 lawyer. So it's around your ability, because of recognised illness or mental health
15 conditions, that you've been unable to instruct a lawyer.
16 I think one of the real issues with disability and it's something that we touched on
17 yesterday, that can fluctuate. And so somebody might be okay, and this is the thing about
18 Post Traumatic Stress Disorder; one of the symptoms of that is that you avoid thinking
19 about the trauma, and so you might actually not be diagnosed with Post Traumatic Stress
20 Disorder until you actually see an expert. And so you may, to all intents and purposes, be
21 actually carrying on with your life sort of okay because you're not actually having to think
22 about, you're avoiding thinking about the trauma.
23 But the thing with disability is once it's deemed to have stopped, your time starts to
24 run. So if you have a period of wellness and you're functioning, the time starts to run and it
25 doesn't stop again. So I mean we've had clients who where you might say that the disability
26 has stopped for a bit and then maybe six months down the track they've been in a car
27 accident and suffered a significant brain trauma but the time doesn't stop, it doesn't re-stop.
28 So that person, because of their brain trauma could never instruct because of that, but the
29 disability doesn't kick in again, it keeps running from the time that you're no longer under
30 disability.
31 New Zealand, we have an additional, under the 1950 Act, which covers most
32 people, we also have – so for most claims of six years you have to bring it from the age of
33 20, but if it's personal injury and most of these claims are personal injury, so that's all of the
34 abuse claims really physical and sexual abuse, you actually only have two years to bring a

1 claim. And then you've got another four years on top of that that the court has a discretion
2 to allow that additional four years if there's been no unreasonable delay. So that's just
3 another hook that has been used in New Zealand to kick claims out.
4 **MS JANES:** Can I just take you to, you talked about the 1950 Act.
5 **MS COOPER:** Yes.
6 **MS JANES:** No contemplation of these types of claims?
7 **MS COOPER:** No.
8 **MS JANES:** But there was a 2010 amendment.
9 **MS COOPER:** Yes.
10 **MS JANES:** Can you talk about what the changes were and are they better or worse for claimants.
11 **MS COOPER:** So the amendment only applies to reasonable discoverability. And to be honest
12 it's a very, very confusing set of amendments. So it applies a long stop. So one long stop
13 provision was within five years of that amendment, so up until 2015, and the other long
14 stop period was 15 years from the time of the cause of action. So I mean if we say a
15 20 year old that would potentially extend it to 35, and then there is a discretion, but I'm
16 not – I think this is the confusing part, is, you know, is that it, is that the long stop.
17 Because there is also a discretion in the case of sexual abuse to take into account all the
18 reasons for delay to extend that. And in physical abuse, if that's by something called a
19 close associate, and that has been a term taken from former Victoria and New South Wales
20 legislation, so which, of course, has been found to be outdated and already overtaken by
21 legislation which gets rid of the limitation period. So we don't really know how those
22 amendments to the 1950 legislation really work yet.
23 **MS JANES:** So in practical terms, how is that impacting on claimants who come to you both
24 historical and contemporary claimants in terms of what you can advise them about
25 application of the Limitation Act to their cases?
26 **MS COOPER:** Well, for our older clients it's a significant barrier and that's really around the way
27 that the courts have interpreted those provisions since *White*. I mean one of the things in
28 *White* was that it restricted reasonable discoverability to sexual abuse only, whereas I think
29 I explained in *S v Attorney-General* he'd been the victim of both physical and sexual abuse
30 and the Court of Appeal applied it across the board.
31 Disability, as I say, has just got lots of fish hooks in it. And the way that the courts
32 interpreted that, I mean a couple of more recent cases, which Amanda will talk to, maybe
33 shine some light on that and there's been a little bit more, I suppose, kinder I would have
34 said to claimants. But even still, there are lots of barriers there.

1 So I think for our older clients we just say the Limitation Act is almost now
2 insurmountable and to get through it, I think Amanda explained, you have to be damaged
3 enough to get through the Act which requires a very kind of high level of damage, but then
4 you've also got to be functioning enough to give a coherent account of what happened to
5 you. I mean that's almost a perfect storm plaintiff.
6 Which is the reason, as I said yesterday, that's the reason why we file all claims
7 where we can beat the Limitation Act, we file them.
8 **MS JANES:** In April 2010 you wrote, so if we can bring up number -- document number 9,
9 witness 94 ending in 398 and we see that's a letter from Cooper Legal to Garth Young at
10 the Ministry of Social Development dated 28 April 2010, and you raised some issues about
11 suspension of the Limitation Act. If we can call out the three, four actually highlighted
12 paragraphs, if you could just go through the yellow highlighted parts for us please.
13 **MS COOPER:** So, "Further while we accept that there have been potential Limitation Act and/or
14 ACC defences in some of the claims MSD has resolved with clients of this firm, MSD has
15 always relied on those defences in terms of the limits on its offers made with regards to
16 settlement.
17 While MSD continues to rely on its rights vis-a-vis the Limitation Act, clients have
18 no option but to file their claims in court in order to protect their positions in the event that
19 any less formal processes may prove to be unsuccessful. This is particularly given the
20 extraordinary delays in MSD being able to complete the care, claims and resolution process
21 for most clients. It is observed that delay is a very real concern, given your own
22 information that 20% of claims dealt with by the Ministry do not settle.
23 We also note that in a number of cases you have been unprepared to proceed with
24 the care, claims and resolution process until we have submitted a document in the nature of
25 a statement of claim".
26 **MS JANES:** And moving over the page if we can, calling out those highlighted paragraphs, and
27 again if you could just read the highlighted parts.
28 **MS COOPER:** "As we have stated, if we are required to provide that level of detail and legal
29 definition of a claim and the client is forced to incur the legal cost of doing so, then there is
30 little to be gained by holding off filing pleadings in a court context.
31 We note that Chief Justice Elias in hearing the Crown's appeal in the psychiatric
32 hospital cases questioned why the Crown was taking the limitation point in relation to the
33 mental health legislation. Chief Justice Elias challenged the Crown in those cases to let the
34 High Court determine the cases on their merits. The same sentiment applies here. Clearly

1 the option of relying on the limitation defence applies whether or not a claim is filed in a
2 court. Further, our own experience is that MSD relies on its technical defences at all
3 stages. The limitation defence is clearly taken into account in terms of any settlement
4 reached".
5 **MS JANES:** And again, over the page, calling out the highlighted passages.
6 **MS COOPER:** "Many of the churches and other organisations such as IHC with whom we deal
7 agree to suspend the limitation period in the manner we have suggested. It is interesting,
8 particularly as MSD is supposed to be a model litigant, that it takes a completely different
9 position in these cases, which are, after all, involving allegations of abuse by State officials
10 or while under the care of the State.
11 Your letter then asks this firm to provide quite a lot of other information about the
12 complaints and concerns our clients have. This includes a record of where and when they
13 were placed in care. With respect, MSD holds all of our clients' records. It has the
14 resources to obtain this information itself. We have no funding from the Legal Services
15 Agency to enable us to do substantive work on our clients' files. Unrepresented clients
16 would not be required to provide the information you are now requesting from this firm on
17 behalf of a very large number of clients".
18 **MS JANES:** And do you recall a response?
19 **MS COOPER:** Well, nothing changed immediately. I think we had some discussions around
20 filing what we were then calling a mini SOC [Statement of Claim], so a mini statement of
21 claim, to just stop the clock. But those discussions then devolved into agreeing to the stop
22 the clock agreement with the Ministry of Social Development, which we finally agreed and
23 signed up in May 2011. So yes, it was another year later.
24 **MS JANES:** And you covered the limitation agreement with the Ministry of Social Development
25 in your contextual hearing evidence, but can you just summarise the agreement and what
26 the purpose and effect of that stop the clock agreement was?
27 **MS COOPER:** So essentially what it means is that from the point that MSD accepts that a claim
28 has been made, and that's a point that we're now back in debate about, but anyway we'll
29 come back to that. So essentially that was when we notified the Ministry of Social
30 Development that we were requesting records because a client had instructed us that they'd
31 been abused in care. Time stopped from that point in terms of the Limitation Act running
32 to enable us to work through the historic claims process to see if we could resolve the
33 claim. And time would only start running again under the Limitation Act, I think from
34 recall two months after a client might have rejected any offer from the Crown, from MSD.

1 So that has been a big help obviously, it's meant that the vast majority of claims we
2 no longer file in court, and that's significant because there is a lot of work that we need to
3 do to actually get a claim to the point that we can file it. As I say, we still do it for all our
4 younger clients, but it is very hard work, it is reliant on going through as many documents
5 as we can, and with our younger clients where records may run to 3 to 8,000 pages that
6 we've got to try and absorb in a very short time to do that, we still do it though, but that just
7 has meant we don't have to do that with everybody. Obviously there are some
8 disadvantages of that in terms of what we get in terms of the records, but as I say, at least,
9 you know, we don't have to file every claim.
10 **CHAIR:** I don't want to open a can of worms so keep the lid on quite firmly, but if you're not
11 filing in the High Court, what's the Legal Aid situation?
12 **MS COOPER:** So that was very vexed for a long time, but –
13 **CHAIR:** The short question is –
14 **MS COOPER:** We get funding for that, yes.
15 **CHAIR:** – can you get Legal Aid to bring a claim that is not filed in the court?
16 **MS COOPER:** Yes, yes because the legislation specifically provides for engaging in alternative
17 dispute resolution processes, so yes.
18 **CHAIR:** Thank you.
19 **MS JANES:** And we will actually come to a document where that was not entirely clear but –
20 **MS COOPER:** Yes, that's where we got to.
21 **MS JANES:** So we will go to that document shortly. Just going back to discoverability and
22 disability, it would probably – we don't need to spend a lot of time for it, because,
23 Commissioners, we are relying on the contextual hearing evidence which did go into that in
24 quite a lot of detail, as does this brief. But it would be useful just to highlight it with some
25 cases where you can outline how and why it applies and when and why it doesn't, so you've
26 got the *W v AG* case.
27 **MS COOPER:** Yes, so that was – I guess it also demonstrates kind of the way in which the
28 court's view of these claims changed as well. So *W v Attorney-General* was one of the very
29 first cases that I took. This went to the Court of Appeal in 1999, so the argument was about
30 reasonable discoverability, particularly this was a client who had instructed us in the, as
31 I say, 1996. By the time she came to us she had tried to apply for ACC, she'd written a
32 short narrative of what had happened to her in care, it was a handwritten account, she'd
33 spoken to a nun about some of her experiences and had had some counselling.

1 But the court there found that these kind of preliminary steps were not enough to
2 trigger the reasonable discoverability and it wasn't actually until she had – I'm trying to
3 remember, I think it was proper therapy and somebody actually diagnosed her with a
4 disorder that she actually was found to have reasonably discovered the link. So, you know,
5 it required some better understanding. Then of course we had *S v Attorney-General*, which
6 was also High Court and then Court of Appeal. So that was in 2003 the Court of Appeal
7 decided that. That was both reasonable discoverability and disability.
8 So again, you know, from all outward looks a reasonably functioning person,
9 I mean he'd gone to university, he'd had an on-going alcohol abuse problem but was
10 working, married, you know, so to all outward looks kind of seemed to be functioning
11 okay, but the court there found that in terms of reasonable discoverability, again it was
12 really – so he had a massive kind of breakdown when his foster mother, who had abused
13 him, died, and that kind of unlocked all these memories really, and that was the step that
14 enabled him to get counselling. So again, it kind of ran from there.
15 But also too what was important in that case in terms of reasonable discoverability
16 was actually accessing his departmental files, because he hadn't known then what role the
17 Department had had to play and what decisions the Department had made or not made. So
18 actually accessing his files and understanding the liability of the department was critical. In
19 terms of disability, you know, so as I say, we had these kind of outward looks as though he
20 was –
21 **MS JANES:** Can I just pause you there.
22 **MS COOPER:** Sure.
23 **MS JANES:** Just to make a point before we move away from *W* and *S*. In terms of the redress
24 that they were able to achieve in their cases.
25 **MS COOPER:** Yeah.
26 **MS JANES:** As I recall from your contextual evidence around 150,000 each, where, in terms of
27 subsequent compensation payments, would you characterise that as sitting?
28 **MS COOPER:** Well above anything, there's never been – in the context of these claims, there's
29 never been anyone who's received – I think the next highest would be 90,000. And that's
30 for a breach of Bill of Rights Act claim too, that's somebody who had no limitation
31 problems and it was BORA [Bill of Rights Act]. So, yeah, most claimants, I think the
32 average for a Ministry of Social Development is like 18,000, I think that's what the
33 statistics would say. But, yeah, we'll talk about that later, but yeah, very, very big disparity.

1 So with those two, they got a big lump sum payment, I think actually *S* was – *S* kept
2 140 in his hand and he had to pay 160 to Legal Aid. And I would have thought *W* was
3 about the same, I wasn't acting for *W* at that stage, Judith Ablett-Kerr was.
4 **MS JANES:** Just to confirm, the 140, 150 was in the hand.
5 **MS COOPER:** Yes.
6 **MS JANES:** And legal costs were –
7 **MS COOPER:** On top of that.
8 **MS JANES:** On top of that. Thank you, I stopped you there.
9 **MS COOPER:** That's all right.
10 **MS JANES:** But we'll carry on with your disability.
11 **MS COOPER:** Yeah, so the critical thing there was the, there was a commonly accepted
12 diagnosis of Post Traumatic Stress Disorder, and it was accepted that that disorder had one,
13 stopped him, he'd avoided thinking about the trauma, but also two, it had been a, you know,
14 it had stopped him from being able to instruct a lawyer. So his claims were in time.
15 And then we kind of then, *White* and, you know, you know what happened there,
16 which was really interesting because in terms of the functioning of both Earl and Paul, they
17 were much less functioning plaintiffs, much, much less functioning plaintiffs than certainly
18 *S*. And I have to say I remain devastated to this day that – of the outcome of that in terms
19 of both reasonable discoverability and disability, because it seemed to me in terms of
20 reasonable discoverability not only was it restricted to sexual abuse, but you just needed to
21 have a small kind of, I use that word scintilla, a small tiny little understanding, and that was
22 enough. Whereas the earlier Court of Appeal cases had made it clear it didn't need to be a
23 sophisticated understanding, but it needed to be a sufficient understanding before your legal
24 rights kicked in. And yeah.
25 *K* I just wanted to refer to again. I did refer to it in the contextual hearing, but again
26 it was another unusual decision, decided about the same time as *White*. So this was a man
27 who by the time the hearing came to be dealt with was already under the Intellectual
28 Disability Act and that Act only applies if you've been – if you've had a low IQ from birth,
29 so below 70, and yet the judge held well, he wasn't, you know, he wasn't actually detained
30 under that legislation until after he'd taken this litigation. And also that he was somehow
31 sufficiently not disabled to instruct a lawyer and yet he was detained under legislation that
32 said his IQ was at a low enough level that he had to be, you know, especially detained and
33 had particular rights because of his low IQ.

1 So that didn't make sense to me. And then with *J*, which was again in this kind of
2 triumvirate of cases which had the catastrophic effect on Legal Aid. Here it was – she was
3 found to not be under disability because here the court found that she was undoubtedly
4 aware of her distress, emotional upset and anxiety. Well, again the test was around
5 understanding a psychological condition. I mean these are kind of just normal features
6 really. And also too, in terms of making the link, because she'd gone to ACC, as had *W*,
7 that again was said to have been when she made the link.
8 So you see these cases, you know, you see *W* and *S* from 2003 and then only four
9 years later kind of a very big turnaround. So yeah, they were, I think surprising is one
10 word. And obviously catastrophic really in terms of what that meant for this group of
11 claimants.
12 **MS JANES:** And just to orient the Commissioners, this can all be found at your evidence pretty
13 much from paragraph 49 to 108 if further information is of value. Then we go over to the
14 case of *LSA v W*.
15 **MS COOPER:** So these were then after the withdrawal of Legal Aid process kicked in which
16 we'll talk more about. We were then fighting for four years, I think, three or four years to
17 actually retain Legal Aid for this client group. And the reason why we put these cases in is
18 because they put further glosses on the limitation tests. And we've referred to the *LSA v W*
19 case because here's the High Court expressly rejected the findings of the Court of Appeal,
20 so this is a High Court expressly rejecting the findings of the Court of Appeal, a five-court
21 bench Court of Appeal, in *S v Attorney-General* on the basis that they somehow had
22 developed a better understanding.
23 So I mean, yeah, so that was interesting. And then we had other cases which we've
24 referred to, so *LSA v LAE* and *LSA v L*. So this was about the quality of expert evidence
25 that had to be provided, and what that meant was that experts now had to read every single
26 document that was relevant to a claimant's life. So right from whoa to go collecting
27 educational records where they were available, criminal justice records, medical records,
28 ACC records, every single record. And that all had to be taken into account by the experts,
29 and if that was not taken into account, then their reports were rejected as not being robust
30 enough.
31 **MS JANES:** What were the practical implications of that change of requirement?
32 **MS COOPER:** Well, I think – I mean we already had a very limited number of experts that we
33 could access to do these reports. That actually limited the pool even further, because the

1 amount of documentation that needed to be reviewed was, you know, like literally boxes
2 for some clients. And that just meant, you know, because typically most psychiatrists
3 doing this work do work in the public system and then, you know, have one tenth or two
4 tenths to work in the private system and they just couldn't do it. And it also meant that the
5 reports became very expensive. They went from being $1,500 to $2,500 up to $8,000 to
6 $10,000.

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

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

15 **MS COOPER:** Yes.

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

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

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

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

30 **MS COOPER:** Yeah.

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

1 always gone very well, because sometimes people clam up or don't want to talk or are too
2 distressed to talk. So you get to that point and then things can go astray at that point too.
3 **MS JANES:** And Amanda, you were going to tell us about the *Taylor v Roper* and the *J v J*.
4 **MS HILL:** Yes, just briefly because they're illustrative of the way more recent cases have been
5 dealt with. I'll deal with *J v J* first because it's the earlier case. That was a 2015 case of a
6 woman who sued a relative for sexual assault when she was a child. So this was a direct
7 claim against a perpetrator but still a civil claim. And she, and I won't go through all the
8 evidence, but the court said that she met the disability requirement, so her claim was not
9 barred by the Limitation Act and her – the factual situation was much more like the one
10 you saw in *W v Attorney-General* where there'd been some counselling, she'd, I think, been
11 in the Family Court, there'd been instances of her talking about the abuse, even ringing the
12 perpetrator and saying - "You've done this to me". And the court found that she met the
13 disability extension.
14 So wildly different from the *White* decision. And in the end she received damages
15 of $75,000 because not only was the abuse found to have happened, but the court said
16 actually he's quite a wealthy defendant and so in order to punish because these are
17 exemplary damages we're going to up them to reflect the fact that you have money and that
18 would be an adequate punishment.
19 **MS JANES:** And just to put that in a timeframe, this was a 2015 decision versus 2007?
20 **MS HILL:** Yes. In the second decision, *Taylor v Roper,* which has received some publicity in the
21 last few months or the last year or so. Ms Taylor took civil proceedings against Robert
22 Roper, an individual, and the second defendant in there was the New Zealand Air Force.
23 And recently the Court of Appeal issued their decision because Ms Roper had, I think, been
24 found to be barred at the High Court level. Court of Appeal, in a split decision, the
25 majority found that Ms Taylor had been under a disability for 26 years until she learned of
26 Mr Roper's convictions, and that this news released her in a similar sort of mental
27 development breakdown, there's lots of different words you could use, that had happened in
28 *S v Attorney-General* and there'd been this release. Again, really different from *White*.
29 And another interesting aspect that *Taylor v Roper*, again, only majority of the
30 Court of Appeal found, is that a number of her causes of action were subject to the ACC
31 bar, but aspects of her claims about false imprisonment of being contained in a cage were
32 not covered by ACC because there was no physical injury or personal injury or assault that
33 went with detaining her and consistent with a case called *Willis v Attorney-General* that's
34 not covered by ACC. So the Court of Appeal has sent that back to the High Court for a

1 damages assessment.

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

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

17 **CHAIR:** Does the appeal also cover the disability point –

18 **MS COOPER:** No.

19 **CHAIR:** – or is that accepted by the Crown?

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

21 **CHAIR:** Thank you.

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

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

1 favour of those plaintiffs, so their claims were struck out. So that just became another way
2 in which the claims for this group could be completely struck out.
3 **MS JANES:** And you've talked about the enlightenment in terms of understanding the
4 psychology, the neuroscience. Have you any thoughts about what may make a difference
5 in terms of knowledge of lawyers and judges dealing with these cases?
6 **MS COOPER:** Look I think this is clearly a very specialist area. To understand this you actually
7 need to understand about the way in which abuse impacts on memory, on the ability to
8 disclose, on the ability even to understand that you have a claim. I think – so that's all
9 highly specialist understanding and knowledge. And, you know, just that kind of 22 years
10 is something that I think resonates quite easily.
11 And I think what this says is that to actually work properly in this area, both
12 lawyers, judges and those doing expert reports, all have to have expertise specifically in
13 trauma, because I don't think that this claimant group can actually receive justice unless you
14 have experts, at least people who've got specific training and understanding of these areas
15 making decisions.
16 **MS HILL:** Can I add to that. There also needs to be an understanding of what's been called
17 counterfactual evidence, understanding why people don't complain at the time, why they
18 may act in a way that appears to be conceding or agreeing to something, or not fighting
19 back, and we hear a lot about this in terms of sexual violence cases in the criminal courts,
20 understanding why victims behave the way they do, and not reverting to what we think that
21 means. The other thing that I think is very important is on-going training around
22 understanding unconscious bias, understanding that when a claimant presents with a long
23 list of criminal convictions or maybe doing sentences for some extraordinarily bad things,
24 that that doesn't mean they're not a worthy claimant, they're not worthy of redress.
25 And so putting aside those things, and we'll talk about the high tariff offenders later,
26 putting aside those things and understanding that this was a person in State care, and I think
27 people who saw the photo of Chassy Duncan that was taken when he was at Waimokoia
28 School, they were children and remembering that, the last thing is probably understanding,
29 particularly for our Maori claimants, that there is that additional trauma of colonisation and
30 the impact of that upon culture and having that connection to Te Ao Maori.
31 **MS COOPER:** Yeah, so the loss of mana and wairua, that's just an additional component. So
32 actually that's something else we should say we need appropriately trained culturally as
33 well, that it has to be an aspect of this.
34 **MS JANES:** And just going back to the issue of the counterfactual because that was raised in the

1 *White* trial as well and you talked yesterday about if you are at the point of having to be
2 uplifted from your home in any event. So can you just marry the problems of a court
3 applying a counterfactual scenario to this type of claim.
4 **MS HILL:** I vividly remember this. I vividly remember Miller J going what's the counterfactual,
5 what's the alternative? And you're asked to envisage this alternative plan for this child.
6 Where the reality is, there's not an alternative plan, it's have a better system. Actually do
7 the things that you should be doing right. There isn't alternative universes here, you have a
8 system and a job and you need to do that well. I remember sitting there thinking, just have
9 a good system is probably the counterfactual that I would suggest. But Sonja has different
10 views on that I think.
11 **MS COOPER:** No, I think you know that was the impossibility of the situation we were in,
12 because actually the counterfactuals were just as abusive as any alternative. So it's like
13 well, you're put in an impossible situation because, as Amanda says, if the State had been
14 doing its job properly, I mean you are supposed to remove children to make their lives
15 better, not to either keep it at the same level or make it worse. And, you know, the whole
16 of their lives, everything just made it worse.
17 So I mean, how could we present a counterfactual because the system wasn't
18 working. There wasn't – I mean, you know, that's exactly what the system is supposed to
19 do and that's the complaints still about the system, is that actually it causes more harm to
20 actually remove children. So you set up an impossible – we were set up in an impossible
21 situation, because there wasn't a counterfactual that actually – well, there might have been,
22 foster care, because actually for the sisters, for the sisters, you know, some of the sisters at
23 least, foster care actually was a good counterfactual and they did well and they thrived.
24 And that had been a possibility. But for Earl and Paul, they got fostered for a short time
25 and then they're whipped into the boys homes where it was catastrophic.
26 So as I say, it was like the whole issue of being able to provide a counterfactual was
27 just impossible in these situations because for many of our clients there isn't a good option,
28 and actually probably I'd like to think now that the best option would be working with
29 whānau, however, you know, difficult that may be, but I think for most tamariki we would
30 say that actually working with the whānau, providing resources to the whānau and that can
31 be a broader concept of that, is actually going to produce the best long-term outcomes.
32 Yes, there will still be children who need to be removed, but – and I think, you
33 know, just longitudinally working in this area that's where we've got to. That actually the

1 ones who've suffered the least long-term harm have typically remained with their families,
2 or at least, you know, had some connection, or been placed in really good foster care. But
3 again, we know foster care has been damaging, we heard the Sammons.
4 **MS JANES:** So returning to the Limitation Act and you've talked about the transitional timeframe
5 between MSD and Oranga Tamariki, what are you able to do to try and protect the
6 claimants who will cross, because you have the Limitation Act agreement with MSD, you
7 don't have one with the Ministry of Education and you don't have one with Oranga
8 Tamariki. So what can be done to protect and preserve the rights to redress going forward?
9 **MS HILL:** Those people who will come into the Oranga Tamariki timeframe are in a really
10 difficult position. I don't know whether you want me to go into the limitation, proposed
11 limitation agreement?
12 **MS JANES:** Yes.
13 **MS HILL:** Okay, so there is no current stop the clock with Oranga Tamariki, is the first thing.
14 And the second thing is that Oranga Tamariki appears to still be developing its complaint
15 and claim process. And it's not clear how long that may take. And so in the absence of
16 either of those things, then the only step that we have available to us currently for a person
17 who is in the care of Oranga Tamariki and suffered abuse which is after 1 April 2017, is to
18 file their claim in the court to stop time.
19 We've been seeking a stop the clock agreement for all Crown entities that deal with
20 historic claims for quite a long time, since about 2014. In particular the Ministry of
21 Education, because since about 2014 the number of claims against the Ministry of
22 Education has grown, but we've never been able to negotiate a stop the clock agreement
23 with education.
24 There's a number of reasons for that. We want as broad cover as possible for
25 obvious reasons. Whereas often the Ministry would seek to limit the coverage of any
26 proposed agreement. There's the sticking point of the Education Act 1989, which placed
27 the governance of schools with boards of trustees and created a shift there.
28 But, and we say this quite strongly, the Ministry has such a strong role with special
29 residential schools, even after 1989, that they're in a slightly different boat than your
30 average State school run by a board of trustees, because the Ministry appoints half of the
31 board of trustees for a special school, so gets quite complicated at that point.
32 So we've had a lot of correspondence over the years trying to find an agreement that
33 will work for everyone. And there's always claims that don't quite fit and we've been trying
34 as best we can to fit as many different types of claimants in under that agreement, because

1 obviously it's to their benefit that we fit as many in as we can and the ministries are seeking
2 to keep that as narrow and compact as possible. So that's been a lot of correspondence over
3 the years. So that conversation started in 2014 and carried on stopping and starting through
4 to 2018 and we still did not have an agreement at that point. And since about 2015 we had
5 been filing Ministry of Education claims in the court, rock and a hard place, no stop the
6 clock agreement. If we didn't file their claims then effectively we're negligent at that point.
7 What can you do?
8 So we get to 2018 and I don't even know how many iterations of a draft policy we
9 had been through by then, and Crown Law wrote to us and said look all of the different
10 proposals between, say, MSD, the current agreement, and what we're proposing for MOE,
11 they're inconsistent, and we would really like to be consistent across the board. That
12 sounded like a good prospect, we'd like to have the same agreement because we wanted it
13 to be consistent with MSD's agreement as well.
14 And so the Crown said in 2018 we're going to work with Oranga Tamariki, MSD,
15 MOE, and we'll bring you a proposal for an all of Government stop the clock agreement.
16 And that sounded fantastic. And so that's great and that's in 2018. And then we didn't hear
17 anything for the rest of 2018 and for all of 2019 and up until –
18 **MS JANES:** 24 August.
19 **MS HILL:** – 24 August 2020.
20 **MS JANES:** We'll bring up the document for 24 August.
21 **MS HILL:** Thank you. So this is a letter that we received from Crown Law and I have to
22 acknowledge at this point, this is a very complicated issue and I have some sympathy for
23 Crown Law in trying to conduct an exercise in what really is mustering cats and trying to
24 get everything going in the same direction, so I have some sympathy here.
25 **MS JANES:** If we just call out the highlighted paragraphs, if you can go through those, that will
26 just give the Commissioners a flavour of where the current status is at rather than you
27 describing it.
28 **MS HILL:** That's good. "The draft policy applies to all claimants (both represented and
29 unrepresented) and to both extant – so current – and future claims. It suspends time for the
30 purposes of both the Limitation Act 1950 (1950 Act) and the Limitation Act 2010.
31 As you will recall the original intention was for the policy to apply across MSD,
32 MOE and, Oranga Tamariki. Oranga Tamariki is in the process of developing the detail of
33 its claims process and will consider the application of the policy to claims relating to events

1 from 1 April 2017 in that context. The draft policy currently applies to MSD and MOE
2 claims".
3 **MS JANES:** And if we go over the page please, just call out paragraph 7.
4 **MS HILL:** "The preamble to the policy expressly refers to the Crown's discretion to take a more
5 favourable approach for a claimant in the particular circumstances of a claim".
6 **MS JANES:** And paragraph 11.
7 **MS HILL:** "In summary, an extant claim is lodged on the earliest of the following dates".
8 **MS JANES:** And if we can then bring up the subparagraphs.
9 **MS HILL:** "The date the claimant told the relevant Ministry that they wanted to make a claim,
10 their name and date of birth and any further information the Ministry asked them to provide
11 so that they could confirm that the information constituted a claim (as defined) in paragraph
12 T.1, or the date that the relevant Ministry has otherwise accepted that the claimant engaged
13 with that Ministry's claims resolution process as advised to the claimant by that Ministry
14 described in T1.2".
15 **MS JANES:** Before moving on to the rest of that letter, in terms of the dates, you alluded earlier
16 to the issue about the Limitation Act and there were still some uncertainty about the date
17 that that became operative. Can you just briefly go through where you're at with that now.
18 **MS HILL:** So initially, so the word "lodgement" is used here, in other documents we talk about
19 "claim registration". And it's the date that the claim is notified is another word. There's no
20 consistent term across the correspondence. The claim is notified to the Ministry and that's
21 the date where the date stopped. So it's really important. And it's been a sticking point,
22 because in previous iterations to the agreement Ministry of Education said well no, the date
23 only stops when we get your letter of offer, whereas we might have requested their records
24 several years, sometime before then. So what constitutes lodgement is different between
25 the different departments. Sonja may have something to add around the claim registration
26 issue.
27 **MS COOPER:** We also had some issue with MSD in relation to when the time started as well,
28 and that became a really big issue in respect of a very large number of our clients. Once
29 upon a time MSD, when we requested records, that would be the start of the time period,
30 and in around 2014 for some reason it stopped. We didn't know that until 2018 when we
31 got some correspondence for our clients and a very large number, over 500, were missing
32 from MSD's list of our clients, and so their own record system of keeping notification of
33 our clients requests for records had suddenly stopped, and they said they had no notice of
34 these clients. So that was very problematic for us.

1 Since then MSD's introduced a registration process, so there's a form that every
2 claimant has to complete and we do that on behalf of our clients, and that's the point at
3 which the claim is registered sometimes the clock. But of course, and we had to
4 retrospectively do this very large group of clients which took us again diverted us from
5 actually working on their claims and I was concerned at some of the evidence around how
6 MSD is dealing with that group, and that's something we'll have to go back to MSD about.
7 **MS JANES:** And in fact if we go back down to paragraph 13 they actually do refer to that
8 particular category of claims.
9 **MS COOPER:** Yes, they do.
10 **MS HILL:** Did you want me to read that?
11 **MS JANES:** Yes.
12 **MS HILL:** "In the context of preparing the draft policy MSD has identified that a further
13 modified approach will be required for some other claimants in order to ensure consistency
14 and fairness as between the 559 specified claimants and other claimants".
15 **MS JANES:** And moving over the page please and looking at paragraph, if we can perhaps – if
16 you can read it if I call out all three.
17 **MS HILL:** Should be able to. "MSD advises that on the basis of the policy as currently drafted, it
18 intends to accept (for the purposes of paragraph T1.2 of the policy) that the above claimants
19 engaged with its claims resolution process at the time of their records request.
20 In order to ensure fairness and consistency of treatment as between MSD and MOE
21 claimants, on the basis of the policy as currently drafted, MOE intends to accept (for the
22 purposes of paragraph T1.2) that claimants whose first engagement with MOE's claims
23 resolution was an information request committed to MOE's claims -- was an information
24 request received by MOE where objectively considered the information request was made
25 for the purpose of commencing a claim.
26 For clarity, the ministries note that if any other claimants are in a materially similar
27 situation to your clients (that is, they have made an information request that, objectively
28 considered, was for the purpose of commencing a claim) the ministries will apply the same
29 approach to them".
30 **MS JANES:** And over the page.
31 **MS HILL:** There's a section about long stop.
32 **MS JANES:** Yes, let's quickly look at the section on long stop.
33 **MS HILL:** "We have identified that the current position under the limitation agreement between
34 your firm and MSD, with respect to the long stop period in section 23B of the 1950 Act

1 appears to be unclear".
2 **MS JANES:** And then over the page we carry on, just see if we can highlight 19 and 20. I'm not
3 sure if you can fit 22 in.
4 **MS HILL:** "The addendum – so there was an extra part added to the 2011 agreement about the
5 transitional provisions as they were known – the addendum appears to take a different
6 approach to section 23B(1)(a) and (b)".
7 **MS JANES:** We probably don't need to touch on those, that's going into technicalities we don't
8 need to.
9 **MS HILL:** Happy not to.
10 **MS JANES:** Just very quickly looking – so it goes on to talk about the long stop periods and how
11 they apply and what the policies will look at, and then again over the page similarly. So
12 really the short point, having received this correspondence, what is your sense of where you
13 are in the journey towards a consistent Limitation Act?
14 **MS HILL:** So it's certainly a positive step. So attached to that letter was a draft policy by the
15 way, and the policy is, and Crown Law were very clear, it's written to be understood by
16 lawyers or non-lawyers. Anyone, even the lawyers in the firm struggled with the content
17 and the way it has to be expressed, because it's a very complicated thing.
18 It's a positive step but there are problems. The first problem is it's not a whole of
19 Government document. It's only MSD and MOE. Oranga Tamariki has had – it's been
20 in – it's been alive for three years and it still hasn't got a claims process, so it's sitting
21 outside of this at this point. It's a policy not an agreement. So the MSD current limitation
22 agreement is a signed agreement between Cooper Legal and MSD. It's something that we
23 can hold on to, something that we can try and enforce. The proposed change is a Crown
24 policy, and the provisions of the policy say that the Crown can change it when it feels like
25 it and that there's a reasonably short notification period of change.
26 So it's something that, again it's that discretion, it's that imbalance of power again.
27 And there's a real nervousness there about it being a Crown policy rather than an agreement
28 that potentially could be enforced.
29 There are issues around – on the one hand it's good that there's a provision in there
30 that claimants who don't fit within the policy a more favourable approach can be taken. So
31 we can come to agreement about people who might not fit, but it's the Crown retains the
32 discretion, it's – so the Crown could say no, and again, it's reflective of that imbalance of
33 power that I keep coming back to.

1 There are lots of intricate things that we are going to work through with Crown
2 Law. I'm conscious that our response is in draft and Crown Law hasn't seen it yet, so this is
3 sort of a preview situation for them. And so it's a really good step after waiting for two
4 years for this to have received it this month. It's a good step and we've got work to do.
5 But if we were in a position of not having to file the Ministry of Education claims,
6 that would be wonderful. It would take, like the resource and the court itself is increasingly
7 becoming overwhelmed by the number of claims. Because they just sit there, they're not
8 progressed until we request them to be taken out of the pool, if you like, and –
9 **CHAIR:** Is the Crown filing defences to those claims?
10 **MS HILL:** No, we have an agreement that the Crown doesn't. It's purely to stop time.
11 **CHAIR:** So just to stop the clock.
12 **MS HILL:** Unless, as I say, we request that something is progressed. So progress, but still
13 something to work on. Did you have anything to add Sonja?
14 **MS COOPER:** Yeah, there's still some very narrow and constrained definitions, particularly
15 around the Ministry of Education, what that covers. And again, I think that almost takes us
16 back to the beginning of the discussion back in 2014 when we couldn't reach agreement
17 because it's a very constrained agreement in terms of who it potentially covers. So yeah,
18 that's – as I say, that almost takes us full circle, so that's a problem too. And it doesn't
19 cover the Ministry of Health.
20 **CHAIR:** Yes, I was going to ask about that. Is that a deliberate omission?
21 **MS COOPER:** Well, the Ministry of Health, I've been thinking about this, Amanda, and I have
22 been talking about it. Of interest, the Ministry of Health just seems to sit on its own like a
23 little island. I don't know why it's never been part of the bigger discussions, particularly
24 because many of the clients experience multiple placements, including psychiatric
25 hospitals. And I don't know whether that's, you know, we settled 320 in 2012 and since
26 then the number of claims has been a trickle. And I don't know whether that's because –
27 I suspect this group still doesn't know about their rights a lot of them. That's my –
28 **CHAIR:** That area would cover a lot of the disability claims, wouldn't it?
29 **MS COOPER:** Yes, it would.
30 **MS HILL:** One of the interesting things, and I think it's an interesting challenge and you come
31 back to the idea of the indivisible Crown, this is presented as a Crown policy, not an MSD,
32 MOE policy, it presents itself as an all of Government, but currently doesn't apply to all of
33 Government. So I think there is a disconnect there about how it's presented versus who it

1 actually covers.
2 **MS COOPER:** It states it's a Crown policy, but then it only covers two Government agencies.
3 I mean, you know, really if it was going to be a Crown policy it would be covering
4 Corrections, it would cover police, it would cover those kind of, you know, sitting outside
5 Crown agencies like Stand. So, you know, if it purports to be a Crown policy, that's what it
6 should be.
7 **MS JANES:** And you've described that you currently have an agreement which has the potential
8 for enforceability, but this is a policy which has a discretion which could be changed at any
9 time. In terms of the confidence of your responsibilities to the claimants who come to you,
10 how assured would you be that you could discontinue filing in case there was a short
11 change in policy?
12 **MS HILL:** Unfortunately I have a low level of confidence. We have an election in a couple of
13 weeks and these things are matters of political will, and should the Government decide that
14 it doesn't want to take this route anymore it just repeals the policy. We would have a
15 judicial review sort of route, but I'm not convinced that judicial review of a policy to pause,
16 effectively, a legislated defence -- I'm not a judicial review specialist but I sense that is a
17 very complicated and difficult endeavour. Unfortunately we have a low level of
18 confidence, we're absolutely coming at this in good faith, but, yeah, you cannot help but
19 worry, even with the agreement, we worry that one day the Government will just say we're
20 not going to do that anymore.
21 **MS COOPER:** I really think with the Limitation Act we have to behave in a way that's consistent
22 with our Commonwealth counterparts who have already recognised that the Limitation Act
23 needs to be specifically amended for child abuse victims. And you know, I think if we look
24 at Scotland and we look at Australia, that for child abuse victims limitation periods have
25 been repealed. And in Australia there is still a discretion permitted to get rid of claims that
26 a defendant is able to persuade a court that it can't fairly argue.
27 And I do understand that, I think what we would know is that's going to be rare
28 because most claims there's still enough documentation and there are enough witnesses that
29 you can still pull a case together. But I'm absolutely clear that in this area legislation is the
30 only thing that will work and we've got lots of precedent for that. And it actually then
31 embodies our better understanding and our better knowledge of the way in which abuse
32 victims have all these impediments to being able to report and to take claims.
33 I don't think we should have to rely on goodwill or policy, I think it has to be
34 legislated and then -- and it should cover everybody. I mean it shouldn't also be just State,

1 I mean that should cover across the board, it should be church claims as well because the
2 churches have also relied on their limitation defences and still do from time to time. I mean
3 I think we are seeing a shift and I think that's a real benefit of this Royal Commission, I
4 think we are seeing a real shift in attitude, so we can be only grateful for that, but if there's
5 no eye anymore will that shift back again?
6 So I think we're clear that the only way this can be done in a manner that will
7 properly protect this vulnerable group in terms of their rights is to repeal it and to replace it
8 with legislation as Australia and Scotland and other Commonwealth countries are doing or
9 have done.
10 **MS JANES:** I'm conscious that we're into the lunch, but can I just clarify that when you suggest
11 repeal of the Limitation Act, are you talking about in its entirety or just as relating to this?
12 **MS COOPER:** No, there are specific legislative provisions for child abuse claimants, and that's
13 what I'm suggesting is that we just specifically repeal the provisions for this group of
14 claimants. We started that, we tinkered with it in the 2010 Act and, as I say, we pulled
15 from New South Wales and Victoria legislation and kind of grafted that on, but their
16 thinking has already moved on, their greater understanding and the fact that they've had
17 their Royal Commission and Scotland did its own inquiry and actually relied on some
18 research that we'd done in our firm to repeal its legislation. So I think we just, now that we
19 have this better understanding and we've got all this material and, you know, it has to be
20 done legislatively.
21 **CHAIR:** A good note to end on. We'll take the lunch adjournment.
22 **Adjournment from 1.06 pm to 2.16 pm**
23 **CHAIR:** Good afternoon everybody. Ms Janes.
24 **MS JANES:** So we're still on the Limitation Act and we were talking about the Limitation Act
25 1950 and the Limitation Act 2010. Is there a change in the age of majority and what does
26 that impact have?
27 **MS HILL:** So I think Sonja said earlier the age of majority in the 1950 Act was set at 20, but in
28 the Limitation Act 2010 the age of majority for when time starts to run becomes 18. So it
29 means there's a shift and you have almost less time in that six-year period we've been
30 talking about for younger people who are covered by the 2010 Act, so that cut-off point is
31 now 24 rather than 26.
32 **MS COOPER:** And for some clients, as we're getting younger clients, we have more and more
33 clients who will actually straddle both Acts. So that's really confusing, so you've got two
34 completely different limitation periods which apply. So we always have to take the most

1 restrictive, so we'll typically aim for the 22 if we can. But, yeah, it makes it really difficult
2 now with our younger clients having two different pieces of legislation applying.
3 I should note too, there is again a discretion in the 2010 Act for a defendant to agree
4 that the later Act applies, but so far we haven't seen any agreement from any defendant to
5 the later Act apply.
6 **MS JANES:** And in terms of the process that you are aware that Oranga Tamariki is going to be
7 applying, is there an impact on the Limitation Act period and filing in court?
8 **MS HILL:** Yes. So one of the important changes in the Oranga Tamariki legislation that came in
9 after that department was created provided that people who had experienced abuse in care
10 had to make a complaint to Oranga Tamariki and go through Oranga Tamariki's complaint
11 process first before they could file a claim or begin civil proceedings. So there's that
12 requirement in the legislation that they go through a complaints process first and the
13 evidence before this Commission is that it's still in process. There's a complaints process
14 and claims process, so there seems to be two different things. So it appears there is a
15 functioning complaints process, but not a historic, not very historic with Oranga Tamariki,
16 but a claims process.
17 But what the effect of that is, is time, so if you're 23 years old or 24 years old,
18 according to my reading of the legislation, you have to go through this complaints process
19 before you can file your claim. And by the time you go through that process, your
20 limitation time could have run out. So it's a disadvantage for a young claimant, and to be
21 honest they hardly ever come to the claims process at 22, 23, 24, they're more likely to
22 come to it 30, 35. So this is going to be down the track.
23 But there are people, like Chassy Duncan, who starts the process at 18. And it's a
24 built-in disadvantage, because that uses time under the Limitation Act and also we're not
25 clear that that process is a functioning one. There's certainly no claims process, but the
26 complaints process, and it seems to be a lengthy one too.
27 **COMMISSIONER ERUETI:** When you say there's no claims process, you mean there's no
28 process like the historical claims process?
29 **MS HILL:** Yes.
30 **COMMISSIONER ERUETI:** Where the end result is redress, some form of redress?
31 **MS HILL:** Yes.
32 **MS COOPER:** There has been an ad hoc process, because some people have received settlements
33 through Oranga Tamariki. But in terms of an actual constructed process where, you know,
34 there are some guidelines and policies that's still in development. From our perspective we

1 ignore the legislation; we file. We are not going to potentially jeopardise somebody's legal
2 rights under the Limitation Act, given that is still a defence, we will not prejudice
3 somebody's legal rights by waiting.
4 **MS HILL:** And it does make me wonder, how do you legislate against someone filing
5 proceedings, so I'm not quite sure how that works in practice either and I don't think that's
6 been tested. But we are not going to take that risk.
7 **COMMISSIONER ALOFIVAE:** Can I ask, section 386(a), which is all part of the new suite of
8 amendments that came through, does that have any impact at all, because it says that the
9 Ministry's supposed to still be able to offer advice and support, up to the age of 25?
10 **MS COOPER:** It's a good question. Yeah, I think that's going to be another really good question
11 in terms of how that operates in terms of its interface with limitation periods, because, as
12 we know, I think even guardianship can operate up until now up to 25. So, yeah, how is
13 that going to interface with limitation provisions and complaint provisions if you're still in
14 care. And I don't, you know, there isn't a connection between that, which I think is another
15 reason why legislatively there needs to be no limitation period for this claimant group.
16 **MS HILL:** The reality, from what we can see, the whole interface between MSD and Oranga
17 Tamariki is fraught on a number of levels. Who holds records. So lots of MSD's records
18 were transferred to Oranga Tamariki. So when you do an Official Information Act to
19 MSD, part of it will get sent to Oranga Tamariki, some might stay with MSD. It's really
20 unclear who actually has records now, even historic ones. And we've been in meetings
21 with both MSD and Oranga Tamariki where they say yeah, we're not really sure who's got
22 control over things. That worries me greatly about who has control of information.
23 **MS COOPER:** And it's another way in which important records can slip through the cracks,
24 because if they're held by different agencies in different places and cover different
25 timeframes, again it's another way, as I say, in which records cannot be produced or can
26 appear to be lost, they may not be. And given that the latest iteration of the process which
27 we'll talk about is so document reliant, that's a real fundamental issue for survivors for
28 claimants.
29 **MS HILL:** And it does appear that Oranga Tamariki's process for redress and claims is going to
30 be modelled on MSD's process, which is quite flawed and we'll take you through why we
31 say that is. But there is that replication of those problems there. So there's a view of
32 Oranga Tamariki as a fresh start and we're not convinced that's the case.
33 **MS JANES:** And just you talked earlier about there's no concluded limitation agreement with the
34 Ministry of Education, and so when one goes to the minute of MacKenzie J in August

1 2015, which is at paragraph 729 of your brief, where it recommended that the Ministry of
2 Education claims included in your DSW litigation group, how are they being dealt with if
3 there's no Limitation Act but they've effectively been parked until further order of the
4 court?
5 **MS COOPER:** Well, I mean we're kind of in that kind of no-win situation, so we have to file to
6 stop the clock, but they just sit there. So there's no obligation, as Your Honour asked,
7 there's no obligation to file a statement of defence. And so they're caught up then in the
8 ADR process. So it's considerable extra work that is required for us to do, because
9 pleadings are a lot of work, and then they just sit there.
10 **MS HILL:** So the sole purpose of it is to stop time. And the group is – we talk about the
11 management protocol for the DSW and MOE claims and that's filed – the only ones are
12 filed in court, but in reality that's sort of managing this slow moving mass that doesn't really
13 go anywhere, and eventually claims are either joined to the group because they've been
14 filed, or they're discontinued when they are settled. And the MOE group sit there as a
15 subset, but the agreement is that they sit there without moving to allow us to try and settle
16 the claims.
17 **MS JANES:** So how does one manage the process, for example in the *White* claim, where the
18 Limitation Act wasn't pleaded as an affirmative offence until some years after the claim
19 was filed, how do you deal with that with the Ministry of education?
20 **MS COOPER:** Well, I guess with the litigation that we – the trial next year, as I say, it will
21 involve the Ministry of Education. And it's really a question for us of watch this space. As
22 at the present time we are told by the lawyers for the Crown that they haven't actually
23 finalised their position on the Limitation Act yet. So we don't know yet whether we're
24 going to actually have to deal with the Limitation Act for these upcoming trials, because for
25 both of these plaintiffs their claims were filed I think in their late 20s, so we're already
26 passed that 26 age cut off. So there is, you know, the Limitation Act is a live issue. We
27 have got obviously good psychiatric reports to say that they filed within time, but, you
28 know, we don't know yet.
29 **MS HILL:** The statements of defence filed for the Crown do plead the Limitation Act as an
30 affirmative defence, it's just whether the Crown will actively pursue it is the bit we don't
31 know. It's certainly pleaded.
32 **COMMISSIONER ERUETI:** Was this the litigation you say was tracking for August 2020, so
33 it's now next year?
34 **MS COOPER:** Yeah, it's now next year, June 2021.

1 **CHAIR:** So is it the case now that the Limitation Act is filed as an affirmative defence in all the
2 defences, but you have to wait to see whether in fact it is going to be relied on, is that
3 correct?
4 **MS COOPER:** That's correct. And what we've done, so what we did in the previous
5 Whakapakari trials where we were told by the Crown reasonably late on in the piece that
6 they were going to be asking for a pre-hearing on the limitation issue, quite close to trial,
7 we just actually took the step of withdrawing the application for leave, and we just – we
8 said we're just going to rely on our psychiatric evidence and leave it as a trial issue. So we
9 had to play tactics back. And that's a big call on our part. But just the thought of these
10 claims, you know, facing the outcome of the previous litigation that we'd been involved in
11 and just being stopped in their tracks even though these were Bill of Rights Act claims as
12 well, we just didn't want to face that, so we withdrew that application for leave and we just
13 said we're going to rely on our psychiatric evidence, and make it a trial issue, and as I say,
14 those claims settled, so we didn't have to do that, but we were certainly being pushed to a
15 leave hearing. And we just don't know yet, I think the silk that's been appointed for this
16 litigation hasn't yet made a call about whether limitation will still be made an issue for
17 these new trials.
18 **MS HILL:** On a practical level it's really hard to explain to a claimant that, you know, that you've
19 got this whole claim but they're going to have a one day hearing on the Limitation Act and
20 it's a king hit hearing, so if you lose on that one day your whole claim's gone. Trying to
21 explain why that can happen and the response inevitably is that's so unfair, well yes, it is,
22 but this is the position. So yeah, it's a king hit hearing, the whole thing goes.
23 **MS JANES:** So you've given, before the lunch break, you outlined your proposed solution so we
24 won't go backwards on that, but before we move on from the Limitation Act, just want to
25 check whether there was anything else that either the Commissioners wish to ask or you
26 wish to say on that topic because we're moving to the mental health immunity.
27 **COMMISSIONER ERUETI:** You want to perform the Limitation Act, so you see a process still
28 through the judicial process as well as this Tribunal that you describe it as a one stop
29 redress scheme, both operating at the same time. Is that right?
30 **MS COOPER:** Look I think the majority of claims should continue to be dealt with outside of the
31 court process. I think, you know, I think for this claimant group particularly there needs to
32 be a non-adversarial process that deals with the majority of them. But one of the things that
33 we're very conscious about is that there are really, really important issues of law that these
34 claims give rise to, particularly for our younger clients, where the Bill of Rights Act yet has

1 never been tested. And if we could do it in a way that was survivor-focused, so that it's not
2 traumatic.
3 I mean we could do – I mean one of the things we talked about in our brief is what
4 we call rule 10.15 hearings, so that you just deal with discrete either factual matters or
5 discrete legal matters. MSD has always opposed that for this claimant group and said "No,
6 we're going to do that, it's full trial or nothing". But that's a way we could get discrete legal
7 issues or factual issues done where we could even agree on facts and then say to the judge
8 can you determine what that means in law, what rights does that give rise to, what might
9 that look like for damages.
10 **MS HILL:** The other reason I think both of those things need to happen, the amendment to the
11 limitation legislation and an independent Tribunal is that what we don't want to see happen
12 is a mini court addressing the same issues. So you're just replicating the same problems in
13 an independent Tribunal. I think then, you know, otherwise you're just doing the same
14 things again in a different forum. So that's why both of those things need to happen in our
15 view.
16 **COMMISSIONER ERUETI:** Thank you.
17 **MS JANES:** Just as we're on that point, because we are going to go there but you've addressed it
18 and I think just for tidiness let's do that now. In the Gallen J report of the MSD processes
19 in 2009 one of the recommendations was that there was an independent body that was
20 either a lawyer or a panel of lawyers that took evidence, there could be cross-examination
21 by the fact finder but not by the agencies. So I was going to ask you when we looked at the
22 Gallen report whether you thought that was something that you would recommend or
23 whether there were reservations that you had about that?
24 **MS HILL:** Well, any process that is independent is, on its face, an improvement. The process set
25 out by Gallen J in 2009 is that sort of replication of the same problems. But there's a really
26 big fish hook in there, it's an expensive sort of thing that looks and sounds like a trial, it's
27 still got psychiatrists, it's still very expensive, very time-consuming, but your claim isn't
28 filed. So a process that could take several years uses up all of your time that you would,
29 you know, under the Limitation Act time is ticking while you're doing this.
30 And it's all without prejudice, the Gallen proposal. And so if something went
31 wrong, if you wanted to then proceed to a court, none of it matters. Everything is without
32 prejudice, it can't be put before the court. So you've got to start again. And so when you
33 get into what does this look like in practice, it's terribly traumatic, because you're going
34 through everything that looks like a court except it's not, the cost will be very high, the

1 trauma, because there's still a lot of court-like things about it, and at the end of the day you
2 could end up getting yourself, your actual legal claim barred under the Limitation Act,
3 because you went down this road first.
4 **COMMISSIONER ERUETI:** Are there any qualities of that proposal that you like of Gallen's
5 proposal?
6 **MS HILL:** Independence.
7 **MS JANES:** Happy for us to move on?
8 **CHAIR:** Yes please.
9 **MS JANES:** So we will touch very lightly on the mental health immunity legislation,
10 Commissioners, mainly because again that was covered in quite some detail at the
11 contextual hearing. And Sonja, if I can ask you there was also another reason why we
12 thought we could lightly touch on that now because of changes that arose out of cases.
13 **MS COOPER:** So the Mental Health Act immunity, as we explained before, so there are two
14 immunities, but the immunity in that legislation said that if something was an act in
15 pursuance of the legislation then there was an immunity against civil liability. And the
16 reason that was important was all the way through to the Supreme Court the Crown argued
17 that that immunity applied to all acts except for serious sexual abuse.
18 Thankfully that argument was given pretty short shift, but still, you know, I mean
19 I remember very vividly the then Solicitor-General arguing that – he was asked about, you
20 know, stubbing a cigarette out on somebody and he was in the invidious position of trying
21 to argue that that was treatment because it was teaching somebody not to smoke. He had
22 also written a medical text in which he'd talked about that sort of conduct being an assault
23 and we were able – we had his text with us and we were able to read from that text.
24 So yeah, so I think that's the kind of argument that we were having to deal with.
25 And the important thing about that litigation was that at Supreme Court level it was firmly
26 established that any of those immunities in that legislation did not apply to informal
27 patients and most of the client group were informal patients. So the whole impact of that
28 fell away, and so it ended up that actually there was a reasonably limited impact.
29 **MS JANES:** And so is there anything that you would want to say to the Commission in addition
30 to your contextual hearing evidence about where the use of mental health immunities are
31 impacting on current claims?
32 **MS COOPER:** Well, I think, as I said yesterday, I think the Mental Health Act claims for a start
33 they're restricted, the Ministry of Health only deals with claims up to the end of 1992 and
34 actually the middle of 1993, which is when the current Mental Health Act kicks in, and then

1 liability transfers to the DHBs. And I mean that's just another barrier.
2 The DHBs obviously all have their own lawyers, they rely on the Limitation Act,
3 and so, you know, it's been impossible for us to try and assist again a very big potential
4 client group where I don't even know how many DHBs there are in New Zealand, but they
5 play their defences very hard. And so that's just a very, very big barrier for psychiatric
6 hospital clients who were in care from 1 July 1993. So, you know, even though again they
7 would have rights under the New Zealand Bill of Rights Act, just the kind of logistics of
8 pursuing those claims is really difficult, as we said Corrections or Police.
9 So that's why if that Limitation Act barrier is gone, that just opens up a whole world
10 of possibility for this claimant group, because it should apply to vulnerable adults, it's not –
11 it shouldn't just be children. I know that's the biggest paradigm, but it should also apply to
12 vulnerable adults. If that limitation barrier was gone, then that would just be, you know,
13 would provide access to justice for that group.
14 **MS JANES:** And is there a possibility that a lot of this claimant group now go to the Health and
15 Disability Commissioner and – you're shaking your head.
16 **MS COOPER:** Well, we know that the Health and Disability Commissioner will not look at
17 historic claims. I think we had claims that are about three or four years old and the HTC
18 didn't want to look at them. So if you're talking about claims that are 10, 20 years old, then
19 they're just not going to look at them. And so that's a massive gap. There's no remedy. We
20 do have people coming to us with current very serious claims, but we don't have the
21 resources to do that, because of those additional barriers that there are in place and, you
22 know, the additional funding that we would have to ask Legal Aid for, which we know
23 they're going to say no to. So yeah, they're a group that don't get any access to justice.
24 Another group.
25 **MS JANES:** So you've reinforced why the Limitation Act is still an issue for that particular claim
26 group. So just for completeness at paragraph 1035 of your evidence, you talk about the
27 contextual hearing where the then Human Rights Commissioner, Rosslyn Noonan, gave
28 evidence saying that the Ministry of Social Development had assured the Human Rights
29 Commission it did not rely on the Limitation Act or other technical defences to resolve the
30 claims. You've probably sufficiently answered it, but just in your experience, succinct
31 response to that.
32 **MS COOPER:** Well, I think the succinct response is it will still rely on the Limitation Act where
33 it decides to.
34 **MS JANES:** We're now going to move on to the Crown litigation strategy. And if we can look

1 please at document number 12 which is the Crown tab 7. This is a document that we have
2 seen earlier, but there are some other matters to look at. So if we can go – this is the
3 Cabinet policy committee POL (04317). It is about psychiatric hospital claims. It talks
4 about the Crown's position in relation to those claims at paragraph 7, if we can call that out
5 please. If I can have you read them thank you.
6 **MS COOPER:** So, "agree that the Government's position to these claims is, statutory and other
7 defences should be used, but in meritorious cases the Government may waive its Limitation
8 Act defence. The Government will require the plaintiffs to show their case where
9 compensation is claimed, at least to a prima facie standard".
10 **MS JANES:** And then if we can go to paragraph 60 which is on page 14. This talks about the
11 advantages and disadvantages of the proposals for alternative dispute resolution. If I can
12 just call that 60 to 65 out. Just if I can have you read through those paragraphs.
13 **MS COOPER:** So "Advantages". "It is inefficient, costly and time-consuming to take 73 (or
14 possibly 300) claims to court if a simple alternative can be established. It is an expected
15 step in the case management of litigation that the parties consider ADR and/or settlement
16 negotiations where possible. It allows containment of the issues. It may avoid any adverse,
17 wide-ranging finding by the court of Crown liability. It allows the plaintiffs to choose a
18 forum in which to air their grievances, which they say is one aspect of their claims. It
19 provides independent investigation of the claims (which the plaintiffs say they want)
20 without compromising the Government's need for a principled and transparent process".
21 **MS JANES:** And just if we then go to the disadvantages at the bottom, paragraph 66.
22 **MS COOPER:** "The increased costs to Government in establishing the infrastructure of the
23 alternative are likely to be considerable. Costings have not been done, but given the
24 number of potential claims to be considered individually by a qualified independent person
25 and the proposed travelling Tribunal to hear claimants' stories, the costs are likely to
26 amount to several million dollars. By way of comparison, the infrastructure –
27 **MS JANES:** Go to the next page.
28 **MS COOPER:** - cost (that is, not including the settlement money) of the Gisborne cervical cancer
29 screening inquiry was $5 million". Do you want me to read that next paragraph?
30 **MS JANES:** No, that's fine thank you. Then if we can go to paragraph 68.
31 **MS COOPER:** "Offering these plaintiffs an alternative process may, encourage a flood of historic
32 abuse claims, encourage a proliferation of requests from future claimants for ad hoc
33 purpose-built alternatives to consider the claims, and be seen as a signal that the
34 Government is prepared to lower the standard of proof for historic claims against it".

1 **MS JANES:** And then if we can go to paragraph 84. So this is looking at courts, so those were
2 alternative dispute processes. And if we look at particularly paragraphs 86 and 87 on the
3 next page.
4 **MS COOPER:** "Even if some cases went to trial and the Crown lost (a matter that is too early to
5 assess with any certainty) there would still be a benefit in having key issues decided by a
6 court. The benefit is that regardless of whether the Crown wins or loses, the court's
7 determination will assist in clarifying the key issues and the applicable law and to provide
8 guidance for how any other similar issues could be settled without having to go to trial.
9 Therefore, it is unlikely that all cases would proceed to trial.
10 If the Crown was successful in some or all of the claims, there would be real
11 advantages in sending a signal that unmeritorious claims will be defended and that numbers
12 of claims alone will not drive the Crown to an alternative, softer approach".
13 **MS JANES:** And so this pre-dated the *White* litigation and we're talking about strategy. So
14 having now read that, because you won't have seen that document before, as we go into the
15 discussion of Crown tactics, any thoughts arising from that?
16 **MS COOPER:** Well, I had a few thoughts. I think the outcome of that was obviously that we had
17 to file everything. So, I mean, yeah, so we had to put everything through the court process
18 because there had been a deliberate decision not to create an alternative process. And when
19 I think now, when I think now of the cost of setting up the confidential forum, so that dealt
20 with the psychiatric hospital claims, then the cost of the Confidential Listening and
21 Assistance Service, and then you think of the cost of this Royal Commission of Inquiry, if
22 you think of all of that cost and you put yourself back to that timeframe, how much further
23 ahead would we be and how much cheaper would it have been to have actually set up that
24 independent Tribunal, done it once and done it well back then and how much further ahead
25 would we be in the resolution of these claims.
26 And I, you know, when I think about that now, we weren't obviously aware of that
27 document until now. You know, when you think about all that infrastructure cost that's
28 gone in in the meantime to try and avoid actually, you know, one, I think you need public
29 kind of inquiry until now into what's happened, and to, in a sense, push claimants away
30 from compensation, you know, wouldn't we have been better off to have grappled it way
31 back then?
32 When I think about how many claims could have been settled when we've got this
33 massive backlog and all of the Government agencies have these massive backlogs of
34 claims, wouldn't all of those millions of dollars that have already been spent in a sense

1 batting the issue away and saying we don't know there's any systemic stuff here, you know,
2 it doesn't look like to us that they've been able to prove there's any systemic abuse, how
3 much further would we be ahead?
4 So yeah, that's where I thought about this. The other thing that occurred to me in
5 reading this, is that we were never offered, for example, the option of a judicial settlement
6 conference up until 2010. And that was when Miller J, I think, you know, here we're right
7 in the middle of this catastrophic withdrawal of aid process, and Miller J actually hauled us
8 all into court, including Legal Aid, and said look, you know, these claims might have legal
9 problems, but at the end of the day, the Crown's got a moral responsibility, it must be very
10 clear to everyone that these people have suffered abuse, you need to start resolving them.
11 And so it was only from that point that we actually were able to engage in judicial
12 settlement conferences. I have to say they were spectacularly unsuccessful and you've
13 heard about some of the claimant's experiences of those judicial settlement conferences.
14 You heard Georgina Sammons talk about hers, you heard Gay Rowe talk about hers.
15 You know, I mean they were processes in which we always have gone to a huge
16 amount of effort to actually prepare will say statements and to set out the legal position and
17 we've always felt that the other side, whether it's been the Ministry of Education or the
18 Ministry of Social Development or the Ministry of Health has done minimal work, and
19 really rocked up not intending really to change the position. I mean the purpose of these
20 are settlement conferences, and to us they've just been another mechanism to coerce
21 vulnerable people into accepting settlements that are not just.
22 **MS HILL:** The thing that struck me, and Sonja's just mentioned the sort of six-year gap between
23 this paper and the beginning of these processes, but what struck me was that real hardening
24 of attitude. This is post-Lake Alice.
25 **MS COOPER:** Yeah.
26 **MS HILL:** And this idea of, you know, "We're not going to be seen so give an inch, we're not
27 going to be seen to be softer". The statement about the standard of proof, post-Lake Alice
28 where there wasn't really an investigation into the allegations, there wasn't a factual inquiry
29 on an individualised basis, but that hardening of attitude was really apparent to me in this
30 paper. And in light of the Lake Alice settlements, and not to detract from what people
31 suffered in Lake Alice.
32 **MS COOPER:** No.
33 **MS HILL:** But that real change of Government approach struck me.
34 **MS COOPER:** And of course we saw that played out over the next however many years.

1 **MS JANES:** And just on the Lake Alice, there was also no application of the Limitation --
2 **MS HILL:** No.
3 **MS JANES:** - Act in that settlement.
4 **MS COOPER:** Or the ACC bar, and all of those claims would have been barred by ACC and
5 barred by the Limitation Act.
6 **MS JANES:** You talked about the morality aspect of settling claims and that takes us neatly to
7 Gallen J's 2009 assessment of the Ministry of Social Development. First question is, when
8 did you become aware of that document?
9 **MS HILL:** Only at this Royal Commission. We'd not seen the Gallen – the 2009 Gallen report
10 before.
11 **MS COOPER:** No.
12 **MR HILL:** I understood it had been legally privileged up until now, or it had been not shown to
13 us at least.
14 **MS JANES:** And as you read that document, because you will have seen the Crown's evidence
15 that they find it a reassuring document about their process.
16 **MS HILL:** Yes.
17 **MS JANES:** So before we go into some of the aspects that are covered in the Gallen report, do
18 you have any broad comment that you would make?
19 **MS HILL:** I think describing as complimentary or expressing confidence in MSD's settlement
20 approach at that point in 2009 was over reaching I think to say the least, because when you
21 actually read Gallen J's report and his review of some of the claims, he found problems
22 with just about every claim that the Ministry had dealt with, and he expressed concern more
23 broadly on a couple of things, but one thing that he noted in relation to several of the claims
24 he reviewed, and he talks about file C in his report, that there's no mention of solitary
25 confinement when MSD were assessing these claims. And he notes that the use of solitary
26 confinement for children is not something which should simply be ignored, and Sir Rodney
27 set out his view of the legal considerations which needed to be taken into account. And for
28 one of the claims that he was reviewing, that young person had spent 14 days in solitary
29 confinement and he said that would need substantial justification. And it just wasn't
30 addressed in the Ministry's settlement approach.
31 Now that's 2009 and we're in 2020 and the characterisation of the use of solitary
32 confinement is still a bone of contention between us and the Ministry. And when we talk
33 about the Ministry's current processes, and we'll talk about our concerns around how the
34 use of solitary confinement and false imprisonment doesn't seem to factor as an issue for

1 settlement. So 11 years down the track we're still looking at the same issues. So I found it
2 really interesting that even back then Gallen J was saying this is an issue you can't ignore.
3 But, of course, we didn't know that at the time.
4 So Sir Rodney Gallen J also commented in relation to that same claimant that their
5 complaint of abuse from another named person who had been convicted of similar
6 behaviour but not against that complainant had not been accepted. And Gallen J thought it
7 should have been. And he had reservations about MSD's view that causation was an issue.
8 So he described MSD, yeah, it was MSD at that point, as down-playing a claimant's
9 experience. And that's something we're still seeing now. And then to Gallen J – I keep
10 going between Sir Rodney and Gallen J, he's the same person – he expressed unease about
11 the treatment of another claimant who'd been made a very low ex-gratia offer, a low offer
12 of settlement and that claimant had [died]. And he reviewed a number of other claims
13 saying that MSD not infrequently failed to acknowledge some aspects of the claim which
14 were important to the claimant but not to the investigator.
15 And lastly, Gallen J dwelled in some detail on the Limitation Act and his disquiet
16 about its application to these claims. So he contrasted the Crown position that all of these
17 claims were potentially barred by the Limitation Act, but he felt it was at least arguable that
18 the kind of claimants, and that's how he described them, with which the Crown were
19 dealing could be said to have a disability. So he seemed to be at odds with this Crown
20 blanket view that all of these claims were barred by the Limitation Act.
21 So when we see descriptions of the 2009 Gallen report as being complimentary of
22 MSD's process and that's been reported to Cabinet at that point, but when you read the
23 report it's not very complimentary at all. There are certainly complimentary parts, he says
24 there's obviously sympathy with some claimants, and he does talk about the moral liability
25 which I think we'll come on to. But I just wanted to highlight those parts of the report
26 because it's easy to accept a report to Cabinet saying I know it's quite good, but when you
27 get into it into the granular parts of it it's not actually that good at all.
28 **MS JANES:** So we'll generally work through the report although we may skip some of the bits
29 that you have –
30 **MS HILL:** Sorry about that.
31 **MS JANES:** No, that's absolutely fine. So the starting point really was Gallen J outlined what he
32 understood the Department's definition of meritorious claims were. Can you read that out,
33 that's at paragraph 164.
34 **MS HILL:** Is that the one on the screen?

1 **MS JANES:** No, it's not.
2 **MS HILL:** 164 of our brief or – there we go.
3 **MS JANES:** We're now calling out 164.
4 **MS HILL:** Thank you. "The view which has been taken by the Department and the Department's
5 advisors is that a meritorious claim is one where there is some moral liability as a result of
6 indisputable conclusions that abuse has taken place, but that a claim in the courts may be
7 defeated by the limitations which stand in the way of such claims. In such cases, that moral
8 liability is not to be met by way of a payment for compensation but rather an ex gratia
9 payment to be seen as an acknowledgment that there was a moral if not a legal obligation.
10 That was a generous conclusion".
11 **MS JANES:** And in your reply brief of evidence, could I please have you read paragraphs 12 to
12 14.
13 **MS HILL:** "It is unclear what moral liability means in reality. It appears, however, to be a claim
14 which could be proved on the facts, but maybe defeated by statutory bars or affirmative
15 defences. Several of the later court decisions referred to in our evidence were successful in
16 proving the facts of a claim but lost on the limitation point, including *White* and *J*. These
17 claims fit the definition of meritorious claims but the plaintiffs were left without any
18 remedy. For many years, indeed *J* never received any compensation to our knowledge.
19 The decision-maker for meritorious claims has always been the Crown. The Crown
20 also controls the access to information across claims, giving it the ability to accumulate a
21 body of knowledge which is not available to the claimants. It is never clear whether this
22 information is applied in determining whether a claim is meritorious, disadvantaging
23 survivors. The approach that the Crown may not be legally liable for a claim but may have
24 a moral obligation has served to minimise the Crown's legal liability. With no transparency
25 around what the Crown deems to be its moral liability, the goal posts for people trying to
26 assess claims against this threshold continuously move".
27 **MS JANES:** If we can go to paragraph 17 of Gallen J's report, because in his report he recognised
28 that most plaintiffs seeking redress for historical abuse would have difficulty and be
29 unlikely to succeed in the courts because of the limitation provisions. And he talks about
30 that. So can I have you read paragraph 17.
31 **MS HILL:** "It should be remembered that a number of claims had proceeded to hearing in the
32 courts, with the result generally being that the various limitation provisions prevented the
33 claimants from succeeding against the Department in respect of which they sought
34 damages. It was on the basis of these outcomes that in respect of most claims which were

1 referred to the Ministry of Social Welfare unit, legal advice was received that it was
2 unlikely that the claims would succeed if they proceeded to a hearing in court. For that
3 reason, the risks of a claimant succeeding against the Crown in most cases were assessed as
4 low".
5 **MS JANES:** Gallen J had some thoughts about why potentially that could be overcome. So we
6 will have a quick look at paragraph 21 and 22, if we could call those out please.
7 **MS HILL:** "There is also a significant factor which points to a conclusion that it was the intention
8 of the Government that claims where appropriate should be met with a degree of sympathy.
9 The Cabinet policy committee at every stage had been advised and was aware of the view
10 of the Crown Law Office, on the basis of the relevant court decisions that the risk of the
11 majority of claimants recovering damages, even when they were able to establish the
12 allegations upon which the claims were based, was low because of the limitation provisions
13 which applied in respect of individual claims. This was especially true in the case of claims
14 against the Crown Health Funding Agency. Nevertheless, reference was made to the
15 settlement of meritorious claims.
16 The direction to settle meritorious claims can only, I think, be interpreted as a
17 direction that the overall justice of the claim, having regard to the circumstances, needed to
18 be taken into account or at the very least balanced against the legal barriers which most of
19 the claimants would face".
20 **MS JANES:** And we won't go to them in the interests of time, but there are similar references at
21 paragraph 31 to 32 and 154. So in light of the expectation firstly of the Department about
22 what a meritorious claim is in terms of moral versus legal liability, and the thought that
23 there was a Cabinet directive that there should be sympathy with these claimants, how
24 would you say you have experienced the Crown's approach, is that aligned with the
25 expectations Gallen J outlines?
26 **MS HILL:** No, it's not been. The approach has been starting from a position of disbelief, there's
27 been very little sympathy and we've never seen – we didn't know about the test of
28 meritorious claims, but we've certainly never seen, or we didn't see that approach for a
29 very, very long time, and arguably it's not there now.
30 **MS JANES:** So we go back to our body of knowledge discussion yesterday about where a
31 department is aware of a particular time period where there is no abuse or convicted
32 abusers, how would you think that body of knowledge, taking into account also the culture
33 of abuse paper which you prepared and the institutional updates that you provide, how
34 could you suggest that things could be done differently using that knowledge and applying

1 the meritorious claim approach?
2 **MS HILL:** Even if we take the position that, you know, you can prove your claim on the facts,
3 I mean you look at someone like Keith Wiffin and the evidence he's given about what
4 knowledge he was given and then given more later. There's an enormous amount of
5 knowledge by 2009. I would have thought if the Crown policy was truly aligned with the
6 Gallen report and the way that Gallen perceived claims to be dealt with, then I would have
7 thought a lot of those claims would have been resolved in that short space of time. But
8 none of them were.
9 **MS COOPER:** I mean we would have expected reasonably that most of the witnesses, for
10 example, who'd given evidence in the *White* trial, including the two plaintiffs, would have
11 had offers made to them. But they didn't appear at that time. And I mean Keith Wiffin is
12 an example of that. And, you know, it took years for those people, and again, we had to
13 keep advocating for an outcome for them.
14 **MS HILL:** Can I just illustrate the point that Sonja's made. So some of the witnesses in the *White*
15 trial received settlement offers this year.
16 **MS COOPER:** Yes.
17 **CHAIR:** 2020?
18 **MS COOPER:** Yes.
19 **MS HILL:** Late 2019 at a push but to illustrate that point.
20 **MS COOPER:** Yeah, indeed.
21 **CHAIR:** And in terms of the body of knowledge, I mean did more come to light in that
22 intervening time that then made settlement more likely?
23 **MS COOPER:** Well, I think as a result of the *White* trial we started certainly to start collecting as
24 much conviction information as we could. So about staff members.
25 **CHAIR:** That would have been known to the Crown anyway, wouldn't it.
26 **MS COOPER:** Yeah.
27 **MS HILL:** I think it comes down to what do you mean about come to light, what they already
28 know and what we're able to dig up, and those are two quite different things.
29 **CHAIR:** I was really thinking, do you know if the Crown subsequently found out things they
30 didn't know earlier which then changed their minds about settling. You can't be expected to
31 know, but you can be expected to speculate.
32 **MS HILL:** I can certainly give you an example. There was a staff member at Epuni called John
33 Ngatai. He's now deceased so that's why I can use his name. For a long time claimants
34 who made allegations about him, and there were quite a few, had their claims declined,

1 MSD would not accept that he was an abuser. And that went as far as a judicial settlement
2 conference for a client, he's referred to in our brief as SNF. And at judicial settlement
3 conference MSD would not accept any allegations against that particular man. And then
4 a year or two ago, I don't have the dates in front of me –
5 **MS JANES:** We can actually bring up the documents, that's document number 19.
6 **MS HILL:** If you don't mind jumping to that I thought it would be useful to point out.
7 **MS JANES:** Yes, and it ends in witness 94 150.
8 **MS HILL:** Yes. There we go, March 2019. "Do you want me to read some of this out? How do
9 you want to do this?
10 **MS JANES:** Yes, I think use this as you want to just to illustrate your point.
11 **MS HILL:** Yes. So as I said, Mr Ngatai, it says there at paragraph 2, he was employed at Epuni,
12 Weymouth and Arbor House which was a smaller institution for around 15 years. And he
13 died in 1991. And as I've explained there, there was a JSC, judicial settlement conference,
14 in February 2013. This is a few years after the Gallen report and MSD would not accept
15 Mr Ngatai was abusing children. We should have said there was a group of witnesses at
16 that point, there wasn't just one.
17 **MS COOPER:** And he would have been -- he was referred to in our 2006 paper.
18 **MS HILL:** Yes. So I've said at paragraph 5 of my letter, "As a result of the Ministry's stance a
19 number of clients were forced to accept settlement offers which did not address their
20 allegations about Mr Ngatai". And then, "In October 2017 the Ministry of Social
21 Development appeared to accept Mr Ngatai as a sexual abuser for the first time". There
22 was no explanation about why this was, we just got a response to an offer one day, a
23 response to a claim one day in relation to a particular client where allegations about
24 Mr Ngatai were accepted with no explanation of why that was. So this letter asks why.
25 We said you've never told us what caused this change of position, but we were
26 concerned at the number of people who had settled their claims when the Ministry refused
27 to accept that. We asked the Ministry to revisit those claims or let us know what steps it
28 intended to take.
29 **MS JANES:** You received a response and that's document 20 ending in 4151. Keep talking.
30 **MS HILL:** Yes, I'll keep talking while it's waiting. So our timeline now is 2013 is a refusal,
31 there's four years and suddenly there's a change of position. And we queried that with the
32 Crown in March 2019, August 2019 we get a response from the Crown. "MSD is currently
33 unable to provide you with a substantive response to this request as your query raises wider
34 issues that MSD is in the process of considering. However, we are looking into this matter

1 and will be able to provide you with a considered response in due course.
2 MSD will be discussing the wider issues with other relevant Crown agencies as part
3 of its commitment to the principles guiding how the Government agencies will engage with
4 the Royal Commission and survivors of historic abuse in State care which includes being
5 joined up".
6 We still don't know what changed MSD's position in relation to Mr Ngatai. But it
7 shows that something came to MSD's attention, we don't know what. This is the lack of
8 transparency that we work with all of the time. But he died in 1991, so I would think that
9 there's something in the body of knowledge that MSD has found, we're at the point of
10 guessing at this point, but it demonstrates not just the change of approach and change in
11 information, but the time it can take for information to change, and how it disadvantages
12 people along the way. So I thought that was a useful example in terms of that changing
13 knowledge.
14 **MS JANES:** And it also addresses something that we were going to come to later, but let's cover
15 it now, in that you had wanted to say something about the application of the findings in the
16 *White* trial as to when they were applied and when they weren't applied.
17 **MS COOPER:** Yes, we deal with that in our brief. We gave a number of examples of clients who
18 were at Epuni or Hokio at exactly the same time as Earl and Paul, and made very similar
19 allegations to those that had been accepted by Miller J in that trial. And curiously and
20 frustratingly they were rejected for quite a number of clients, and this continues to be the
21 case.
22 And when that was challenged, it was obvious that the Ministry was relying on
23 Miller J's recitation of the defence witnesses' evidence to deny something as being a fact
24 rather than his actual findings. And when you read Linda's evidence she actually says well
25 yes, we're aware of this decision but we'll choose when we apply it. I mean I'm really
26 paraphrasing it, but that's the essence.
27 So even when we do have findings by a court, independent findings by a court, the
28 Ministry chooses and picks when it will apply it, even if clients are there in the exact same
29 timeframe.
30 And so we just have this frustrating lack of consistency, reliance on evidence that
31 the court has said is not proven, so it's totally self-serving and that's just one of the ways
32 that even last year this year is used to deflate, deny, minimise claims. Which again is
33 another reason why it has to come out of the State, you know, because the State is -- it's the
34 fact finder, you know, it performs all functions here and it can't do that with any integrity

1 when it's got -- when it's the defendant, its job is to protect itself.
2 So yeah, that is a very, very big frustration for us, and you say it's recorded in the
3 briefs, that's what they do, if they don't want to apply it they don't. So when you've got a
4 situation where a Ministry can pick and choose what it's going to accept, which it does,
5 then you've got the paucity of records added to that, you've got a – it's completely unfair to
6 claimants.
7 I was going to illustrate also too we were talking about the records issue, I was
8 going to illustrate this with a claim I've dealt with recently, if I can just say because this
9 might identify the clients that I'm going to talk about I'd ask for a section 15 order please.
10 **MS JANES:** So if we can excise on the live stream and have a section 15 order so that what is
11 next said does not identify them.
12 **CHAIR:** Did you want me to make such an order?
13 **MS JANES:** Yes, if we could thank you, it's whatever the time is, 3.24, the evidence coming after
14 3.24 on Wednesday I think we are.
15 **CHAIR:** 3.24 on Wednesday 30 September, 3.21, is not to be published.
16 **MS JANES:** Is not to be published.
17 **CHAIR:** Do we have an end point for the non-publication?
18 **MS COOPER:** When I've finished narrating this.
19 **MS JANES:** But in terms of it not being published, it would have to not be – it would have to be a
20 permanent one because this is a new case.
21 **CHAIR:** I think what we should do, it's 25 past 3, let's take the afternoon adjournment and let's
22 sort this out because I don't want to make an order that doesn't apply or is appropriate. So
23 I'll ask you to consult over the adjournment and we'll make a formal order after that.
24 **MS JANES:** Yes, we'll take the adjournment now and we'll resolve that, thank you.
25 **Adjournment from 3.23 pm to 3.49 pm**
26 **CHAIR:** Ms Janes.
27 **MS JANES:** Commissioners, just to highlight where we'll be going in terms of what happens
28 next, is that we will halt the live stream.
29 **CHAIR:** Yes.
30 **MS JANES:** And Ms Cooper will provide the answer about the evidence that she was going to
31 give. Mr Mount very kindly is keeping track of the actual lines of the transcript that that
32 relates to, we'll then ask you, Madam Chair, to make a section 15 order over those
33 particular lines of the transcript and then we will resume the live stream.
34 **CHAIR:** And just to be clear, that will be a permanent order?

1 **MS JANES:** That will be a permanent order.

2 **CHAIR:** Thank you.

3 (Evidence given under section 15 order)

4 Individual Restriction Order

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1 Individual Restriction Order
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Individual Restriction Order

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

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

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

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

1 **MS JANES:** In fact you received a letter, if I can call up document 15, which is witness 94 ending
2 in 068, and that's Cooper Legal chapter 4 document 2. And this is a letter from the
3 Ministry of Social Development to Cooper Legal and it's from Peter Hughes, the Chief
4 Executive.
5 **MS COOPER:** Yes, I remember it.
6 **MS JANES:** Can you just, if we call out the highlighted paragraphs, if you can read the bits that
7 you would like to take us to.
8 **MS COOPER:** "In your letters you noted my comments to Mr Keith Wiffin that where MSD
9 believe it is fair and agreement can be reached we will seek to settle with claimants, and
10 that I would investigation the issues people raise around their past care and seek to respond
11 fairly, regardless of the forum people chose to raise the issues they have with the care they
12 received".
13 **MS JANES:** Before you go on, it does refer to Keith Wiffin and we know that this is a 2007
14 document, but we've also heard that in 2009 he effectively withdrew his claim.
15 **MS COOPER:** Yes, that's right. And, you know, we can talk more about that because I think
16 there is some interesting evidence in Garth Young's brief that I want to particularly
17 highlight about that.
18 **MS JANES:** So we'll return to that when we come to that section. If you carry on.
19 **CHAIR:** Just to make it clear, this is Mr Hughes writing to you is it?
20 **MS COOPER:** It is, it's Peter Hughes who was then the Chief Executive of MSD writing. He
21 also says there, "I believe it is the responsibility of public servants to own mistakes and be
22 accountable for them, do what they can to fix them and ensure that they are learned from".
23 I think that next paragraph is interesting, he talks about New Zealand being served
24 by committed social workers who seek to make a real difference to people's lives.
25 "Everything I have seen suggests this has been true in the overwhelming majority of cases
26 going back many years. That does not mean that there have been cases -- abuse and neglect
27 and where this can be shown I will act fairly".
28 Then he goes on to say, "With any allegation or claim regarding this Ministry we
29 will seek to address concerns in a way that acknowledges an individual's needs and
30 attempts to provide for those needs in a way that will achieve some positive long-term
31 outcomes for them and their families. You will appreciate that claims must also be
32 addressed in a way that fairly represents the past actions, proper or otherwise, and
33 responsibilities of Child, Youth and Family and its predecessors, their staff and agents".
34 **MS JANES:** We'll just very quickly go to the second page and that just confirms that it is indeed

1 Peter Hughes and there is a – we'll call out that paragraph.
2 **MS COOPER:** So here we were referring to a client who was reaching the age of 26, for two
3 clients, and there we're specifically told, "You may wish to preserve your clients' position
4 by filing a statement of claim and any necessary applications. Please be assured that I am
5 still committed to continuing to consider your clients' claims".
6 **MS JANES:** And you replied, if we can call up document 16 which is witness 94 ending in 073.
7 And this was on 10 May 2007. And when it comes up you have outlined your concerns.
8 So if we can – this is – if you could just quickly call out the bottom number for the Crown,
9 thank you, and then call out the paragraph that's highlighted.
10 **MS COOPER:** "As you are aware, I have been acting for clients who are bringing claims against
11 MSD and its predecessors for nearly 12 years now. In that time, your organisation has
12 settled only one of my client's claims without requiring that client to prove their claim in a
13 court. The only other client of mine whose claim has been settled was forced through nine
14 years of litigation and protracted negotiations, which caused him considerable distress and
15 cost over $200,000.
16 In respect of my current clients whose claims are filed in court, my only experience
17 is of your organisation vigorously (and in my view ruthlessly) pursuing its legal rights,
18 pushing all the claims through the litigation path and failing to consider any alternative
19 resolution processes (including negotiating settlement or mediation) to resolve client's
20 claims. Further, I have seen no progress towards any alternative process for resolving our
21 clients' claims, which was our desired outcome in facilitating meetings between your staff
22 and a number of our clients last year. Indeed, we have repeatedly been told that no
23 alternative process has been agreed to yet and none may be".
24 **MS JANES:** And so tying – yes, let's go to the last paragraph.
25 **MS COOPER:** So we're obviously pre-trial, "As you must be aware, my firm has just over six
26 years to prepare before we commence a nine week trial against MSD. All of the resources
27 of the firm are devoted to managing the very heavy demands of this trial and the other
28 litigation we are progressing in this office. While it is regrettable, due to MSD's delays, we
29 will have to leave further communications about the matters addressed in our
30 correspondence until after our trial commitments have been completed".
31 **MS JANES:** And so taking those two pieces of correspondence, one, MSD saying that where we
32 make mistakes we will be accountable, marrying it with the Crown litigation strategy of
33 settling meritorious claims early, and your response that only one case has settled in 12
34 years, what would you say about how you have experienced and more particularly your

1 clients have experienced that meritorious approach to early settlement of claims?
2 **MS COOPER:** Well, I mean I think that letter is evidence that certainly at that point, and as
3 Amanda says really until mid-2010 when there was judicial intervention and United
4 Nations reported adversely and Human Rights Commission was involved, we didn't see any
5 progress at all. And from our perspective, and we'll talk more about the Crown pushing on
6 hearings where we had no Legal Aid funding, again to strike out claims, you know, we saw
7 no offers coming through, I think we talked already about the trial witnesses, I mean the
8 plaintiffs didn't see any outcome for years.
9 So from our perspective, it's either a view the Crown didn't think any of the claims
10 were meritorious, which you just have to think that must have been the case, and there was
11 also this Crown strategy of pushing everything on for trial. I mean we were also embroiled
12 in the psychiatric hospital litigation at that time too which was tracking its way from two
13 levels of the High Court up to a full bench of the Court of Appeal and then up to the
14 Supreme Court, so we were embroiled in that litigation too through this process.
15 So from our perspective, we just felt like from a claimant's perspective that the
16 Crown had decided it was on full scale attack, get rid of all of the – I mean for the
17 psychiatric hospital claims, I think the clear intention was to get rid of them all through the
18 strike-out process. And with the Ministry of Social Development, I think the strategy there
19 again was to use that armoury, and we saw that in the earlier paper, you know, to use court
20 losses as a bludgeon, in a sense to kind of say you've got no merits, so go away, that's how
21 we and the claimants felt.
22 **MS JANES:** Contrasting that with the Lake Alice experience, and I understand you weren't
23 involved in that litigation, but from your understanding, was there a commitment to that
24 global settlement for Lake Alice by all of the departments, and if so why did it not translate
25 into the MSD and residences Child Welfare?
26 **MS COOPER:** In our discussions with Crown Law at that stage, I mean we – and Grant
27 Cameron, we certainly came to understand that that settlement had come about really as a
28 political process. So when Labour had been in opposition, it had said very strongly these
29 people should not be forced into litigation, you know, they've suffered terrible abuse,
30 they've been traumatised, they should not be forced into a litigation process. And so of
31 course then it became the Government, and so then, you know, you've got, in a sense it was
32 hoisted on its own petard because it had made these statements in opposition, and so it was
33 then in a sense bound to put in place a process to resolve these claims out of court.
34 But I think reading the documents now, but again we'd never seen before until now,

1 it was very clear that in kind of manoeuvring through that process the Crown was very
2 conscious of the claims that my firm was starting to take coming forward and I think it was
3 very conscious of being deliberate about not setting up a precedent.
4 And so you see this rhetoric that is even repeated in the briefs before this
5 Commission now, that Lake Alice was just so different and it was a clear example of
6 systemic abuse and, you know, it was documented and so, you know, it can be treated as
7 this special circumstance that merited being treated differently. But we have never seen it
8 that way, it was part of a whole system. And, you know, we've said before, many of the
9 Lake Alice claimants are our clients now because they were State wards when they were
10 taken to Lake Alice and treated. And they talked in their statements about the abuse they'd
11 suffered in places like Hokio and Epuni and Holdsworth.
12 So there was a lot of cross-over. And again, a lot of the clients who'd had Lake
13 Alice settlements, and you saw that with one of our witnesses, yeah Patrick, you know, so
14 he gets this huge settlement for this brief period of time that he has in Lake Alice, it's about
15 $80,000 or something, and then he gets this tiny little settlement from the Ministry of
16 Health for experiences that, you know, perhaps if we weigh them, not as, you know, given
17 that always in these processes things are graded in terms of seriousness and moderate and
18 less serious in terms of what they attract for compensation, so while it might not have been
19 at that same level of seriousness, still he's making significant allegations and there's such a
20 significant disparity in the settlement.
21 So I mean I've gone on to a slightly different point, but the point there is the Lake
22 Alice, what happened to that group of clients was not significantly different to what
23 happened to clients of ours in psychiatric hospitals throughout New Zealand and in Social
24 Welfare residences and in Ministry of Education schools and in health camps, it's just that
25 it, you know, it's still presented today as if it's some discrete area that was different.
26 But I just think given already the evidence that you've had us present showed that
27 there was already such a big body of knowledge. Otherwise what was the point of the
28 confidential forum? What was the point of the Confidential Listening and Assistance
29 Service? There's all this information that has been accumulated and reports given that
30 shows this wasn't just confined to this small number of years in this adolescent unit in Lake
31 Alice Hospital, and yet I think you're still being asked to believe this fantasy that that's
32 somehow out there on its own and that anything else is just a few rotten eggs, you know.
33 And so, you know, on the whole you're asked to accept, I think, that there's just a few rotten
34 eggs and a few bad things that happened to a few people instead of it being systemic.

1 **MS HILL:** Can I just add to that in going back to what things looked like in that sort of 2007 to
2 2010 period, and I think the reason that Lake Alice is described as systemic is because it
3 could be contained to the Child and Adolescent Unit. And it was easier politically and
4 from an understanding what your risk is, because these were children in the Child and
5 Adolescent Unit. And so the – and rightly so, the public response to it was significant.
6 But they never interviewed the staff at Lake Alice in any depth, there was no real
7 look at the facts. And when we contrast that with meritorious claims, this idea of you can
8 prove your claim on the facts.
9 So Lake Alice, it was because it was Dr Leeks, it was because of the aversion
10 therapy which was documented and horrific, that was tagged as systemic, without any
11 significant or balanced investigation of the facts. But when we get to the rest of the claims,
12 they have to be meritorious and you have to prove it on the facts.
13 So there's this really different approach. And it's because, I think, there was a
14 floodgates concern there, the size of it. They were able to contain Lake Alice and they
15 couldn't contain the rest.
16 **MS COOPER:** Yeah, and the other interesting thing about Lake Alice reading the documents,
17 again we weren't so aware of that, is that the way it was being presented to Cabinet was that
18 any compensation was only in respect of this narrow aversion therapy aspect. But actually,
19 when you read the compensation it covers the physical abuse, the sexual abuse, being
20 caged, all sorts of aspects. And those who got the higher levels of compensation were the
21 ones who claimed those other aspects. And yet, the documentation given to Cabinet said
22 that's actually not part of the compensation process, it clearly was and it's –
23 **CHAIR:** All of that was documented in, again, Gallen J's report.
24 **MS COOPER:** Yes.
25 **CHAIR:** It was he who identified the differentials.
26 **MS COOPER:** Right, but in terms of how that's been presented to Cabinet, it's like that's not been
27 compensated, that's not part of this package. But clearly it was because, as you say, Gallen
28 J set out this is how I'm going to divvy up the money. And that's all done with, as Amanda
29 says, no investigation, staff never got an opportunity to comment. And we know from the
30 Crown lawyers that they said, you know, if we'd been allowed to have a say about this, we
31 would have never allowed that settlement process to proceed, because the staff denied it.
32 So yeah, it's interesting I think to show how political statements actually end up in
33 processes occurring and then you can constrain that and re-define it and that's why that
34 that's still presented as though it's an anomaly.

1 **MS JANES:** Going back to – so you've done your 2006 culture abuse paper, there is a lot of
2 information that is going forward with claims, but you also mentioned the Confidential
3 Listening and Assistance Service. And we know from Judge Henwood's evidence that they
4 saw 1,103 victims and survivors.
5 From your perspective, did you see or experience or have referenced how that
6 information was applied to settlement of your claimant categories?
7 **MS COOPER:** Well, I mean it was interesting, because they weren't allowed to report on
8 individual experiences of course, so I mean that was the terms of reference for both the
9 confidential forum and the Confidential Listening and Assistance Service. Actually I know
10 Judge Henwood actually fought, in a sense, about that so that at least she could present the
11 more generic themes that were coming through and so she did provide those reports of that
12 generic information that she was coming through.
13 But I mean this was one of our big concerns about the confidential forum and the
14 Confidential Listening and Assistance Service was that it was this big funnel into which all
15 this information was going and then it was buried in a box somewhere. In fact, you know,
16 with CLAS, they actually destroyed all of the transcripts of evidence at the end of their
17 process. So for those individuals who asked for their transcripts they'll have them, but
18 otherwise, that's again a massive source of information which this Inquiry could have had,
19 for example, which has gone.
20 **MS HILL:** Although CLAS did refer, when it was requested CLAS would refer people to MSD
21 directly.
22 **MS COOPER:** Yes.
23 **MS HILL:** And their transcript, as I understand it, would follow them. And it says something
24 about the time a process takes that MSD continues to make offers of settlement based on
25 CLAS transcripts even now, it's taking quite a while. So where those individuals have been
26 referred from CLAS to MSD, their information follows them. They were usually put
27 through a second interview with the MSD team. But I think the majority, as Sonja said,
28 that information got destroyed because that was what CLAS was supposed to do, it was a
29 vortex.
30 **MS JANES:** So in terms of what would have been an invaluable body of knowledge to feed into
31 settling meritorious cases, from what I'm understanding of your evidence is it never made
32 its way to be applied in that manner.
33 **MS COOPER:** No, it wasn't allowed to, it was expressly a terms of reference that individual
34 claimant experiences could not be provided, you know, could not be commented on unless

1 the client had given their permission, but then it just went and off it went to the Ministry to
2 do its own processes. So that was a limitation on the terms of reference, and same with the
3 confidential forum which, of course, dealt with the psychiatric hospital claims.
4 **MS JANES:** So when you talk about your preference for an independent body, what would you
5 say would need to be different to CLAS, who did have some therapeutic referral
6 counselling, access to records, how different would it look and why would it look that way?
7 **MS HILL:** Certainly Judge Henwood did an extraordinary job within the terms of reference, we
8 absolutely acknowledge that she did an amazing job with what she had. But that
9 information should never just go into a position to be destroyed, it needs to be retained, it
10 needs to be analysed, and the people who are identified as perpetrators, if they are alive
11 they need to be located, if they are still working for MSD or another organisation then that
12 needs to be established. All of those things and that information needs to be used, not just
13 gone into a vortex and to disappear forever, that's no use to anyone, especially claimants.
14 You know, one of the things that we see so much now is MSD saying "We want to
15 learn from this, we want things to be different, we want Oranga Tamariki to be this new
16 and radically different organisation". But if you just send things into a vortex and destroy
17 it, you don't learn anything at all. So part of the, what I would love to see of this
18 independent Tribunal is an on-going recommendation function where it not only responds
19 to claims, but it helps make sense of what happened in terms of those cultures, that what
20 needs to happen to go forward. And I don't think there is any learning happening in the
21 current way that MSD deals with claims in particular, and certainly none from MOE.
22 **MS COOPER:** And I think the other thing too is that the reason why it's really important that it's
23 independent is that if you have an independent body holding that repository of information,
24 it's got no vested interest in protecting it, it's got no vested interest in minimising people's
25 experiences or denying that a particular perpetrator abused children or vulnerable adults, it's
26 there as an independent body with, as I say, with no vested interest in its own
27 self-protection to collect information and then review that information when it's coming to
28 assess claims.
29 And I think the importance of that is, is that as more information comes in, it can
30 update what it knows about placements, perpetrators, systems, cultures, and build up that
31 information so that it can keep reassessing what it knows about happened to those who are
32 in care and who come to it.
33 And I think that then means we've got an independent and transparent body of
34 knowledge that can be cross-departmental, that can then be applied to assessing claims in a

1 fair, independent and transparent way. It's not hidden, it's not something that nobody else
2 has really got a clear idea about except the Ministry itself. And it's not a situation where
3 the Ministry can decide what it's going to accept and what it's not going to accept and
4 whether it's going to say well it was at this level rather than at this level.
5 So that's another benefit of it being an independent body, it can just – it should be
6 the repository of all of this information because, let's face it, we've now got a lot – we
7 should have – a lot of accumulated information from which to build up this body that can
8 then be applied transparently and across ministries and other, you know, like churches to
9 say this is what we know, so if an individual comes and they say "This is my experience",
10 those on that independent body can say "Oh, yes we've heard all about this before". If it's a
11 new one then that just gets added into that body of information, and so when another person
12 comes it's "Aah, we've heard about this before".
13 **CHAIR:** Would you also see it as having a function of maybe reporting –
14 **MS COOPER:** Yes.
15 **CHAIR:** - on thematic issues, systemic issues to Government?
16 **MS COOPER:** Absolutely. I think as Amanda says, one of the things that we think is really
17 important, if practice today is going to be better, we actually have to really learn from the
18 past. And, you know, our clients are getting younger, you know, our youngest clients are
19 still in their teens. So if we're really going to learn, and that's again why I think it's
20 important that it's independent, because otherwise the organisations have got their own
21 self-interest in protecting their image, then again, that information is really important in
22 saying this is the information that's coming forward to us, this is where we see that social
23 work or residential care or secure or the use of seclusion needs to be improved. This is
24 what's causing harm.
25 And I think too, if you have independent bodies, you might be more likely to have
26 former staff members, for example, or other professionals. I mean like I've had so many
27 e-mails over the last few days from people who've been associated with the residential
28 schools, or the residences who said "I'd love to help". I'm going to be encouraging them to
29 come to the Royal Commission because they've clearly got relevant information.
30 So and it may be that if there was this independent body, where they weren't
31 worrying about whether they're going to be disciplined or they're not worried about, you
32 know, are they going to have their professional integrity attacked if they disclose, that we
33 might get that information coming more from, as I say, staff or former staff as well to add
34 to that body of information.

1 **COMMISSIONER ERUETI:** So this is quite a large body you've got in mind, right, it's not only
2 a redress scheme, a one stop Tribunal, but it also has an oversight role as well, which feeds
3 back into the ministries and agencies.
4 **MS HILL:** And bear in mind that what we propose will always be what I call the Rolls Royce
5 experience, so I imagine –
6 **MS COOPER:** Not the Toyota.
7 **MS HILL:** Yeah. Currently we've got more like a Lada-type experience, whereas I envisage a top
8 of the line model. But I appreciate that, you know, that might get knocked around a wee bit
9 in the process. But currently all of these different things are trying to be – different parts of
10 the State are trying to do all of these things. Some parts, MOE, MSD, Oranga Tamariki are
11 all saying we want to learn. Are they doing it in an efficient way? Probably not. If we
12 took that function out and put it into one thing, I think that's probably more effective and
13 probably more cost efficient.
14 So yes, I'm proposing a fairly large body, because I think that's what's needed.
15 Because what I see now, of course, is the children of some of our clients and sometimes
16 their grandchildren, they're in care too. And that's just one of the grimmest things you can
17 see. It's horrible. And nothing's changing. So I think we have to think large, we have to be
18 ambitious, because nothing's going to change otherwise.
19 **MS COOPER:** And it may be that, you know, ultimately the need for this body might actually
20 become much smaller, but I think the reality is at the moment there is such a big backlog of
21 claims that need to be addressed. You have to at least set up a reasonably substantial body
22 for the meantime to actually clear this big backlog, and to gather that information. Because
23 if we are real, if the ministries that committed to the Royal Commission and, you know,
24 have committed to the learnings, if we're going to be real about this, then, you know, we
25 have to make sure that we learn all the information, because there will be younger people
26 who can come forward and talk about their current, you know, their very recent experience.
27 And there's a lot to be learned from that still, because that impacts on those who are now in
28 care, who are now in residential schools, who are now in youth justice residences being put
29 into secure care.
30 So, you know, there is I think – and then as I say, if we've managed that, I mean we
31 know that the Waitangi Tribunal, for example, is expected to have a discrete timeframe.
32 And I don't see, you know, it may be that it gets to a smaller body in due course. I think
33 there will always be these kinds of claims, because my – I think our view, our vision of this
34 is that it would be across Ministry, it wouldn't just, you know, it would cover Corrections,

1 and let's face it Corrections claims are going to keep coming. It would cover police claims,
2 it would cover Oranga Tamariki, it would cover the Ministry of Education, it would cover
3 health camps, it would cover NGOs that are contracted to provide care.
4 I mean I think you would know from the recent Children's Commissioner and other
5 reports there are still substantial issues that need to be addressed. There are still substantial
6 children, numbers of children, particularly, who are abused in care. I think it's like – I think
7 the last report was like 20% or something. I mean that's a big number of children. And
8 that's just what we know. And as I say, given what we know about the lack of reporting we
9 can guess that the actual figure is considerably higher than that.
10 So I think there is an on-going function for it, but starting off it probably needs to be
11 big.
12 **COMMISSIONER ERUETI:** I'm just wondering how – I'm not sure if we've got time to discuss
13 this now, maybe it's for later, but how this idea would fit with the current reforms for
14 oversight, like the Children's Commissioner role, like independent monitors that have been
15 established.
16 **MS JANES:** We'll definitely be building up to that, as we go through the processes we'll tease out
17 certain things and then there will be a much more formed, once you've heard the evidence,
18 how the integral parts all fit together. So if you're comfortable to leave it there.
19 **CHAIR:** Yes.
20 **COMMISSIONER ALOFIVAE:** I'll save my questions for when we get to that part then.
21 **MS JANES:** You're welcome.
22 **COMMISSIONER ALOFIVAE:** No, carry on.
23 **MS HILL:** Sorry, we digressed quite substantially.
24 **MS JANES:** No, this is such an important part of why you're here and what you're contributing,
25 so very comfortable. But I'm just conscious if we do too much of it now it won't weave
26 together in the coherent way.
27 **CHAIR:** We'll leave it to you, Ms Janes.
28 **MS JANES:** Thank you very much. So just taking you a little bit back but still in the same realm,
29 because it underpins one of the concerns that you have about this independent body that
30 you're talking about. If we can go to document 18 which is witness 94, 114, Cooper Legal
31 chapter 4 document 35. And this is a letter from Cooper Legal to Rupert Ablett-Hampson,
32 who is the Acting Deputy Chief Executive Ministry of Social Development.
33 Can we just go through the highlighted parts. And this is talking about the
34 accelerated settlement categories and the Ministry's approach to how they assess within

1 those. So if we can go through the highlighted parts and make any comments you wish as
2 we go through.
3 **MS COOPER:** On 17 January 2014, Garth Young sent through a revised set of accelerated
4 settlement categories, Mr Young also provided a spreadsheet showing the range of
5 payments made over the past two years.
6 **MS JANES:** And going to the – thank you. Calling those out.
7 **MS COOPER:** "We attached a spreadsheet which identifies by numbers of clients the spread of
8 offers when compared against MSD's proposed categories. We observe that we have
9 adopted a critical conservative and analytical approach applying the draft categories as we
10 understand them. The categorisation work has been peer-reviewed. We assessed all the
11 offers at least twice, if not three times, before finally adopting the position represented in
12 the spreadsheet attached.
13 You will see there are only two categories where our categorisation matched MSD
14 figures and that was in relation to categories 1 and 4. We have a significantly higher
15 proportion of clients represented in categories 2 and 3. We have no clients receiving a zero
16 payment as we expected. This is because we have, to the best of our knowledge, weeded
17 out all of the claims where we consider MSD has no liability".
18 **MS JANES:** Then as we move to the next page, can you just briefly talk about what categories
19 you're talking about and where this then leads to.
20 **MS COOPER:** So this was what came to be the Fast Track process and we were involved in
21 negotiations from the start about the categories which the highest category, at that stage 1,
22 allocated the top amount of money, which was $50,000, and then down through to the
23 lowest category which allocated $5,000.
24 We actually said at the very first meeting to MSD, look we don't know – your
25 figures are going to be wrong because you've based this on set elements you've already
26 made, where you deny a lot of what the clients allege happened to them. And so they've
27 got a lower payment than what the Fast Track process would say they were entitled to,
28 where you're going to do a sniff test, and as long as they were in the places – their records
29 show that they were in the places they said they were, you're going to accept those
30 allegations and pay them according to that category, you know, depending on the
31 seriousness of their allegations.
32 So what we were doing here is we were pointing out some of the problems with the
33 categorisation, for example, it didn't take into account practice failures – and social work
34 practice failures are a major component of many claims – didn't take any account the Bill of

1 Rights Act, we weren't sure about how the Ministry was defining false imprisonment, had a
2 very loose definition which wasn't a legal definition. And so we were explaining here that
3 we had applied the categories to, I think at that stage it was about 188 offers, which the
4 Ministry had at that stage, and we'd been really tough, and as we've explained in that letter,
5 we only had two categories that were roughly the same, and that was categories 1 and 4. So
6 that was the $50,000 category and the $20,000 category from memory.
7 And what was the outcome of that is we – MSD agreed to do a dummy run of the
8 same 188 offers and they came up with figures that were very similar to ours, in fact they
9 got more category 1 claims than we did, which was interesting, so we were obviously too
10 tough. But otherwise their categorisations were very similar to ours and yet the proposal
11 that had gone to Cabinet and which Cabinet had approved was based on a very, very
12 different bell curve.
13 And so we said to MSD well, you can't do this process in a way that's fair because
14 you don't have enough money. You haven't asked Cabinet for enough money. And so we
15 said well, are you going to go back and ask – say you've made a mistake and go back and
16 ask for more? And then there was a long period of silence, and then we were told no, they
17 weren't going to go back to Cabinet. And we know from the Cabinet papers that to this day
18 Cabinet wasn't told that MSD had made mistakes in its budget, that instead they were going
19 to apply something called a moderation process.
20 **MS JANES:** And we'll come to that, so for the moment, so this –
21 **MS COOPER:** Sorry.
22 **MS JANES:** That's okay because there's quite a lot to unpack around that particular subject. And
23 I think we'll do that tidily under the MSD processes tomorrow. So just quickly going
24 through this document again, you've already alluded to the fact that you raised some
25 concerns about physical abuse, secure care, false imprisonment, sexual abuse and moving
26 on to the next page. In particular, and this is going to your independence point, it's, if we
27 could call out the top two – if you can read those out.
28 **MS COOPER:** "In Mr Young's e-mail of 20 February 2014 he has referred to an element of
29 subjectivity in the assessment and how that is informed by MSD's experience across a large
30 number of cases and by assessing claim against claim. These comments give us
31 considerable concern about the objectivity and transparency of the accelerated settlement
32 process. It appears that MSD will ultimately decide what category a client's claim falls
33 into, regardless of what we say. This is not at all how we understood the process would
34 work and makes it impossible for us to advise our clients". And then we had some

1 additional concerns as well.
2 **MS JANES:** Then you also have a number of examples where, within the exact timeframe of the
3 *White* litigation and the findings of the judge, where there was disparity. So can you just
4 quickly talk us through some of those and they're at your evidence I think chapter 4 – don't
5 worry, just give me the examples. So you've got the case of TW at Epuni which is
6 paragraph 444 to 445.
7 **MS COOPER:** Yes.
8 **MS HILL:** So this was – you're right it is set out in our evidence, so TW and WW from Epuni.
9 So just let me grab that out of the brief.
10 **MS COOPER:** I think they're the ones I referred to earlier. So they're clients who were at Epuni
11 at the same time as the White brothers. But the way in which their claims have been
12 assessed has been to reject their allegations even though they were there at the same time.
13 And under the Fast Track process both of them actually got $5,000 offers. I note that. Yet
14 they were, as I say, if the sniff test had been applied properly they'd identified staff
15 members, they were in well-known institutions, they'd made allegations of physical
16 assaults, one of them had made allegations of sexual assaults. So they'd made all the kinds
17 of allegations that if, you know, applying that categorisation should have justified at least
18 category 4, if not category 3, so $20,000 or $30,000, but when we got their offers both of
19 them were offered 5.
20 **MS HILL:** If I can just clarify a phrase that Sonja uses the "sniff test" – we have nicknames for
21 things unfortunately. What we mean by that is that the allegations a person makes are
22 accepted unless there is evidence that they were not in the institution or the staff member
23 that they make the allegations against wasn't there at the time. So it is on its face
24 acceptance of a claim is what we mean by that. But the phrase we use really reflects, we
25 think, the element of meaningful work that went into some of those assessments.
26 **MS JANES:** And we won't go to it because of time, but I will refer it so that the Commissioners
27 can note, but there is at the Crown tab 111, it's an internal Crown document dated 28
28 August 2006 authored by Garth Young and that talks about what they did with the DSW
29 culture of abuse paper, and this will be addressed with the Crown. So the investigations
30 that they undertook, and also identified the no marking and the kingpin culture.
31 **MS COOPER:** Which of course were not part of the assessment process at all, and are not
32 currently part of the assessment processes either.
33 **MS JANES:** And you've seen documents now in preparation for this which names a number of
34 alleged perpetrators and convicted perpetrators.

1 **MS HILL:** Yes.
2 **MS JANES:** How would you say that information could or should have been used relative to your
3 client categories?
4 **MS HILL:** I think sometimes where a person's been convicted then those allegations were
5 accepted on the face, but sometimes they weren't, and so there was no consistent treatment.
6 One of the problems with the Fast Track is that you couldn't see what was happening. A
7 Fast Track offer, it came in and it said you've made a claim, we've assessed your claim and
8 this is the compensation, and it's take it or leave it and there's no discussion about what's
9 accepted or what's not.
10 And so we couldn't see what information was taken into account or how it was
11 assessed, which is one of the challenges with the Fast Track process. And we don't know –
12 so, for example, there's a staff member called Mr Zygadlojudic and we can say his name
13 because I believe he has died. He was recorded as being shifted to another institution after
14 indiscretions with residents.
15 Now we don't really know what impact that had, like did that mean they accepted
16 allegations about him, we don't know. So there's no real transparency there. Mr Chambers,
17 he was convicted after we assisted clients to make police complaints. Generally accepted
18 as an abuser, but we don't know if that was a higher category which they apply for
19 particular offences, or a lower level of compensation for what would have been a less
20 serious offence if we were talking around criminal offending.
21 Mr Calcinai; again, he's since died after he had a second set of charges laid against
22 him for sexual offending. We don't know how MSD treated his offending, if they took it
23 into account and then we'll talk about the moderation process later. So even if they're
24 accepted at a certain level it may have been pushed down even further. Does that answer
25 your question?
26 **MS JANES:** Yes, and adding to that you've got the Mr Ansell from the Earl White case.
27 **MS HILL:** Yes.
28 **MS JANES:** And Mr Moncreif-Wright from the Wiffin.
29 **CHAIR:** Can I just ask quickly there, when you get your Fast Track decision, do you get reasons
30 or –
31 **MS COOPER:** No.
32 **CHAIR:** You just get "Your client's been assessed and this is what they're getting"?
33 **MS COOPER:** Yes, you have the example with Kerry Johnson, he had a Fast Track offer, so
34 that's in his –

1 **CHAIR:** Yes.
2 **MS COOPER:** - in his evidence, so it was just –
3 **CHAIR:** You've got nothing other than that?
4 **MS COOPER:** No.
5 **MS HILL:** And it was a way of trying to clear a backlog of claims very quickly.
6 **CHAIR:** Yes.
7 **MS HILL:** And if a person rejected a Fast Track offer they then went into the full investigation
8 process, which would take a lot longer but you could sort of see how they were working
9 through the claim.
10 **CHAIR:** The point is if you don't have the reasons, you don't know –
11 **MS HILL:** No.
12 **CHAIR:** It's hard to evaluate whether to accept it or not because you don't know what they've
13 taken into account, would that be right?
14 **MS HILL:** Yes, yes.
15 **MS COOPER:** And the thing is that's why we'd gone through the exercise, and we still do that
16 exercise with every client offer that we prepare, we go through an evaluation process to
17 assess where we think it might fall in terms – and so I mean that was one of the reasons
18 why we judicially reviewed MSD in relation to the Fast Track process, because they
19 wouldn't give us the final categories. So it's like well how can we provide any advice to
20 clients if we don't know how it works?
21 And I mean we'll explain, it's the same reason why we did a complaint to the
22 Ombudsman about the current MSD process, because again they wouldn't give us the
23 categories. So again it's like well there's no transparency around how you assess what
24 dollars you put on what, we still don't know how the Ministry of Education does it. So with
25 the Fast Track, yeah, you just got this offer and then we –
26 **MS HILL:** Non-negotiable.
27 **MS COOPER:** Non-negotiable. We had our own views about what we thought where it fitted.
28 **CHAIR:** Thanks.
29 **COMMISSIONER ALOFIVAE:** Despite repeated requests for the clarification, it just wasn't
30 forthcoming?
31 **MS COOPER:** So with the Fast Track no, they wouldn't give it to us. As I say, we ended up
32 having to take judicial review proceedings and we got it as part of their affidavit evidence,
33 otherwise they were not going to give it to us.
34 **MS HILL:** When we talk about it we mean the specific categories of what compensation was

1 allocated to what sort of things in a claim. So that specific – the core rules was the thing
2 that we couldn't see until we launched that proceeding.
3 **MS JANES:** I wonder if we go to the Ombudsman decision because that, rather than beleaguering
4 that point, that is quite a –
5 **MS HILL:** Is that the most recent one?
6 **MS JANES:** Yes, the current one. Let me just see if I can – it's document 36, MSC for committee
7 ending in 655.
8 **MS HILL:** Do you want me to give a very quick background on this?
9 **MS JANES:** Yes, very quick background, you've got 5 minutes.
10 **MS HILL:** So we've just talked about obtaining information, rules of the process in 2016, that
11 was the Fast Track process. Jump forward to 2018, early 2019, MSD says we've got a new
12 process, and we're going to streamline it and it's – and it will sort of be like the Fast Track
13 but better, and this is what we're going to do and we're going to implement it shortly.
14 Now we did have some consultation with MSD prior to that about what it may look
15 like, but then it was just imposed, this process just was started, we actually were told about
16 it several months after it was launched. And what happened was when we were told about
17 it we found a document on the internet, it wasn't given to us about the process. We were
18 sent the brochures that direct claimants get, so we got the brochure and we were told about
19 this process, but when we found the actual, what's called the business process document, it
20 was redacted and we said can we have that document please under the Official Information
21 Act, because that tells us how you're assessing claims. And MSD said "No you're not going
22 to have an unredacted version; A because it relates to negotiations, and B because people
23 will use that to inflate their claims and lie about their experiences".
24 So we complained to the Ombudsman, which is what you do when you want clean
25 copies of things, and this is the Ombudsman's decision; which clearly says that this issue
26 around compromising negotiations can't apply because this is a take it or leave it process.
27 So in 2019 take it or leave it process. And we were allowed to have – I say the
28 Ombudsman recommended that we had a clean copy of the whole documents and MSD
29 later provided that to us.
30 **MS JANES:** If we can just call out that and if you can read that from the case note.
31 **MS HILL:** So this is the Ombudsman case note: "Engagements conducted on a take it or leave it
32 basis are not clearly negotiations for the purposes of the OIA. The possibility that release
33 of procedures and guidance would in future prompt fraudulent or exaggerated claims was
34 too remote".

1 **MS JANES:** If we go to the second page, and while they're doing that I promise we actually will
2 be talking about the MSD processes, so we haven't jumped over that entire topic to this
3 point.
4 **MS COOPER:** That's fine.
5 **MS HILL:** So the Chief Ombudsman, I'll wait until it comes up so I can read it. "The Chief
6 Ombudsman observed that requesters have a right under section 22 of the OIA to access
7 documents containing policies, principles, rules or guidelines in accordance with which
8 decisions or recommendations are made in respect of any person. The right under section
9 22 is subject to, among other things, section 9(2)(j) of the OIA but not section 9(2)(k). The
10 Ministry agreed that section 9(2)(k) was not applicable in the circumstances".
11 **MS JANES:** We'll just jump down to the bottom.
12 **MS HILL:** "Consequently the Chief Ombudsman was not persuaded that disclosure of the
13 document would prejudice any 'negotiations' of the kind that section 9(2)(j) is, as a matter
14 of public policy, intended to protect.
15 Even if the Ministry's dealings with claimants did amount to 'negotiations' of the
16 kind contemplated by section 9(2)(j), the Chief Ombudsman was not persuaded that
17 disclosure of the guidance material would prejudice or disadvantage those negotiations.
18 The Ministry contended that disclosure of certain information would enable people to make
19 fraudulent or artificially exaggerated claims. The Chief Ombudsman was not persuaded
20 that such a prejudice would arise, however, as there was nothing in the guidance material to
21 suggest that the Ministry would not conduct checks on each claim".
22 **MS JANES:** Just go to the final page, the Ombudsman made a clear finding about rights of access
23 to information, so we'll just call those out.
24 **MS HILL:** "Finally, the Chief Ombudsman was not persuaded that the likelihood of harm arising
25 was so great that it was necessary to withhold the full guidance material. This was in part
26 because the Ministry had made some redactions in its original release of the guidance to the
27 requester, when many of them could be figured out by an experienced advocate. The
28 Ministry had also expressed some wavering views on the likelihood of fraudulent activity.
29 Nevertheless, the Chief Ombudsman observed that claimants must have access to
30 the rules, guidance and policies affecting their claims to make sure they are receiving a
31 service that is consistent and fair.
32 The Chief Ombudsman observed that release of all the guidance material at issue in
33 this case would help claimants to be fully informed about how their claim will be assessed
34 and in turn provide a better sense of closure and an increased feeling of fair treatment by

1 the Ministry. Consequently, even if the Ministry had established that disclosure of the
2 material would create a harm of the kind contemplated by section 9(2)(j)the public interest
3 in release of this information would have carried a significant weight".
4 **MS JANES:** Just rounding that out, in terms of your ability to access exactly what was being
5 applied in assessment, is this the first time that that has been available to you?
6 **MS HILL:** Yes, so – but I have to caveat that slightly. So the Ministry agreed, it complied with
7 the recommendation of the Ombudsman and gave us the business process document
8 alongside a note saying "This is now out of date and we'll provide you with subsequent
9 iterations of the document shortly". And I think about a week later we got.
10 **MS COOPER:** Two weeks.
11 **MS HILL:** Two weeks later we got the next two versions and we've subsequently been advised
12 there's another version.
13 **MS COOPER:** We got that last week.
14 **MS HILL:** Yes, we got the latest version last week. So not all those changes are substantive, but
15 it reflects the sort of information environment that we're in.
16 **MS COOPER:** I think it's important because I think Amanda said we got that in 2019, we
17 actually only got that a few months ago.
18 **MS HILL:** We got the redacted version in 2019.
19 **MS COOPER:** Yeah, but actually the Ombudsman decision was only a couple of months ago.
20 You'll see that that note, that case note is 6 September, so literally only a couple of weeks
21 ago. So that's how long it's taken us to get this information.
22 And a caveat came with that as well. We got a letter from the Ministry saying,
23 "Now this is publicly available, if we get any letters from you from clients arriving shortly
24 after this letter that are slightly different from information you might have given us before,
25 we'll be treating that with scepticism". So –
26 **MS HILL:** They'll be applying – and I'll explain that more a little tomorrow when we talk about
27 what's called a step 2 analysis, there's a process. But there is, yeah, it's a different treatment
28 now if a person makes subsequent allegations where the Ministry's already received their
29 claim; after the release of the handbook they'll be treated differently. But we'll address that
30 in detail.
31 **MS JANES:** There is a letter that will come up on your screen tomorrow.
32 **COMMISSIONER ERUETI:** Is the handbook online now?
33 **MS HILL:** It is.
34 **COMMISSIONER ERUETI:** So do clients get –

1 **MS HILL:** For the small amount of people who would know where to find it. It is not something
2 that is easily accessible, even for someone who's well-versed in using the internet. But yes,
3 like everything released under the OIA it is online.
4 **MS COOPER:** I just wanted to comment too, I mean I think, you know, this has to be seen within
5 the context of the principles in relation to the Royal Commission which is about openness
6 and transparency and mana tikanga, you know, and yet there are still all of these obstacles
7 to this very day that you have to fight to get basic information to understand how your
8 claim's going to be dealt with.
9 So I just think that needs to be seen within what the State agencies are saying to this
10 Royal Commission are going to be their principles and that's also in the Crown litigation
11 strategy compared with actually its conduct on a day-to-day basis which is, in our view, not
12 consistent with those principles.
13 **MS HILL:** And with the greatest – we are very grateful to the Ombudsman for actually turning
14 around that complaint quite quickly in the scheme of things.
15 **MS COOPER:** Yes.
16 **MS HILL:** The Ombudsman will now be dismayed to notice that we've made a fresh complaint
17 about the content of a document that was released to us, and we'll explain why that is when
18 we talk to you about the actual processes.
19 **MS JANES:** Then on that cliffhanger.
20 **CHAIR:** But wait there's more. Thank you.
21 **Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei.**
22 **REGISTRAR:** This sitting is now adjourned.
23 **Hearing adjourned at 5.07 pm to Thursday, 1 October 2020 at 10 am**
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ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter of	The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes and Ms Danielle Kelly for the Royal Commission
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	1 October 2020

TRANSCRIPT OF PROCEEDINGS

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1 **Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei**
2 (10.02 am)
3 **REGISTRAR:** This sitting of the Royal Commission is now —
4 **CHAIR:** Ata mārie koutou katoa. Nau mai haere mai ki tēnei ra. Thank you, Ms Janes.
5 **MS JANES:** Tēnā koutou Commissioners and we will continue with Amanda Hill and Sonja
6 Cooper on their previous affirmations.
7 **CHAIR:** Previous affirmations, yes thank you. Good morning to you both.
8 **QUESTIONING BY MS JANES CONTINUED:** Yesterday we ended as we were going to start
9 to talk about processes, but we need to cross a bridge before we do that. So, we've been
10 talking about civil litigation and we're going to be starting to talk about civil processes. But
11 within that framework it's important that we understand the Crown as a model litigant
12 because it applies to both litigation and to their conduct in civil claims. So, we are at the
13 Cooper Legal evidence at chapter 8 and we're looking at paragraphs 981 to 985 but we will
14 be having a conversation, that's just to direct you to where we are.
15 So between 2002 and 2012, Crown Law and the Crown agencies were supposed to
16 act as a model litigant. What does that mean in practice?
17 **MS COOPER:** So where we've got the model litigant standards is from a New Zealand Law
18 Society seminar paper which was given in 2010 and at that stage Crown lawyers
19 themselves described, from other frameworks but also too from court decisions, what a
20 model litigant was supposed to be.
21 So at that stage, in that paper, the Crown described a model litigant being one who
22 deals with claims promptly and does not cause unnecessary delay in the handling of claims
23 in litigation, makes an early assessment of the prospects of success and the potential
24 liability of the Crown, pays legitimate claims without litigation where it is clear that
25 liability is at least as much as the amount to be paid, acts consistently in the handling of
26 litigation, endeavours to avoid, prevent and limit the scope of legal proceedings wherever
27 possible, including by considering ADR, so alternative dispute resolution, and by
28 participating in ADR processes where appropriate and where it is not possible to avoid
29 litigation, keeping the costs of litigation to a minimum.
30 And again, there was some number of guidelines around that, including by not
31 requiring the other party to prove a matter which the Crown knows to be true, not
32 contesting liability if the Crown knows the dispute is really about quantum, so how much
33 compensation should be paid, monitoring the progress of the litigation and using methods
34 appropriate to resolve it, including settlement offers and payments into court, not taking

1 advantage of a claimant who lacks the resources to litigate a legitimate claim, not relying
2 on technical defences unless the Crown's interests would be prejudiced by the failure to
3 comply with a particular requirement, not undertaking pursuing appeals unless the Crown
4 believes it has reasonable prospects for success or the appeal is otherwise justified in the
5 public interest and apologises where the Crown is aware that it or its lawyers have acted
6 wrongfully or improperly.
7 **MS JANES:** And so in terms of yesterday, the last day and a half, we have gone through a range
8 of areas in litigation. So without repeating them unnecessarily, can you summarise what
9 you would say has been the experience of your claimants contrasted against what a model
10 litigant should look like.
11 **MS COOPER:** So perhaps if we use the *White* litigation as an example, but I think some — the
12 Paul Beale litigation is probably another example of some of the things that we've
13 experienced. First of all was contesting name suppression, and initially with the *White* case
14 name suppression was contested for everybody. Eventually — and so we had to take that
15 to the Court of Appeal. That was pre-trial. And the Court of Appeal there said that there
16 should be name suppression for those giving evidence of sexual assaults, because that was
17 consistent with the approach in the criminal courts.
18 We were arguing that it should also cover those giving evidence of physical assaults
19 because of the same level of trauma. We had evidence to support that. And also too
20 because a lot of our clients were and continue to be prison inmates, and there are particular
21 safety issues and vulnerabilities for that client group. So as I say, that went back and then
22 the issue came up again on the start of trial and the judge, Miller J, granted us name
23 suppression for those witnesses giving evidence of sexual assaults, but not any other form
24 of abuse.
25 So we appealed that, again up to the Court of Appeal, because we had been told by
26 a number of our witnesses, particularly our prison clients, that they did not feel comfortable
27 giving evidence if they knew that their identities would be out in the public domain. So we
28 had to go back up to the Court of Appeal and that delayed the start of the trial by a few
29 days. I mean it was heard within a couple of days, and the Court of Appeal didn't issue a
30 written decision, but essentially said for us to go back and tell Miller J that they would
31 grant name suppression if they had to write a decision, so at that point we had name
32 suppression for the duration of the trial.
33 Name suppression has continued to be an issue really up until the most recent trials
34 and I'll talk about that later, but name suppression has continued to be a vexed issue. And

1 we would say not consistent with recognising how vulnerable our clients are, which is why
2 at the very start I think we said it's a very new recognition about the vulnerability of our
3 clients.

4 Another thing that we saw in the *White* trial, and again that's continued to be even
5 through until the present trials, is contesting vigorously admissibility of witness evidence.
6 Almost a line by line approach to the evidence, you know, saying that this is in and this is
7 out, and so we've had multiple hearings and we did with *White*, and we have on an
8 on-going basis for our trials, almost a line by line analysis of what evidence the Crown has
9 considered to be admissible and not.

10 So we've again had to have these interlocutory hearings, so before trial to determine
11 what evidence we can actually lead on behalf of our witnesses. That's been really difficult,
12 because again, the impact of that is to compartmentalise a witness's experiences, like they
13 might be able to talk about — the argument of the Crown was they might be able to talk
14 about sexual abuse because that was relevant to the plaintiffs, but not the physical abuse
15 that was around that, or they might not be able to talk about particular staff members who
16 abused them. So that all kind of constrains the way in which we had been able to present
17 the case and the witnesses had been able to give their evidence.

18 **MS JANES:** And were there any issues about knowing which witnesses you were going to be
19 required to call or not?

20 **MS COOPER:** The *White* trial was terrible. I mean, you know, that was a very long trial, it was
21 eight weeks, and the Crown would not tell us each day which witnesses they were going to
22 be calling. So they might give us 16 names, so we were having to prepare
23 cross-examination overnight for the possibility of cross-examining up to 16 witnesses.
24 They wouldn't even tell us for some witnesses whether they were going to call them or not.
25 And then we'd know on the day that they weren't going to be coming, they were no longer
26 going to call them. So that just made our preparation time — we were having to work until
27 midnight every night to be ready the next day, made it very hard to prepare. So that was
28 very gruelling.

29 **MS JANES:** In terms of a level playing field, were the Crown at a similar disadvantage about
30 your witnesses?

31 **MS COOPER:** No, we were required to tell the Crown every day who our witnesses would be
32 and we had to stick to that within reasonable rules, so no, there was not a level playing field
33 there.

34 The other thing that I just — we've already commented on the use of the medical

1 examination, I don't want to say any more about that, but that has also been quite — it's
2 appeared to be very gruelling for the plaintiffs, as I say, having to have multiple people,
3 psychiatrists examine them. I wanted to very briefly mention use of private investigators,
4 which was in the *White* trial, I've already commented on that, but that, again, was — that
5 was — it was difficult for our witnesses. I think Keith Wiffin talked about that just how
6 intimidating he found it. And we did have plaintiffs and other witnesses talking about the
7 fact that these private investigators were watching them, and with our two plaintiffs, so Earl
8 and his brother, they had approached other family members to ask, you know, would you
9 give evidence against your family.
10 Yeah, so that was very hard, and again, and we had no transparency around that, we
11 didn't — we weren't told, we weren't given a warning, and we still don't — we're still not
12 really clear to this day when in other trials private investigators may have been used and if
13 they may still be used in the future.
14 One of the other hurdles, and I've talked about it before, is late disclosure of
15 relevant documents. And that was a really, really big issue in *White*. We were still being
16 given documents as we were cross-examining the Crown's witnesses and, you know, so
17 some of the witnesses had already finished and we were still getting documents. And in
18 fact, in the *White* trial we got documents about a year and a half after that trial had been
19 completed that were very relevant to Paul's allegations of sexual assault, and just may have
20 turned the balance there in terms of that finding, which was ultimately that he was not
21 sexually assaulted.
22 So there were all of those kinds of disadvantages, and it's really still unclear to me
23 to this day why those documents didn't turn up until a year and a half after the trial had
24 been concluded.
25 **MS JANES:** And are we talking about a small number of documents or a large number of
26 documents?
27 **MS COOPER:** That was a small number of documents but they were critical documents, because,
28 as I say, they went to the issue of whether Paul was likely to have been sexually abused by
29 a staff member who he said transported him to Epuni. He was a staff member, by the way
30 I note, whose file had been destroyed. So there was — evidence came through in that file
31 that the Ministry had destroyed a whole lot of staff files in 1999 which ironically was the
32 same year I filed Earl's claim, and his was one of the ones that was destroyed. And, you
33 know, one of the witnesses remembered he'd been through a disciplinary process but could
34 no longer remember what that disciplinary process was about. So all of that information

1 was gone.
2 **CHAIR:** Just while you're going through these, you've told us in the *White* trial there was
3 contesting name suppression and that that continued through subsequent litigation.
4 **MS COOPER:** Yes.
5 **CHAIR:** Are you able to indicate as you go through whether the practices you're describing in the
6 *White* trial have continued in subsequent litigation?
7 **MS COOPER:** Certainly. So I think name suppression, the current trials that we are talking
8 about, and it's important to go back to that. So the current trials, this has been the first time,
9 and that perhaps reflects the new Crown litigation strategy, this has been the first time
10 we've not had to file applications and evidence to support name suppression.
11 What it was agreed with the Crown lawyers Meredith Connell, was that we had to
12 provide information supporting the application, so the particular trauma that the client had,
13 and/or the fact that they're a prison inmate. And as long as that information has been
14 sufficient, so we've done that for every single witness, then it's been done by consent.
15 **CHAIR:** I get that point and you've said that before, that up until now, but in relation to all these
16 other matters you're raising, like the use of private investigators, like the provision of late
17 evidence and all of those matters, are these unique to the *White* trial, or are they matters that
18 were also —
19 **MS COOPER:** No.
20 **CHAIR:** That's what I want to know, for each of them do they continue?
21 **MS HILL:** So if I can briefly talk about the name suppression issue. So this came up again in
22 2015.
23 **CHAIR:** I've got the name suppression issue, it continued until now when it's changed. But the
24 other matters.
25 **MS HILL:** Okay.
26 **MS COOPER:** So late disclosure, it's fair to say that with the trials we're dealing with now we are
27 still getting disclosure. I think one of the things that — and that's partly because, because
28 we'd been through, particularly the Whakapakari litigation now, I think this is our third
29 iteration of it, through that process we've collected in through the Crown a lot of
30 documents, but we've noted that a lot of those documents have not appeared in the
31 discovery that's been produced. So we've said well, what about these documents, we've got
32 these documents which are also relevant. And so we've had to require that. And again it's
33 partly an issue, Your Honour, of what we don't know we don't know. So —
34 **CHAIR:** But just remember the context in which you're giving your evidence, you're saying a

1 model litigation thing and you were asked to say have they demonstrated that. Now you're
2 telling us that they didn't, in your view didn't demonstrate it in *White*, what I want to know
3 is, have they been demonstrating it subsequently? You don't have to go into great detail.
4 **MS COOPER:** Sure.
5 **CHAIR:** But just in relation to each of these matters.
6 **MS COOPER:** Sure. I think we are certainly doing better even with late disclosure but again,
7 probably more to come.
8 **MS HILL:** I think the issue too is the *White* trial was the last full trial that we've had.
9 **CHAIR:** That's right, so we don't have much to compare that with.
10 **MS HILL:** We don't, and so everything since then have been interlocutory applications and if
11 private investigators have been used we wouldn't know.
12 **CHAIR:** No, okay, all right.
13 **MS COOPER:** I think I can say, though, challenging admissibility of evidence, that has been a
14 very big issue in the more recent trials. And literally we had a line by line analysis. I mean
15 we served something like 36 briefs of evidence and I think we had literally hundreds of
16 pages back analysing those briefs of evidence line by line as to admissibility.
17 We did have a hearing before Ellis J and she made some very broad rulings, and
18 what I can say is the Crown has not appealed those rulings and since then we have worked
19 on a cooperative basis.
20 **MS HILL:** Admissibility hearing that Sonja's talking about was in mid-2019.
21 **CHAIR:** Thank you. We won't labour that point any further.
22 **MS COOPER:** I think the only other — I think I noted yesterday was the way that the witnesses
23 and the plaintiffs were dealt with in the trial as though they were criminals, so I would like
24 to think that that will be different.
25 So where do you want me to move to now? I think, you know, one of the issues I
26 think if we can kind of look at the model litigant, because that also applies to Legal Aid.
27 What we were then faced with is we had a number of significant legal rulings in that case,
28 but Legal Aid refused to fund the appeals. So we took that on ourselves and what that
29 meant was — so in doing that, as you'll know an unsuccessful appellant has to pay security
30 for costs into court, so we had to fund — I funded that. We also had to do the bundle, so
31 had to fund that. That was about $13,000. And then the firm itself probably, well, we did
32 well over $200,000 worth of work without any pay. And this is in a situation where there
33 were really significant legal issues that needed to be tested. So that's again one of the
34 impacts of this.

1 **MS JANES:** Just while you're on Legal Aid and — so we all know that subsequent to the *White*
2 and the *K* decisions there was a revisiting by the Legal Services Agency about Legal Aid.
3 Again, we heard a lot about that in the contextual hearing and there is a lot in your brief, so
4 we won't revisit that greatly. But just in the context of the model litigant framework, what
5 was happening at the point that there was the review of Legal Aid, the appeals and then the
6 reinstatement? Can you just briefly summarise that period, and the impact on claimants.
7 **MS COOPER:** So during that period, during the withdrawal of aid period, I mean there were
8 hundreds of clients whose Legal Aid was withdrawn, including clients who were being
9 tracked towards hearings. And we were busy reviewing all of those decisions to the Legal
10 Aid Review Panel and then later the Legal Aid Tribunal, which got very quickly bogged
11 down. And so the decisions were taking a long time to be issued. And during that period
12 the Crown was pushing on the hearings that we had. And these were particularly leave
13 hearings or where we were being required to comply with court timetables.
14 So we started with *W* which was a Navy trial, and we hadn't been able to comply
15 with the timetable. We were supposed to have filed all the trial briefs, but his funding had
16 been withdrawn, and the Crown was pushing that on and saying well in the absence of
17 funding, you know, we still had an obligation to carry on and do the work without any
18 funding. And they were asking for a, it's like it's an unless order; so in other words that
19 unless we complied with the court timetable the claim would be struck out.
20 And that was the first in a series of decisions where the High Court said that as
21 lawyers we were officers of the court and it didn't matter that we had no funding, we had to
22 continue on with the court timetable and we had to continue to get evidence and brief our
23 witnesses. And I mean these are expensive trials, they are thousands and thousands of
24 dollars. And to get expert reports, we told you about the cost of instructing psychiatrists
25 and getting expert reports. And we were told by the High Court that we were expected to
26 fund that without any Legal Aid. So that was causing some consternation and we got some
27 advice from the Law Society about that that said we didn't have to. Anyway, that was a
28 whole side issue.
29 But in the meantime we had these hearings that would determine the claimant's
30 rights under the Limitation Act, and even though the Crown was delaying itself, so we had
31 one which was KRB which we refer to in our brief, where the Crown delayed by something
32 like six months and got an adjournment which we didn't oppose, because its own expert
33 evidence wasn't available, when we came to ask for an adjournment because there was no
34 decision yet about the withdrawal of funding, the Crown were saying that they would suffer

1 prejudice and was asking the court to push that on.
2 And relying on the earlier decision that we still, as lawyers, had obligations to the
3 court, the judge was initially going to push that on but then said oh well, the Crown had an
4 adjournment so it's only fair in this case that this is a short adjournment to see whether the
5 funding is reinstated. And I think he was one of the first clients that we were then forced to
6 withdraw as lawyers for because the funding wasn't reinstated by the time the hearing came
7 back on.
8 And we then had another hearing a few months later which was a very similar
9 situation, and again we were in a situation where the hearing was forced on by the court. I
10 was actually in trial at this time doing the Navy trial at this stage, and you know, we were
11 hauled into court and told again that we, you know, we would be in breach of our
12 obligations as officers of the court, and even though the court accepted it was completely
13 not our fault, that there was no decision by the Legal Aid Tribunal, we still had to be ready
14 to go ahead for this hearing.
15 This was a client who was not expecting us to work for nothing, none of our clients
16 ever expected us to work for nothing. And he had said to us we don't expect — "I don't
17 expect you to do this work for nothing and I will act for myself". And he signed all the
18 appropriate paperwork to do that, because, you know, that's — you can change
19 representation. And the court still said that we had to go ahead and that we would be in
20 breach of our obligations if we didn't. His funding was reinstated the day before that
21 hearing and of course we couldn't prepare. So we did the best that we could, as I was still
22 in trial at this stage so it was another lawyer of the firm.
23 And in the end the judge granted the adjournment, but later on was very critical of
24 us and made a complaint about me to the Law Society, which was resolved about four years
25 later completely vindicating me and the Law Society had to pay a big amount of costs.
26 But the effect of all of this, and I'm sorry I'm quite emotional about this, because it
27 had a catastrophic effect on us being able to continue to represent our clients because the
28 Crown kept pushing these hearings on knowing we had no funding, knowing that it was not
29 our fault, knowing that we were stuck waiting for the Legal Aid Tribunal to make decisions
30 about whether funding would be reinstated and the Crown kept pushing these hearings
31 ahead, and the courts were enforcing that.
32 And so this started a phase of us having to withdraw in advance from quite a few of
33 our clients and the result of that was that a number of our clients at that stage had to
34 abandon their claims. And I still feel really sick about that to this day. It was a horrible,

1 horrible time. And I mean all of the Government — all of the parts of that were playing a
2 part in that, Legal Aid was playing a part in it because it was tardy in getting its
3 submissions to the Legal Aid Tribunal, Crown Law should not have been pushing these
4 hearings on. And I note that the Solicitor-General is still really unapologetic about that in
5 her two briefs of evidence, saying that — trying to allege that there was some prejudice to
6 the Crown. There was no — these claims were really late anyway. What prejudice would
7 it have been to have waited another few months to see whether these clients actually got
8 their Legal Aid back. There was no prejudice. And yet that's still the position maintained
9 in the Solicitor-General's briefs.
10 And so, as I say, this was just a very difficult time for our firm. We felt like we
11 were being pressured from all quarters to give up and go away and we were having to say
12 to our clients, some of our clients where they were being pushed, their claims were being
13 pushed on for hearing and we had no funding, "We actually can't help you and we have to
14 withdraw as your lawyers".
15 So that's an example and probably one of the extreme examples of this. But that
16 went on for a number of years.
17 **MS HILL:** I guess one of the key things this goes to in terms of the model litigant rules is not
18 taking advantage of impecunious plaintiffs. And in short point, not taking advantage of
19 people who are poor. And this is effectively what happens here. If you have Legal Aid and
20 you are in this really uncertain, shifting ground situation, then you are most certainly taking
21 advantage of people who don't have any other avenue.
22 **MS COOPER:** And I just wanted to say there, I mean one of the things that the court also
23 acknowledged at this stage is how complex these cases were. These cases are difficult for
24 lawyers, let alone this particular client group. To argue Limitation Act hearings that may
25 ultimately extinguish their legal rights completely, to have expected them to do this without
26 lawyers was unreasonable. And, you know, one of the things I actually said to the High
27 Court was, well appoint us as counsel to assist. And the High Court said well no, we're not
28 prepared to pick up the tab. So anyway, that was rock and a hard place.
29 And in the midst of all of this, Cooper Legal was also audited, so Legal Aid also
30 appointed a law firm to undertake a very, very gruelling audit of us. And I mean we were a
31 number of high fee earner firms at that stage because it came on the top of the Bazley report
32 into Legal Aid. But that was a one and a half year process where we were looked at in
33 minutiae, everything we did was examined and cross-examined, we had hours with the
34 auditors, it was Mai Chen and her firm. It was very gruelling, and again at the end of that

1 process we were completely vindicated.
2 But again it was a distraction, it was another thing that was kind of wearing us down
3 and stopping us doing work actually progressing the clients' claims. And, you know, what
4 we became aware of later, and I mean bearing in mind that all of these arms of the
5 Government, including Legal Aid, had an obligation to behave as model litigants, what we
6 became aware of later is that actually the various arms of the Government were all meeting
7 together.
8 So Legal Aid was meeting with Crown Law and the Ministry of Education and the
9 Ministry of Social Development and the Ministry of Health and the Ministry of Justice.
10 And I think there were meetings going on for about two or three years, right in this
11 timeframe and it's clear that there were discussions, because we OIA'd [Official
12 Information Act 1982] them, of course, and got the information which we've put some of
13 that in our evidence. And there were discussions about the strategy of how to deal with this
14 litigation and the claimant group and our firm.
15 So yeah, this was just all of part of this very gruelling four years. You know, I just
16 note then I had to chop my staff by half, Amanda was one of the people who went during
17 that period. I had to —
18 **MS HILL:** To be clear, Sonja did not make me redundant, I left of my own free will.
19 **MS COOPER:** Exactly, but we actually had to — like we actually didn't have to make — we
20 only made one staff member redundant, but we actually had to encourage staff to move on
21 at that period because we didn't know if we were actually going to survive. But in the
22 meantime, we continued on as best we could and we continued to file claims and we
23 continued to prepare briefs of evidence and we continued to work, we did about $1 million
24 worth of work without any payment. Ultimately when the Legal Aid struggles were all
25 finished we got about half of that back, but, yeah, I mean so we just carried on, but with a
26 very reduced staff and feeling, you know, very beset, I guess.
27 So and I think the other thing, just if we come back then to Legal Aid, so we've
28 talked a bit about, you know, the Legal Aid. So we're going through this process of the
29 withdrawal of aid. When we were successful, Legal Aid appealed, so that — those appeals
30 then were going into the High Court. So we were having also appeals against the
31 withdrawal of Legal Aid and if we lost we were obviously also appealing too because we
32 were trying to maintain funding for our clients. So we had, I think we had until 2011, so
33 from 2008 to 2011 we had protracted and prolonged litigation with Legal Aid.
34 **CHAIR:** How many appeals went to the High Court on Legal Aid issues?

1 **MS COOPER:** Minimum of five that I can think of. And they're big, like they were involving
2 multiple plaintiffs. And I mean the importance of those, and we've already referred to those
3 in the context of the glosses then that the High Court was putting on the Limitation Act
4 tests and making it harder, harder, harder for claimants to get through the Limitation Act.
5 So we've referred to it in that context.

6 **CHAIR:** So the harder the test became, the less likely Legal Aid was to be granted.

7 **MS COOPER:** Quite.

8 **CHAIR:** That's the link between the two.

9 **MS COOPER:** Yes, quite. And I mean what was ironic as we were getting to the end of this
10 process, you know, we were starting actively to talk about, you know, really engaging in an
11 ADR process and, you know, it was kind of right in this timeframe too where we are
12 discussing filing the mini statements of claim and talking about the stop the clock
13 agreement. So all of Legal Aid's kind of acting still as if there's no hope and still boxing on
14 to get funding withdrawn.

15 And during this time too I should add, and you will have seen in our brief, we're
16 also saying to Legal Aid, we're asking for funding because we're talking about engaging in
17 an ADR process with the Ministry of Social Development, and Legal Aid's saying to us
18 "No, we're not going to fund you for that." So we were just stuck between a rock and a
19 hard place.

20 And in the end that went all the way through to the Court of Appeal, the Legal Aid
21 litigation. And I mean they instructed a silk for that litigation. And this is, by the time
22 that's heard, we know that we're going to be settling the CHFA [Crown Health Financing
23 Agency] litigation. This is just another thing I throw in, because it's again relevant to the
24 model litigant decision, is that with the Crown Health Financing, so the psychiatric hospital
25 litigation, unbeknown to us the financing officer had contacted Legal Aid and said — yeah,
26 and said well we're actually going to be making an offer, you know, we're going to settle
27 these claims, but we didn't know that at that stage.

28 And in the meantime, Legal Aid's still saying to the court there's no prospects of
29 success, they didn't say — I mean they were filing affidavit evidence in court, they didn't
30 tell the court that they'd been contacted by the Crown Health Financing Agency to say that
31 they were going to be making offers to settle. And we didn't know it until later on, and
32 I refer to that in my brief, because that was kind of horrifying too, to find that out later.

33 And so, as I say, Legal Aid just kept boxing on to try and continue with this, you
34 know, path of withdrawing funding from as many people, while all these things were going

1 on, which were actually more towards starting to work in an alternative dispute resolution
2 path.
3 You know, so by the time we got to the Court of Appeal we actually had some good
4 news, you know, we could actually say, look, I think by then we had the stop the clock or
5 we were, you know, nearly there. And the Court of Appeal was quite critical of the
6 prospects of success test that had been kind of applied and said well, it just means prospects
7 of success, it doesn't need any more gloss on it than that. And there are all these factors
8 that you have to take into account, and that we'd been arguing that, you know, where it's
9 kind of important issues of law and it might involve the Bill of Rights Act and they said,
10 you know, these are some of the factors that Legal Aid needs to take into account,
11 vindication, which again for this claimant group is really important.
12 So and they also said that as an adjunct of funding for litigation, of course that will
13 include ADR processes. But it needed the Court of Appeal to be very clear about that for
14 us to be able to then actually use the Legal Aid we already had to go through then what
15 became the ADR processes.
16 **MS JANES:** Can I just get you to clarify before we move on in that, picking up the point that the
17 Chair put to you, is that post *White* and *K* where effectively the limitation and the ACC bars
18 completely extinguished the ability to have compensatory damages.
19 **MS COOPER:** Yes.
20 **MS JANES:** The legal services —
21 **MS COOPER:** Not completely.
22 **MS JANES:** No, but in the court.
23 **MS COOPER:** No, well again, I mean with ACC, ACC is very dependent on timeframe, yeah,
24 but we lost those claims on that, yes, yes.
25 **MS JANES:** Yes, sorry.
26 **MS COOPER:** Sorry but — yeah.
27 **MS JANES:** So the Limitation Act and the ACC bar meant those cases were lost despite the
28 findings.
29 **MS COOPER:** Yes.
30 **MS JANES:** Legal Services Agency then took those and said anything where the Limitation Act
31 and/or the ACC bar apply does not pass the reasonable prospect of success test, would that
32 just —
33 **MS COOPER:** That was it in a nutshell, but I mean it was applying those tests to situations where
34 there wasn't a limitation bar. I mean Chassy Duncan was an example of that, we'd filed his

1 claim before he turned 22, so there was no limitation bar. And he was also a Bill of Rights
2 Act claimant, and you know, that's a separate category of damages.
3 So they were still withdrawing funding for clients even where we were able to say
4 we can surmount the hurdles, so this is how difficult it became really, and why it became so
5 litigious.
6 **MS JANES:** So what would you say a model litigant should be doing in those circumstances?
7 **MS COOPER:** Well, I mean, yeah, throughout all of this we were saying to people, talk to us,
8 let's see if we can reach agreement, you know, let's see if we can work cooperatively. And
9 that's what I would have expected a model litigant to do and that's what we still say, can we
10 work cooperatively?
11 I mean I think the whole disclosure to Police issue and the litigation that we've had
12 around that lately is another example of us saying to Oranga Tamariki and MSD [Ministry
13 of Social Development] talk to us, reach some agreement with us about a protocol. But
14 they've boxed on with the litigation and, you know, both the High Court and the Court of
15 Appeal, and that's as recently as last year and the year before, have been critical of there
16 being no discussion, no attempt to reach an agreement, just litigating.
17 So that's — I mean I think that's one of the things, we've always been willing to
18 talk, we've always been willing to reach compromises. The fact of the 2011 Agreement is
19 an example of that. The fact that we've engaged with all of these ministries in processes
20 that we have problems with but we've engaged with them nevertheless, and we've done
21 what we can to pass on our feedback about what could be done better, we've participated in
22 all of the reviews, you know, for a long time we actually had monthly meetings with the
23 Ministry of Social Development where we talked through on a month-by-month basis how
24 we could make things better, how we would make the claimant processes better, how MSD
25 could respond better to the claims, how we could improve timeframes. I mean we did that
26 work for years, we've — even now with Oranga Tamariki we engaged in a consultation
27 process.
28 And we've always been willing to do that, we continue to be willing to do that. Like
29 the, you know, the one limitation policy to rule them all. You know, again, we're saying,
30 yeah, we'll work with you, give us it, you know, we'll provide you with our feedback. So
31 that's what I would expect a model litigant to do is work cooperatively. And as much as
32 possible reduce the delays that these tactics have incurred, the cost, because when I think of
33 the cost to the public purse that all of these applications and, you know, this litigation that
34 we were involved in for many years and still go around from time to time, and the trauma

1 to the claimants, which is the thing I want to highlight. It causes trauma to them. I mean
2 the disclosure applications is the most recent example of that. I've got one client who has
3 been around this track three times now. So yeah, so do you want me to explain what that
4 means?
5 **CHAIR:** Are we going to come to that or is this something that —
6 **MS JANES:** No, we weren't going to come to that so if you could very briefly.
7 **MS COOPER:** This is the on-going issue of wanting to disclose the court documents to the Police
8 and —
9 **CHAIR:** This is you've got a civil claim underway.
10 **MS COOPER:** Civil claim underway.
11 **CHAIR:** And then I think you said the other day that reasonably late in the piece the Crown have
12 said we're now going to refer this to the Police.
13 **MS COOPER:** Quite, so in a separate issue that has arisen more recently, in 2016, again
14 unbeknown to us, the Ministry of Social Development and Oranga Tamariki and the Police
15 entered into a protocol where if information came to the Ministries that somebody had been
16 sexually assaulted, or there were physical assaults alleged by a number of claimants, that
17 information would be referred to the Police for investigation. There are also policy
18 documents that were created within the Ministry of Social Development and Oranga
19 Tamariki that said that where allegations of this kind were made in the historic claims
20 process, if they were still existing staff members, those allegations would be put to staff
21 members and they would be given an opportunity to comment.
22 Again, all unknown to us, and we didn't have any transparency around that. So this
23 came about because it came — we got a letter saying that the Ministry was intending to
24 pass on details from statements of claim without knowledge or consent of a number of
25 plaintiffs to the Police, and we said well hang on, that's a big step, we've been around this
26 track before, you know, that our view is that the claimants need to consent because it's a big
27 deal to refer them, their claims to the Police if they don't want to be involved with the
28 Police and there are safety issues.
29 And so we tried to actually, you know, say work with us to come up with an
30 agreement. They wouldn't, filed court proceedings asking for that to be disclosed, so we
31 had a protracted series of hearings in relation to, I think, three plaintiffs at that stage before
32 Ellis J who issued a ruling saying actually now none of the information from the court files
33 can be disclosed to third parties, and she made a ruling that the court had to give consent to
34 any disclosure to the Police and/or perpetrators. And that there was a requirement that the

1 plaintiff be heard, you know, so that if there were safety issues they could be — those could
2 be considered.
3 And as I said, this was the first decision in which the vulnerability of this claimant
4 group was first recognised, first time. And that — the Crown appealed that saying that the
5 court didn't actually have any power to make these decisions, that it was actually purely up
6 to Oranga Tamariki or the Ministry of Social Development to make these decisions, that it
7 was best placed to consider privacy issues, and that it had a statutory requirement in terms
8 of the reporting, the notification provisions of the now Oranga Tamariki Act.
9 **CHAIR:** Was that appeal successful?
10 **MS COOPER:** No, no, we were successful, again, and again very powerful decision, Justice
11 Joseph Williams delivered the decision just before — he was actually in the Supreme Court
12 when we got the decision, but no, that upheld Ellis J. Again reflecting the vulnerability of
13 this client group and again lamenting that we haven't been able to work together to agree
14 this.
15 **MS HILL:** If I can add here, it's important to say at this stage that almost always the clients who
16 were put in this position want to help, they want to ensure that children who are currently in
17 care are safe, but they also need to make sure that their own families are safe.
18 **MS COOPER:** That they are safe.
19 **MS HILL:** There's usually a way that we can do this in a consultative way where the claimants
20 are put at the centre of that discussion, and this is addressed in Chassy Duncan's evidence.
21 But where we just get an e-mail saying we've disclosed this information, it's already been
22 done, let us know if they've got any safety concerns, if the claimant has got any safety
23 concerns, and the Police have said, "We actually can't provide any help on that front".
24 That's something — it's another thing being done to the claimant. But we are really clear
25 that wherever we can we will make sure that information goes in the right direction to
26 ensure that children who are in care right now are safe and our claimants will almost always
27 want that. It's just how we get there.
28 **CHAIR:** I think we should move on, the point's well made, thank you.
29 **MS JANES:** Yes, we weren't going to go to this topic because it is so complex and it takes a lot of
30 unravelling, but for those who want to read about it, it's in the brief at chapter 8 paragraphs
31 835 forward through to about 971. And just noting that there is now a document where the
32 Police have set out the circumstances in which they will — so for the record, I will read
33 that in, but we won't go to that document.
34 **CHAIR:** Thank you.

1 **MS JANES:** So it's witness 94 document 404.
2 **CHAIR:** Thank you.
3 **MS JANES:** But I will take you back, Sonja, just very briefly to the point that the Chair raised,
4 again in the model litigant, about where there has been a possibility of referral but there has
5 been a delay of six or eight years and close to trial where that has occurred. Again, if you
6 could just very briefly highlight that aspect.
7 **MS COOPER:** Well, I think we've already — I think the Beale was a good example of that and
8 we had with the Whakapakari, the earlier Whakapakari trials we had exactly the same
9 experience, you know, working on a trial timetable and quite close to trial and we're being
10 told that there's been a referral to the Police, so yeah, we've been around that a couple of
11 times.
12 **MS JANES:** And a lapse of years from when it could have been referred?
13 **MS COOPER:** 10 years.
14 **MS JANES:** Then just going back, you've talked about Legal Aid, but is there anything that you
15 would want to say about the Crown seeking costs personally against the plaintiffs?
16 **MS COOPER:** Yes, I should note that, so we had two plaintiffs where the Crown has sought
17 costs personally against the plaintiff. So in the Navy litigation, when the Crown was
18 pushing on the trial timetable, so they applied for costs against the plaintiff at that stage
19 whose legal aid had been withdrawn and the court made a costs order against that plaintiff.
20 And again, in the *White* litigation, although obviously they were both legally aided, the
21 Crown, well, the successful party can seek costs against a legally aided person personally in
22 extraordinary circumstances and here the Crown sought costs against Paul personally on the
23 basis that he had not disclosed some — a settlement he had reached with one of the
24 churches. And I have to say I think Miller J was fairly incredulous that that argument had
25 been raised, given the extraordinary delays on the part of the Crown in terms of discovery
26 and, yeah, it got fairly short shrift.
27 **MS JANES:** What effect is there on a plaintiff of the potential that they become liable for a large
28 debt?
29 **MS COOPER:** Well, it's huge. I mean that's one of the reasons why we do all our work on Legal
30 Aid, that's a choice that we make, because it provides a buffer, it — (1) it provides the
31 funding which otherwise they could never take these claims without that funding, but also,
32 (2) Legal Aid is a protection because, you know, a legally aided plaintiff is not liable for
33 costs except in those exceptional extraordinary circumstances.
34 So it's also a protection, so I think, you know, knowing that applications would be

1 made personally for costs is, it's very daunting and traumatising. And knowing too that if
2 you've got a circumstance where your funding's withdrawn that you're going to have a
3 personal costs order sought against you by the Crown, that's very daunting as well. And I
4 think it's a way of putting people off carrying on.
5 **MS JANES:** And before we look at a possible way forward, is there anything else that you want
6 to quickly highlight about —
7 **MS COOPER:** No, I think I've covered the high points there.
8 **MS JANES:** So have you seen anything that you would think could be something that the
9 Commission could consider?
10 **MS COOPER:** I think there was good work done again with the Australian Royal Commission
11 and that looked at the models from New South Wales and Victoria. I think I had
12 highlighted the New South Wales model. There are some aspects of that I've got some
13 reservations around, you know, particularly it still kind of protects that, you know, you can
14 vigorously defend if you want to. But I think there are some very good principles in there
15 emphasising, you know, the need for special training. And a lot them echo of course what
16 is in the — what was in that 2010 New Zealand paper. But I think what's useful about it is
17 the special — the recognition that these are a special kind of case, that one always needs to
18 be conscious of the claimants as a particularly vulnerable group with particular needs, and
19 the need for training and specialist skills. And I think, you know, just there is some very
20 good articulation of principles in there.
21 What I would say, and I think it's something that I emphasised yesterday, is that I
22 think this needs to be legislated. I think if it's a policy it's very easy to be changed. I mean
23 as we saw with the model litigant when the Crown principles came in in 2012, the model
24 litigant had completely dropped out.
25 So again, I think it needs to be legislated. And if we're doing a kind of
26 purpose-built statute for this claimant group, then the model litigant aspect of this should go
27 in as part of that statute and it should apply to all defendants, so all bodies that are dealing
28 with this claimant group. And I mean ultimately how broad you make that, but I would
29 have thought, you know, it needs to cover our vulnerable adults, for example, who were in
30 psychiatric hospital care, and disability care, so I think — but to make sure that it can't
31 be — that there's no kind of working around the policy or —
32 **CHAIR:** So it would cover, in your — the way I'm hearing you, you would want it to cover all of
33 the people who are covered by the terms of reference of this Royal Commission?
34 **MS COOPER:** Yes.

1 **CHAIR:** Children, young persons and vulnerable adults.
2 **MS COOPER:** Absolutely. And I mean, I know that sounds strange, but I — as I think I said
3 yesterday, I think this is an area where the judiciary also need to be trained. So I think, you
4 know, if we are kind of doing a legislative look at all of this, it's an area I think in which it
5 should be emphasized that all of those working in this area need to be trauma trained and
6 understand the particular ways in which victims of this kind can or can't report and the
7 limitations on their ability to take claims and the sort of assistance that they'll need and the
8 different needs they have.
9 **MS JANES:** And just touching very lightly on this document, we won't spend a lot of time. But if
10 we could call out paragraphs 9 and 10. And while that's happening I'll just briefly — at
11 paragraph 5 it talks about early acknowledgment, paragraph 6 regular communication, 7
12 access to free counselling, 8 facilitating access to records, 9 paying legitimate claims
13 without litigation. Then if I can have you read 9 and 10.
14 **MS COOPER:** "In accordance with the Model Litigant Policy, agencies should consider paying
15 legitimate claims without litigation. Agencies should consider facilitating an early
16 settlement and should generally be willing to enter into negotiations to achieve this.
17 Agencies may not rely on a statutory limitation period as a defence. On 17 March
18 2016 the Limitation Act 1969 [NSW] was amended to provide that an action for damages
19 that relates to the death of or personal injury to a person resulting from an act or omission
20 that constitutes child abuse of the person may be brought at any time and is not subject to
21 any limitation period under the Act".
22 **MS JANES:** We've also heard about delay, so if we could call out paragraph 11 and I'll have you
23 read that as well.
24 **MS COOPER:** "Agencies will resolve all claims as quickly as possible, and will seek to resolve
25 the majority of claims within two years, or for matters proceeding to hearing, to have the
26 matter set down for hearing within two years. Progress may depend on the conduct of
27 claimants' lawyers and police investigations".
28 **MS JANES:** And then going quickly to the point that you were raising at paragraph 11 it talks
29 about potential experts to reduce trauma.
30 **CHAIR:** I think we've done 11, maybe it's the next one, 12.
31 **MS JANES:** 12 sorry.
32 **MS COOPER:** Yes. "To reduce trauma to victims and to reduce unnecessary cost and delay,
33 agencies will suggest to claimants a range of potential experts" — that's a different point,
34 that's about who they can access.

1 **MS JANES:** Yes. So it's very much, it's a wrap around in terms of —
2 **MS COOPER:** Absolutely. I was just going to note too, in terms of, if we are going to amend, if
3 there's going to be an amendment of the Limitation Act, one of the things that needs to be
4 considered is whether it's retrospective. In Scotland it was certainly retrospective. And
5 that has meant in Scotland, and they expressly acknowledge that, the people who had lost in
6 court, because of the Limitation Act, could actually go back around and renegotiate their
7 claims. So for people like the Whites, J, those are the two obvious examples, probably
8 even my Navy chap as well, they could actually ask for a remedy.
9 And I think again, in consonant with being a model litigant, I think that would be
10 consonant with that as well, is actually to be able to go back and revisit.
11 **CHAIR:** The only obstacle of that — an obstacle of that, of course, would be the ACC problem as
12 well, wouldn't it?
13 **MS COOPER:** Partly.
14 **CHAIR:** Partly, yeah.
15 **MS COOPER:** But again, with J, for example, she was all pre-ACC.
16 **CHAIR:** Okay.
17 **MS COOPER:** So she would be actually entitled to compensatory damages.
18 **CHAIR:** But that's a matter of timing, isn't it?
19 **MS COOPER:** Absolutely. And there are aspects of course that are covered by ACC and aspects
20 that are not, it's such a complex area.
21 **CHAIR:** I'm just saying it wouldn't be a king hit if the Limitation Act — there would still be some
22 difficulties of course, but it's just to recognise that and not to discuss the merits of it at this
23 stage.
24 **MS COOPER:** Quite.
25 **MS JANES:** And in December 2019 there was actually the review of strategy for the resolution of
26 historic claims, and we'll go to Crown tab 95, because we heard Keith Wiffin in his
27 evidence say that this was actually a good framework for looking at resolution of these
28 claims. He did make the point he didn't think that the processes aligned with the principles,
29 but I would like to seek your views on this document and what you would say. So looking
30 at the highlighted paragraphs.
31 **CHAIR:** Just for the record, it's the Cabinet Social Wellbeing Committee Minute that we've
32 referred to earlier.
33 **MS JANES:** We have referred to it, it is the Minute of Decision and it is December 2019.
34 **MS HILL:** So this, it is a good document in terms of being quite aspirational. I think the

1 principles are very good. But there is — and I agree with Keith Wiffin, there is a
2 disconnect between this strategy and what is happening on the ground, if you like, in terms
3 of the settlement processes. We talked yesterday about the Ombudsman case note and
4 receiving information, so there's a disconnect between the withholding of information and
5 those principles of openness and transparency.
6 And I've talked about the Crown's obligations under Te Tiriti, under the Treaty of
7 Waitangi. And while there is a difference between acting in what you see is in accordance
8 with the principles, and substantively acknowledging the things that have been lost through
9 being in State care, and I think I've mentioned this before, there is no provision for loss of
10 culture or language or disconnection from your whānau or hapu. Those things aren't
11 compensated for. So you can have a framework that talks about the Treaty, but are you
12 properly acknowledging the things that are lost? No, you're not. So there needs to be a lot
13 more work in that space.
14 **MS JANES:** Just jumping you to paragraph 5, probably by implication Cooper Legal gets a
15 mention. It talks about the criticisms of the Crown's response to historic claims by
16 claimants and their legal representatives, including criticism of the Crown for failing to
17 provide an approach to resolving claims consistent with tikanga Māori. You've talked
18 about that.
19 **MS HILL:** For once I don't believe that's actually a reference to us, somebody else is criticising
20 the Crown. I believe that was the Waitangi Tribunal claimants who took that view. And
21 I've certainly learned a great deal through that process and from the people involved in that
22 process. But we've not seen any changes to the way the Crown address claims to be
23 consistent with tikanga Māori. There's been no change that we have seen so far.
24 **MS JANES:** Just going to 3.2, can you read that out and then in light of the new handbook that
25 you have been reviewing, is there any comment that you would make?
26 **MS HILL:** So principle 2 says that, "Settlement will be considered for any meritorious claims
27 (particularly where legal risk justifies settlement) where merited settlement would be full
28 and final with no admission of liability".
29 There's a lot going on in that principle. But I'm going to go on to talk about MSD's
30 settlement process in quite a bit of detail shortly. But what we see is this idea again, this
31 subjective meritorious, it's what the Crown says is meritorious and there's a different
32 threshold where there's a legal risk. It's certainly a different way to view claims. And this
33 idea of a merited settlement or a worthy claimant, I have real difficulty with some of those
34 terms. And we're not seeing that coming through in — certainly not in the Ministry of

1 Education process.
2 **MS COOPER:** Can I just add to that too, in the latest iteration of the Ministry of Social
3 Development policy which we got I think last week or the week before, litigation risk was
4 specifically recognised in previous versions of it as being a factor that might increase the
5 compensation that is offered to a client, it's gone. Litigation risk is no longer a factor that
6 will be taken into account, which again seems actually inconsistent with 3.2.
7 **MS JANES:** Jumping to your page 5, paragraph 6. If we could call that out.
8 **MS HILL:** So that's a potted summary of our various criticisms over the years, delays in response
9 to claims, redactions on personal information provided, uncertainty around the process, the
10 level and consistency of settlement offers, criticism of the reliance on legal defences in
11 litigation such as the limitation defence which prevents a litigation of claims not brought
12 within a specified period.
13 **MS JANES:** And then if we go to page 2 paragraph 9, the Crown sets out its five overarching
14 principles. This is — these are the principles that Keith Wiffin suggested, he had some
15 favour.
16 **MS HILL:** Actually the principle 2 I was looking at earlier, that was the previous strategy, I don't
17 think I was particularly clear about that, sorry. So the earlier one about the settlement of
18 meritorious claims is up to 2018/19. So these are the new principles. Do you want me to
19 quickly, in a paraphrasing way —
20 **MS JANES:** Yes, thank you.
21 **MS HILL:** The resolution of grievances early and directly with an individual, including the
22 individual's whānau, hapu, iwi and community where they wish. Settlement will be
23 considered for all meritorious claims and will generally be full and final without admission
24 of liability, if a claimant becomes aware of additional material or circumstances not
25 considered by the Crown, the Crown may consider that new information and whether any
26 response should be made.
27 **MS JANES:** And we'll be looking at that revisitation policy.
28 **MS HILL:** We will, yes. Where claimants wish to litigate the Crown will concede any factual
29 matters that it does not dispute and will rely on appropriate factual and legal defences. And
30 principle 5, the Crown's approach to Alternative Dispute Resolution and litigation in
31 historic claims will be guided by manaakitanga, openness, transparency, learning, being
32 joined up and meeting the Crown's obligations under Te Tiriti.
33 **MS JANES:** As a matter of principle what would you say about those and have you seen them
34 since December 2019 implemented?

1 **MS HILL:** Those principles are fairly sound, I mean I would always make some changes, but as a
2 general statement they're fairly good. In terms of principle 4 about conceding factual
3 matters, for the trials that are set down for next year, for the first time in our litigation
4 history with the Crown we are working on an agreed statement of fact, which while, you
5 know, there's still a certainly robust process going on there, it is much more positive, it will
6 make for a shorter trial, it will make the — taking the evidence of the plaintiffs' and their
7 witnesses much easier because it's so document heavy, so that we can admit a lot of facts
8 and documents, and have this in the background and then just get to the crunchy evidence
9 and the contested issues. It's a much more efficient way of working and we're really
10 grateful for that progress. So that's one really positive thing that we are seeing so far, and
11 we've talked about the progress on name suppression as well.
12 So there are some changes there. We're not seeing the progress in the settlement
13 procedures and I'll come on to that.
14 **MS JANES:** And normally I would ask you this question because it would seem to fall more
15 naturally under the MSD processes. But the comments I understand you have about Garth
16 Young's evidence may fall into the model litigant category, so are there any comments that
17 you would wish to make about the evidence you read of Garth Young?
18 **MS HILL:** Yes, and I think Sonja has some comments as well, but I'll just quickly note that
19 Mr Young has been involved in every process that Ministry of Social Development has
20 created to deal with historic claims, he's a consistent figure from 2004 if not earlier.
21 But prior to that, he was a social worker and a senior social worker for a long time,
22 and his own evidence is from the early 80s. And that's an inherently conflicted position, so
23 people who are in charge of investigating claims against their former colleagues and your
24 friends, because when you work in one place for a long time these are going to be your
25 friends, how can you do that objectively? And I think it's a really difficult position for
26 Mr Young and others who are in that position. And Mr Young was also the social worker
27 involved with the Sammons family, so he was conflicted in relation to the Georgina
28 Sammons claim and you've heard from those sisters. And that was acknowledged in the
29 course of those proceedings.
30 He was also involved, less briefly, not less briefly, less so with Tanya Sammons and
31 Alva Sammons as well. So he was a social worker involved with those claims and they are
32 ones that have been in the MSD processes for a really long time now. And it really reflects
33 that you can't shift far from some of the things that he's worked on and is now heavily
34 involved in trying to resolve.

1 And to me, the issue of the Crown investigating itself is one of the central reasons
2 why we have to have an independent process. A retired High Court Judge said to us once
3 that the abuser cannot be the saviour. And I think that really emphasises what we're trying
4 to do there, that the same people who were involved at the coal face are now the ones
5 investigating.
6 And just a couple of other things in terms of Mr Young's claim — Mr Young's brief.
7 **CHAIR:** Good slip of the tongue.
8 **MS HILL:** Yes, yes. I think there's not as much emphasis placed on his quite active role in
9 dealing with claimants directly. Mr Young has spent a long time going into prisons, talking
10 to claimants, being a contact person. So when we settled claims, and there was a wellness
11 aspect, it was to Garth Young that the invoices for tattoo removal, education and things
12 went. So there's that real coal face aspect to his contact with claimants.
13 And in our evidence we talk about an Ombudsman's report that dealt with the high
14 tariff offenders policy. I'm touching on that because one of the Ombudsman's
15 recommendations was that MSD apologise for misleading a claimant and we'll call him
16 Mr B, and it was Mr Young who made the representations to Mr B that his claim would be
17 dealt with imminently. And in the end it took years because it was held up by the high
18 tariff offenders policy.
19 So it was actually Garth Young making those representations that were later the
20 subject of an apology. So we just wanted to highlight those sorts of things that may not be
21 covered in his brief of evidence. And just again, sort of noting that real conflicted position
22 that he has. I know that Sonja has some comments as well.
23 **MS COOPER:** I just wanted to comment on his evidence in relation to Keith Wiffin's claim.
24 Because I literally had my mouth open when I read two paragraphs 7.5 and 7.6. I think just
25 because perhaps this illustrates some of our — the ongoing issues we have about redactions
26 and actually obtaining relevant files. So he said in relation to the request for information
27 about Keith's abuser, Mr Moncreif-Wright, "the 8 November 2007 Official Information Act
28 request from Cooper Legal asks for staff records and any other information MSD holds
29 about the staff members" and this included Mr Moncreif-Wright — "I replied on 20
30 February 2008 in respect of Mr Moncreif-Wright, I stated that the Ministry holds one staff
31 file and two staff cards noting dates of employment for Mr Moncreif-Wright. There is
32 nothing contained in the file that relates to name of another client or Mr" — I'll go slower.
33 "Nor is there any information relating to any allegations of physical or sexual abuse against
34 Mr Moncreif-Wright."

1 He then goes on in the next paragraph to say, "The Ministry certainly was aware of
2 the offences committed by Mr Moncreif-Wright prior to that date, I accept that it may
3 appear as though I or the Ministry was not wanting to disclose that fact. But that was
4 certainly not my intention".
5 What was the intention? I just — to be honest, as I say, my mouth just fell open.
6 Particularly when you know from the multiple Crown briefs of evidence that refer to
7 Mr Wiffin's claim, that this is in the exact same time that we are receiving correspondence
8 from the Crown saying that there's no evidence to support Mr Wiffin's claim. And I'm
9 just — I'm still horrified about that. And that's not just a reflection on Garth Young, that's,
10 in my view, a reflection on the Ministry of Social Development as an organisation, but it
11 also reflects on Crown Law, because I assume that Crown Law knew that information as
12 well.
13 And if I can just point to that again in the *White* trial, Mr Ansell, who sexually
14 abused Earl, the Crown claimed legal privilege over his conviction information history.
15 And so — and that was upheld by Miller J, and he said go off and get it yourself.
16 But the problem is, you've got to know which court they were convicted in, you've
17 got to have their full name, their date of birth and sufficient information to actually collect
18 that information.
19 **CHAIR:** Is that not a matter of public record that the man had been to trial and been convicted?
20 **MS COOPER:** Yes.
21 **MS HILL:** But by public record you still have to know which court to ask and where to find it, so
22 it's a very difficult to find.
23 **MS COOPER:** I know your question is why was legal privilege claimed.
24 **CHAIR:** Why was it, yes.
25 **MS COOPER:** I don't know and we challenged that legal privilege.
26 **CHAIR:** Yes.
27 **MS COOPER:** We weren't aware of that conviction until then, and as I say, Miller J upheld the
28 privilege even though — and I said but it's a public record, as I say the answer was you go
29 and get it, you go and get it yourself.
30 **CHAIR:** We won't relitigate that here but —
31 **MS COOPER:** No, but we did. But we did and as a result of that we set about actually obtaining
32 as far as we could, conviction information about as many staff members as we could. And
33 we found that, you know, for a number of our witnesses who gave evidence in the *White*
34 trial, there were actually criminal convictions relating to them. But they were not on any of

1 the records that we received in relation to them, they were not in discovery at all.
2 So yeah, just again, one of those obstacles for claimants in a process that is already
3 slanted against them, and where it's so difficult to collect information.
4 **MS JANES:** And just turning to Mr Young's evidence at 7.15, again, talking about Mr Wiffin's
5 case and he mentions that that is not representative of other claimants. Is there any
6 comment that you would make from your experience?
7 **MS HILL:** I think Sonja's just demonstrated that it is terribly representative. The long delays,
8 I mean and it's acknowledged that Mr Wiffin's claim fell through the gaps, that they weren't
9 responded to for a long time, obviously as Sonja's demonstrated the information's withheld.
10 So I don't think Keith Wiffin's claim is an outlier, it's terribly representative of how
11 claimants are treated.
12 **MS COOPER:** And I think I gave the other example yesterday of that, which — yeah.
13 **MS JANES:** And just a final question, you had talked a little bit earlier about the involvement in a
14 range of face-to-face contacts with claimants. And you had also talked about the thought
15 that various agencies were talking to each other. Is there a — any information that is
16 known to you about Legal Services Agency, MSD talking about that contact with
17 claimants?
18 **MS COOPER:** Well, I think I've already said certainly back in that withdrawal of aid process,
19 yes, there was a lot of communication. And again, that was something that I was interested
20 in reading the Solicitor-General's two briefs. She referred in her main brief about
21 communicating with David Howden at Legal Aid in 2009 because her concern was that we
22 weren't providing all relevant information. I can find the brief evidence, and then in her
23 reply brief she cites a case which was a 2007 case in which the Crown was told not to
24 communicate with Legal Aid. So 2007 but this is 2009 when she is communicating directly
25 with Legal Aid. And that continued for a while.
26 So again, you know, a kind of disconnect really, and it was certainly I think to the
27 detriment of our claimant group, those communications. And indeed, in the withdrawal of
28 aid process, Legal Aid was sending out letters to clients withdrawing their Legal Aid,
29 telling them about the Ministry of Social Development's ADR process and saying you don't
30 need a lawyer for it.
31 **MS JANES:** That concludes our model litigant, so unless there are questions, we would probably
32 take the —
33 **CHAIR:** I think we should take the morning adjournment. Thank you all.
34 **Adjournment from 11.29 am to 11.47 am**

1 **CHAIR:** Thank you Ms Janes.
2 **MS JANES:** Thank you. We are now going to have Amanda Hill talk us through the MSD
3 processes.
4 **COMMISSIONER ERUETI:** Could I just ask follow-up questions from the matters we
5 discussed before the break?
6 **MS JANES:** Absolutely.
7 **COMMISSIONER ERUETI:** I just wanted to ask, we were talking about the new historic
8 approach towards settling claims that came out in December 2019 and it does say in there
9 that one of the aims is to give claimants the right to include whānau, hapu, iwi and
10 community, for them to participate in the resolution process. I just want to be clear that to
11 your knowledge there's been no evidence of that happening since this was released in
12 December 2019?
13 **MS HILL:** No, although I suspect if we put forward someone who particularly wanted to do that
14 then we would find a way through with the Crown. The opportunity hasn't presented itself,
15 if you like, but there's been no proactive suggestion from MSD either. So on both sides it's
16 something that is yet to be tested.
17 **COMMISSIONER ERUETI:** Okay. Another thing that came out of this report, we may refer to
18 this later, is the idea of the centralised process for dealing with historical claims and also
19 reforms of the Limitation Act. But could we be discussing this later? I'm just wondering if
20 Cooper Legal had heard anything from any of the ministries about these proposed reforms
21 or anything had happened?
22 **MS COOPER:** No, we got the report, actually I think Hanne sent that through to us, and then
23 later it was sent to us by Linda, I think, from MSD. But actually no, there's been no
24 engagement with us about what that — what any of the reforms might look like.
25 **COMMISSIONER ERUETI:** Okay, either of one of those two. Okay. The last thing is Garth
26 Young, you talk about his involvement in the operational side, MSD, as well as the claims
27 process. I wonder, you speak only about Mr Young but about whether there are — how
28 pervasive is this within the current claims process?
29 **MS HILL:** Most of the assessors of historic claims have been social workers. So to my
30 knowledge, certainly it was the case for many, many years, most of the life of the historic
31 claims they have been former social workers because you have to know your way around
32 social work practice. That may be changing in terms of the expansion of the historic claims
33 team, but I don't know what proportion of them are still social workers now.
34 **MS COOPER:** In terms of the Ministry of Education, they have two assessors, which is part of

1 the reason why the process is so delayed, and both of them were educational psychologists,
2 so again, quite connected to the Department. One of them, Murray Witheford, for example,
3 actually used to refer people to Campbell Park School and actually used to do assessments
4 of children in Campbell Park School. So again, so that's a conflict position because when
5 we've talked through issues around Campbell Park, for example, he's got very clear views
6 around what he thinks happened there and didn't happen there and, you know, whether staff
7 might have been perpetrators etc.
8 Ministry of Health processes is literally this very small team of the Chief Legal
9 Advisor and one other person, and so yeah, that's contained within this very small team.
10 **COMMISSIONER ERUETI:** Thank you.
11 **MS HILL:** Okay, so I'm going to talk probably at length about MSD processes then we'll come on
12 to Ministry of Health and Ministry of Education after that. But because processes will go
13 into compensation, I just want to remind you one of the first things we talked about when
14 we first started giving our evidence, it feels like about three years ago, I think it was
15 Tuesday afternoon, was article 14 of the UN [United Nations] Convention Against Torture,
16 which requires the State to provide fair and adequate compensation. So I just want to put
17 that back in the background of what we're going to talk about.
18 And we've jumped in and out a little bit about, touching on different processes over
19 the years. So I just want to quickly slot things into a bit of a timeline so that different
20 iterations of the process make a bit more sense. So from 2010 through to 2013 or so, we
21 had the first ADR settlement process with the Ministry of Social Development. And that
22 was run by what was called the Care Claims Resolution Team, or the CRRT. And that was
23 the body that met with Chassy Duncan and he gave evidence about that meeting.
24 And in the beginning, those — the CCRT team met with claimants with one of our
25 lawyers present or obviously with claimants who were self-represented. And that rapidly
26 became overrun with numbers, it wasn't a sustainable way to progress claims. And so, and
27 I've seen correspondence from Garth Young saying we'll shift to seeking a letter from
28 Cooper Legal, or receiving written information rather than those meetings as a way to
29 manage the backlog.
30 And in that time, some settlements obviously took place, and I'll ask for a document
31 to come up from 2011.
32 **MS JANES:** Can we call up document 29 which is witness 94-090.
33 **MS HILL:** Because there weren't any rules at this time, nothing was written down, and we didn't
34 know how claims were being settled, it just seemed to be quite arbitrary. So the document

1 that is up here, it's from a former solicitor with Cooper Legal, Sam Benton, going to Garth
2 Young and in the third paragraph down asking for information about how MSD gets to its
3 quantum, its amount of compensation. "It would be of considerable assistance to us if we
4 could have a better understanding of this. It will hopefully mean fewer disagreements
5 regarding offers". And obviously some information had been given at an individual
6 meeting about how —
7 **MS JANES:** May I, just for orientation —
8 **MS HILL:** Sorry, yes.
9 **MS JANES:** — take you to page 2, because as we know e-mail trails go backwards.
10 **MS HILL:** I started at the wrong end.
11 **MS JANES:** So if we actually start with the originating e-mail on page 2 and I think you're
12 looking at paragraphs 2 to 4.
13 **CHAIR:** I think, Ms Janes, there's a problem, it might be on a different document.
14 **MS HILL:** I can talk to it if we can't locate the document for the time being.
15 **MS JANES:** Is that page 2? Okay, no that's fine.
16 **MS HILL:** That is page 2, so that's the question?
17 **MS JANES:** That's fine, that's all right, yeah.
18 **MS HILL:** So that's the question that was asked of Garth Young in July 2011, how do you
19 calculate quantum? Because several claims have been settled and we thought there would
20 be rules. And if we go to Garth Young's response, which I believe might be further up or
21 further down, there we go, in July 2011 and what we can do is we can see in that first
22 paragraph there from Garth Young, if we can call that out, and that's Garth Young saying
23 "we don't have a documented formula or set of criteria by which the amounts are
24 calculated. What most significantly determines the quantum is the nature of the failing
25 and/or abuse that the person suffered. Other factors may also influence it such as the age
26 and vulnerability of the person at the time of the incident".
27 So that was the information we had about how MSD quantified claims and decided
28 what clients would receive, claimants would receive. It wasn't a lot to go on.
29 And what we know now from the documents produced to this Commission is that
30 actual guidance in the form of the first handbook wasn't written until 2014. So before then
31 I think there was a, from what I understand from the Crown evidence, there's a bit of a
32 patchwork arrangement and the first actual guidance wasn't written until 2014. And quite a
33 few claims were settled before then. So we're punching in the dark a little bit at that point.
34 So as I've said, the CCRT process rapidly became overwhelmed. There were too

1 many claimants, the meetings were unsustainable, and we went to a process of us sending a
2 letter of offer, which is still the process that we have now, and that's a very full account of a
3 claimant's experiences. It takes their interview, their records around I explained that
4 process of putting that together I think on our first day.
5 We got to a point where some claims became stuck, we literally called them the
6 stuck claims. And there were matters of fact or law that meant that they couldn't be
7 resolved. And a slightly nicer term that came about was intractable claims.
8 And we needed to find a way through for this reasonably small group of people but
9 growing, how do we resolve these claims when there is a central issue that just cannot be
10 resolved? And a lot of them were sexual abuse by an adult, whether that be a staff member
11 Campbell Park or a foster parent over a long period of time, whereas if the Ministry did not
12 accept that then there was — that was such a central part to the claim that it couldn't be
13 ignored.
14 And what came about, and it also came about through a direction of the High Court,
15 or an observation of the High Court really, saying that the court wasn't the place for historic
16 claims, that there were some things that needed to be outside the court process. But it was
17 strongly suggested to us to find an independent fact-finding model outside of the court
18 process. And out of that came the terms of reference for the intractable claims process.
19 And this was an ongoing project between 2013 and 2015.
20 And a lot of work went into it. It had everything that we thought would be useful to
21 determine these claims that couldn't be resolved in the normal processes. We agreed on
22 two retired judges, or one of them I think was soon to be retired, one a retired High Court
23 Judge and another retired District Court Judge — Family Court Judge to be the fact finders
24 and they were appointed and it was agreed about how we would deal with evidence, sort of
25 looked a little bit like a judicial settlement conference, will say type of thing. And the fact
26 finder would determine these intractable issues.
27 It was very slow, there were long delays even agreeing things like the terms of
28 engagement for the fact finders and so on. And things got slower and slower into 2015.
29 And we had begun to prepare one claim for the, you know, the inaugural intractable claim.
30 And we had gathered evidence and we'd prepared briefs for the plaintiff. We had support
31 from her sister who also gave evidence about the same abuse. She also was a victim. And,
32 you know, and we're launching into this process and then the Ministry of Social
33 Development sent us a letter one day that said we're not going to proceed with this process
34 anymore, it's too resource intensive and it won't resolve the issues, and the Ministry

1 unilaterally withdrew from the process and it never got off the ground.
2 And ironically when I talked about that 2014 first handbook, that handbook refers to
3 the intractable claims process as where you go when you can't resolve a claim, but the
4 process was dead in the water, it never started.
5 And one of the outcomes of the intractable claims process, MSD said look it's okay,
6 those people who were in the intractable claims process or in that group, they'll be dealt
7 with in the Fast Track Process. So we went from an independent, measured fact finding
8 process, to the Fast Track Process which was a very different proposition.
9 **CHAIR:** And that process was already in place, was it, at that stage?
10 **MS HILL:** It was coming in, this is 2015, 2016, so we knew the shape of it, and Sonja talked a bit
11 yesterday about the origins and the beginnings of that.
12 **MS COOPER:** So yes, when we got this letter, yeah, we were told that these claims would be
13 dealt with under the Fast Track Process, but we were also engaged in quite contested
14 correspondence about well, you know, you need to tell us what it's going to look like.
15 **CHAIR:** What that looks like.
16 **MS COOPER:** Yes, exactly, which then became a judicial review proceeding.
17 **MS HILL:** So we've — so this is why I'm taking you through a timeline because sometimes these
18 things overlapped a little. So with this promise that the claims would be resolved through a
19 new process, I mean we were devastated when the intractable claims process fell apart. We
20 never got any real explanation about why MSD refused to engage in it. Instead they said
21 well judicial settlement conferences are an option. But that was only if your claim was
22 filed in the court and some of the intractable claims weren't.
23 So then we come to the Fast Track Process, it's occasionally called the accelerated
24 process, it later — the whole kit and caboodle got called the two path approach, the Fast
25 Track Process and the full investigation. And Sonja's, as I said, talked about, a little bit
26 about that early discussion and the fiscal envelope and how there wasn't enough money to
27 do what the Ministry had said it wanted to do. And it's important at this point to pick up
28 that narrative and look at the final form of the Fast Track. Because this is the first time we
29 have categories, and I'm always really conflicted about categories, because it feels
30 impersonal and really difficult to me to categorise people's experiences. But the reality
31 with the Fast Track is that MSD wanted to clear a big backlog of claims and this was the
32 way that it intended to go about that. And our claimants had been waiting so long we had
33 to engage them at that point. So I dislike talking about the categories, it feels impersonal
34 but this is what we had.

1 And one of the things that we'll show in the documents, and I'll ask Hanne to pick
2 up with the documents.
3 **MS JANES:** So this is the October 2019.
4 **MS HILL:** We need the Fast Track processes we're jumping ahead quite a lot.
5 **MS JANES:** Sorry, wrong document.
6 **MS HILL:** So we had some different categories, and I'll just —
7 **MS JANES:** Are we at document 43, witness 94-114?
8 **MS HILL:** We've had many, many iterations of categories, so it's — can be very difficult.
9 **MS JANES:** This talks about the spreadsheet and the categories.
10 **MS COOPER:** So this was the letter that we referred to where we had done an assessment of the
11 188 claims and we said that the way that we had categorised them was quite a different bell
12 curve than the way that the Ministry thought that the — had allocated funding for. And
13 then the Ministry did its own exercise with the same claimant group and came up with very
14 similar figures to us.
15 **MS HILL:** I think perhaps it might be the next document.
16 **MS JANES:** So 116, but I think that's the response. Sonja, are you able to pick up the right
17 document and Amanda — is that the one?
18 **MS COOPER:** This was the testing, yeah, so this shows where our results were. So you can see
19 Cooper Legal testing, MSD testing, and as I said yesterday, it showed — they got a lot
20 more in category 1, double than we did. But importantly they'd only allocated 4% of the
21 budget for category 1 payments. Then we start seeing the disparate numbers, so they'd
22 allocated 9% for category 2, which was $40,000 payments. We'd categorised 18% in
23 category 2, and they were only a per cent different from us, 17%.
24 Category 3, which is the $30,000, they had looked in terms of past payments was
25 only 7%. We had 16%, they'd had again a lot more, 21%. And then category 4, again
26 they'd had a bigger number, 29%, we'd had 27%. So that was reasonably close. But
27 obviously we'd had a lot more up higher, and they'd come up with 24%, mainly because
28 they had categorised some of our claims higher than we had. And then the fifth category,
29 which was $5,000, they said 20%, we'd come up with 6%, and they had come up with 13%.
30 And the last one was the interesting one, because this is people who weren't going
31 to get anything. So they had 29% who weren't going to get anything, who were going to
32 get a zero offer. We had 1% in our testing, and they had 2%. But, you know, that's nearly
33 a third of the group that they had budgeted for who were going to get nothing, and yet those
34 were the actual outcomes.

1 So that's just a useful document to show that once we actually did it with real claims
2 against what they had budgeted for, this just really reflected there was not enough money in
3 the budget, if the Fast Track Process categories were going to be applied as they had been
4 presented.
5 **COMMISSIONER ALOFIVAE:** Sonja, was it $50K the top for category 1?
6 **MS COOPER:** Yes, it was, $50,000 was the top, yeah, then $40,000 was the next, $30,000,
7 $20,000, actually I think there was a $12,000 in there I've missed, category 5, and then the
8 $5,000 was the bottom. I had missed one.
9 **MS JANES:** I think while that other document is from 2019, and so it has seven categories rather
10 than the earlier one, it's probably still helpful for you to refer to them in terms of how they
11 were banded.
12 **MS HILL:** Yes, apart from the fact there are some significant differences between the Fast Track
13 categories and this. So we may have to try and locate the document later, but as Sonja's
14 explained, category 1 was the most severe abuse and that is serious physical and sexual
15 abuse combined with a period of false imprisonment or solitary confinement and that's
16 important, I'm going to keep coming back to that. Category 2 also — so category 1, there
17 were very few people who got category 1 because that was long-term physical and sexual
18 abuse.
19 **MS COOPER:** Yeah, so that — for the few of our clients who got the category 1 payments, they
20 were clients, yeah, who'd been in care for most of their lives, they had been through
21 multiple residences and foster care placements and they had suffered physical and sexual
22 abuse in most of them. We had one client in that group who had been in one foster
23 placement for most of his life and he'd been sexually and physically abused there most of
24 his life. So yeah, that was really that defining category for category 1.
25 **MS HILL:** And it went down in terms of what the Ministry — these different treatments of
26 severity. And sexual abuse was split into what was termed serious, so that was anything
27 that was under the Crimes Act, sexual violation and those serious offending levels, and then
28 moderate sexual abuse was indecent assault level-type offending.
29 **MS JANES:** And we saw your letter yesterday where you had raised your concerns about those
30 early categories.
31 **MS HILL:** Yes. And all of these concerns that were raised about the fiscal envelope and the
32 nature of the categories, it ended up being that MSD went ahead anyway and imposed the
33 process. But in each of these categories there is a provision for incorrect use of secure units
34 or false imprisonment. And in the most serious categories there is an explicit provision

1 about being held in secure for three weeks or longer.
2 **MS COOPER:** Accompanied with physical assaults.
3 **MS HILL:** Yes, always attached to assaults. And this was sort of a cumulative assessment. So
4 they didn't all have to happen at once. You sort of had to look at the different parts of the
5 claim and put things into a category. Again it's terribly impersonal, but this is where we
6 ended up.
7 And so when — Sonja's explained the assessment, the numbers didn't come back
8 right. But what happened, and this is explained in a lot more detail in the brief, and we pick
9 up at about paragraph 398 to 399 of the brief of evidence.
10 Instead of asking for more money, a moderation process was introduced. We're
11 going to talk about moderation quite a lot. And it was effectively all of the claims were
12 assessed according to their category, and then in order to fit within the fiscal envelope, the
13 amount of money. They were moderated downwards to fit into a bell curve.
14 So and they don't naturally fit into a bell curve, of course. And it was a moderation,
15 always downwards, I don't know that they ever moderated upwards. But —
16 **MS COOPER:** We had no visibility, so —
17 **MS HILL:** To be clear, this was only — we couldn't confirm that this was taking place until we
18 got the outcome of the judicial review. And that's the decision in XY and
19 Attorney-General, which has been provided. It may be useful to pull up parts of that
20 decision, but just so the two things about the Fast Track, all of the categories, at least all of
21 the upper categories had an aspect of solitary confinement or false imprisonment. And
22 none of the — all of the offers were moderated. So in the end some of them didn't reflect
23 the category that they came into at all, because they'd been pushed down a category by the
24 moderation to make them fit into the fiscal envelope.
25 As Sonja said yesterday, we did the judicial review because we were just told one
26 day that this process was happening.
27 **MS COOPER:** We actually heard it on the radio.
28 **MS HILL:** Yes, that's right, we heard it on the radio. And then we were advised that offers would
29 be made to our clients and we filed an application for judicial review because we couldn't
30 see the rules and we didn't know what was happening. And as we've explained, there's no
31 reasoning in a Fast Track offer, it's just an amount and you take it or leave it.
32 And we filed the judicial review and in that, in one of those oddities, in the
33 affidavits that the Ministry of Social Development filed was the information that we were
34 looking for. So we received that as part of the evidence in the judicial review.

1 But what became central to the application for judicial review was this issue of
2 moderation. And while we had suspected it was taking place because we knew there was
3 no more money, we couldn't prove it, and we didn't know how it was happening. And one
4 of the — one of the statements made by Gendall J in the XY decision was that moderation
5 was taking place but that the Ministry was entitled to do it because the whole settlement
6 process wasn't justiciable, which is the test for judicial review, it sat outside the rules of —
7 it sat outside of what a court could look at. I don't necessarily agree with that, but I don't
8 agree with lots of things, it didn't change it. But what it did do was confirm that the
9 Ministry, instead of seeking more funding for the Fast Track, chose to push down the offers
10 made to claimants.
11 **MS COOPER:** Actually, can I just also, what we also found out once we got the Crown — once
12 we got MSD's response, is that it was a different beast than again what we thought it was
13 going to be. And Amanda's talked about the intractable claims and how we were told we
14 don't need the intractable claims process anymore because these claims will be dealt with
15 under the Fast Track Process. Well no, these clients whose claims were already stuck were
16 excluded from the Fast Track Process. And for strange reasons, people who we were acting
17 for who had siblings who'd already had an offer considered, they were also excluded from
18 the Fast Track Process. And there were other kind of anomalies that we didn't know about.
19 We had been told from the beginning of the process that the Whakapakari group
20 would be treated separately because there was an acknowledgment that they had Bill of
21 Rights Act entitlements. But we learned that they were also included in the group, but that
22 they were being excised down to the $5,000 level on the basis that the Ministry was not
23 liable because that was a third party provider, yeah, so we've already illustrated that. So
24 they not only were included, but they were disadvantaged, and we talked about Linda's
25 evidence where she said oh well, if they had some status, you know, the Whakapakari part
26 was included and we gave some examples where that wasn't, that still doesn't seem the case
27 to us, but we'll come to that.
28 So yeah, I think until we got the response in the affidavits we didn't know, not only
29 what the categories were, but who it applied to and it was very different from how it had
30 been represented to us all the way through almost two years of discussions.
31 **MS JANES:** Just taking you back, so you received the spreadsheet from Garth Young which
32 effectively set out the categories, you then undertook your own assessment of your clients
33 against where you thought they would fit within those categories, and we have seen that
34 document where you went back notifying that, and going back to the letter yesterday, that

1 there would not be sufficient money if they fitted within those categories.

2 Can you pick up the narrative from there, particularly in terms of the fiscal envelope
3 and the response from the Ministry.

4 **MS HILL:** So the response from the Ministry was to agree that our numbers were more than
5 likely correct. So the Ministry has said your numbers are —

6 **MS JANES:** And we'll just pick up witness document 94-116.

7 **MS HILL:** If you've got the document there it's probably easier to look at it.

8 **MS JANES:** It's probably easier.

9 **MS COOPER:** I think that was the one I explained —

10 **MS JANES:** Oh is it?

11 **MS COOPER:** — where we did the comparison of the figures, yeah. So actually they had higher
12 figures than us in many of the categories. So that was when we both did the exercise with
13 the same client group, and as I say, they — their figures were either very consistent with
14 ours or actually in many contexts they put our claims in higher categories than we had. So
15 yes, that's that document we were just looking at.

16 **MS JANES:** So it's the highlighted under the table.

17 **MS HILL:** Yes. "This outcome gives me cause to reassess how the process might work and I
18 have decided that I need to raise the issue with the internal steering group overseeing this
19 work".

20 **MS COOPER:** So this is a letter from Rupert Ablett-Hampson.

21 **MS JANES:** Can we go to the date just to put that within the timeframe, it's 3 June 2014.

22 **MS HILL:** So enormous amount of time trying to come to agreement about this process, and
23 engaging with the Ministry of Social Development over it. But in the end, it looks like that
24 it was accepted that the numbers weren't right, but to proceed anyway, and moderation was
25 the blunt instrument that was used to bring those offers within the money available.

26 **MS JANES:** We'll just quickly look at a couple of documents about the money available. So if
27 we can go to witness 94-119. This talks about the fiscal envelope. So if we go to call out
28 the highlighted paragraphs.

29 **MS HILL:** Again this is from Rupert Ablett-Hampson at MSD.

30 **MS JANES:** And it's 5 August 2014.

31 **MS HILL:** "Please note that since receiving advice on 30 July that Mr 'so and so' has accepted
32 the Ministry's settlement offer, the number of qualifying claims has been amended to 511
33 and accordingly the fiscal envelope amended to $9.019 million. The number of claims that
34 can be assessed as requiring a full assessment remains at 10. It would be entirely your

1 decision based on your assessment of all claims which 10 claims they are".
2 **MS JANES:** Just before you proceed, what was the basis you were allowed to choose 10 only for
3 full assessment?
4 **MS COOPER:** I have to say I don't remember that now. I mean the way that it was originally
5 premised, we were going to have the call with our clients' instructions about whether they
6 opted in or out of the Fast Track Process. And that ultimately was another change imposed
7 because everybody was opted in. So yeah, so that was another thing we found out when we
8 got the judicial review, was that everybody was going to be in the process.
9 So I wonder now thinking about this now whether it was people where we knew
10 that their claims were under assessment but to be honest, who knows. I don't — I actually
11 can't remember.
12 **MS HILL:** There were so many iterations of this process over a two year period, and lots of back
13 and forth, but what we can see from that letter in that second paragraph, agreement that the
14 Whakapakari groups of claims was not included in the 511 claims eligible for the two path
15 process. So agreement there that this group wouldn't be included. And then that last
16 paragraph, "For the sake of absolute transparency, the Ministry will apply the same process
17 for claimants referred directly to the Ministry and not represented by you".
18 **MS JANES:** And moving through the document. This then records that there was an agreement,
19 it's not a signed agreement —
20 **MS HILL:** No.
21 **MS JANES:** — between Cooper Legal and the Ministry of Social Development.
22 **MS COOPER:** Yes, so this was again presented to us, and we were very unhappy about many
23 parts of this agreement, because again, it was quite different from what we had been
24 discussing. And so yeah, we had protracted discussions in which we said there are these
25 aspects of the agreement that are not consistent with our discussions. We won't sign it.
26 **MS JANES:** Then if we go to witness 94-121, going back to the budget issue again, this is a letter
27 from the Ministry of Social Development to yourselves, 19 September 2014, and if we go
28 to firstly the first two highlighted sections.
29 **MS HILL:** "The budget has always been a factor in discussions between us. It has been referred
30 to alternately as a fiscal envelope or a budget but in description all it is is a sum of money
31 set aside to resolve claims through the accelerated claims process.
32 The budget has been set by reference to the previous claims settled. In essence, 380
33 claims over recent years have been settled for $7.75 million and we believe it is not
34 unreasonable to budget a further $7.75 million to resolve a further 380 claims. As a general

1 approach we believe that this is fair and reasonable".
2 **MS JANES:** And what would you comment about?
3 **MS HILL:** We've seen Garth Young's email that says we've got no rules, we've got no criteria for
4 these settlements in 2011. And so the Fast Track is budgeted on this array of settlements
5 that have potentially no consistency between them at all. They are between legally
6 represented and self-represented people.
7 So it's not exactly a sound basis to plan ahead on. But, yeah, and as we go along in
8 the timeline we'll see that this is consistent that we're relying on past payments to determine
9 future ones. It doesn't matter how we got there, the consistency rules.
10 **MS COOPER:** The other thing to comment on too is by this time, you know, there was a lot more
11 knowledge or there should have been a lot more knowledge about things that had happened
12 in particular residences, known staff perpetrators, and all of that should have been pushing
13 the offers up. But we're sticking to this rigid budget which is based on denials and refusals
14 to accept aspects of people's claims in a context in which the information has continued to
15 develop and more is known and more should have been accepted. There's also no
16 inflationary adjustment in that figure either, because these would have been settlements
17 presume — who knows how far they go back to, but if they went back to *W* and *S* they
18 would have been going back as far as 2003 through to 2014.
19 So again, you know, is that a fair way to reach this budget.
20 **MS JANES:** So just in summary, as a benchmark for a starting point for the Fast Track Process,
21 how would you characterise it?
22 **MS COOPER:** Flawed.
23 **MS HILL:** Deeply, deeply flawed.
24 **MS JANES:** If we go to the next two highlighted paragraphs.
25 **MS HILL:** This is about opting in and opting out. So "In these circumstances" — this is MSD
26 talking — "all opt-in means is that the client will receive an offer to settle. There is no
27 compulsion for any client to accept that offer and indeed you will be free to advise those
28 clients as you see fit. It is not possible to run the accelerated claims processes without the
29 complete cohort (less the small percentage exempt) receiving an offer because is necessary
30 to divide the full fiscal envelope amongst all the claimants in the process".
31 **MS JANES:** And we'll go to the second page and look at the first four paragraphs, because I think
32 this then neatly takes you to the moderation.
33 **MS HILL:** So "You can see in this model that the factor that you have put importance on, that the
34 Ministry 'accept a claimant's allegations in full', is not an accurate description. It would be

1 more accurate to say that the Ministry would not intend to contest any allegation made by a
2 client but leave your firm to use those claims to distribute payments in accordance with the
3 fiscal envelope.
4 The categories are a means of categorising claims however it is unlikely, having
5 regard to the fiscal envelope, that all payments will be able to be made in the categories
6 which would be applicable if all claims are accepted at face value. (We both established
7 that to do so would have an inflationary effect.)
8 If we applied the model you advocate then we would end up increasing the level of
9 payment made to claimants under the accelerated claims process. This would be unfair to
10 those claimants who have preceded them to settlement. It is rare for us to accept all the
11 claims made by your clients. Our settlements are usually a reflection of us only accepting a
12 portion of the claims having undertaken a thorough, and by implication, lengthy
13 examination of each case. In reality the negotiation and examination we usually go through
14 around a case is replaced in the accelerated claims process by a tiering of cases within the
15 overall fiscal envelope. This is a pragmatic approach to achieve a prompt resolution, it
16 does not result in an unfair bargain bin price. We believe this is fair and reasonable
17 because the fiscal envelope has been set by reference to the previous claims settled".
18 **MS JANES:** So just any comments that you would want to make about the observations in that
19 letter and approach?
20 **MS HILL:** First of all, everyone's opted in, so by "everyone" we mean everyone who had an
21 outstanding claim up until 31 December 2014. Those people who we'd sent a letter of offer
22 or a statement of claim done. So that's where those numbers have come from, everyone
23 who's sitting waiting for the Ministry to respond up until December 2014.
24 And what they've done they've taken that whole group and opted them in and
25 divided the money up. But of course people didn't take Fast Track offers, so it's artificial.
26 And they've jammed that whole group into the budget and divided it up, and then in order
27 to do this, and they've said that in here, and pushed them all down.
28 So whether or not they wanted a Fast Track offer, whether or not they accepted one,
29 they're factored in. So it's fundamentally flawed. I'm not much of a mathematician but
30 even I can see that the numbers are going to not be right at this point.
31 **CHAIR:** To me the words "opt-in" imply that you take an option to voluntarily to go into a
32 system. From what you're saying it doesn't sound like that.
33 **MS HILL:** No, the Ministry opted them all in.
34 **CHAIR:** They opted them all in?

1 **MS COOPER:** Yes.
2 **CHAIR:** Whether they wanted to be opted in or not?
3 **MS COOPER:** Yes.
4 **MS HILL:** Yes. So they're all sitting there, think of them all sitting there, and if we took
5 instructions from a client, and we give them advice about whether the Fast Track was a
6 good process for them or not. Some people did well out of it. And so for some of our
7 clients, though, we said don't look at this offer, it's not worth it. If you came in under the
8 Bill of Rights Act, or you had practice failures, the two big exclusions from the Fast Track
9 Process, we said opt out and some of those people did. So we had to actively say do not
10 make these people an offer under the Fast Track Process. And for everyone that stayed in
11 that pool they just arrived one day in two large boxes, we had 280 offers arrive on a Friday
12 afternoon, because everything always happens on a Friday afternoon.
13 **MS COOPER:** And I was in Geneva.
14 **MS HILL:** So we've jumped forward a little bit there, but that's the comment I have, that you
15 squeeze, artificially squeeze this group of people into your budget and then it doesn't work
16 because some of them aren't going to take those Fast Track offers, and they'll have to be
17 moderated down.
18 **MS JANES:** And in terms of being survivor-focused or fiscally-focused, what comment would
19 you make?
20 **MS HILL:** It's fiscally-focused clearly. I mean to say it's consistent with past settlements but then
21 to moderate them, I can't — I've never decided whether they were consistent with past
22 payments before the moderation or after. I've never been clear in my mind about that. And
23 if they were only consistent with past payments before moderation, it means that all of
24 those payments were probably lower than past payments when they came out the other side
25 of the moderation process.
26 **COMMISSIONER ALOFIVAE:** Amanda, you said the two exclusions were the Bill of
27 Rights —
28 **MS HILL:** Yes.
29 **COMMISSIONER ALOFIVAE:** — and staff practises.
30 **MS HILL:** So these were the two things, and I say exclusions; they weren't accounted for under
31 the Fast Track is a better way to say that. There is no monetary provision for the Bill of
32 Rights Act. So, and you can sort of see how that would be difficult to do in a category
33 situation.
34 So if you were in care under — if you were in care after September 1990 and if your

1 rights were breached under the Bill of Rights Act, there was no extra money in the Fast
2 Track Process for you. The other thing was social work practice failures. We talked a
3 lot — we've talked a lot about these from time to time. Failures of social work, failure to
4 respond to complaints, to visit, to remove people, to approve a caregiver, that sort of thing.
5 No provision in the Fast Track Process.
6 **MS COOPER:** And the reason for that was is because it would have required looking at the
7 records and that's, of course, what they wanted to avoid in the process.
8 **MS HILL:** So it's a —
9 **MS JANES:** Can I just clarify, if you opted to accept a Fast Track settlement, was there an
10 opportunity to return to MSD for a Bill of Rights Act —
11 **MS COOPER:** No, it was a full and final settlement.
12 **MS HILL:** It was non-negotiable and it was final.
13 **MS JANES:** So you were getting to moderation.
14 **MS HILL:** Yes, so I think I've covered off the moderation in the Fast Track Process. And so we
15 received, as I say, a couple of large boxes of offers and some people whose claims were
16 primarily based on physical and sexual abuse and long periods in solitary confinement, or
17 secure units, some people were happy with their offers. I don't want to paint it as a —
18 **MS COOPER:** No.
19 **MS HILL:** — as a completely bad process. Some claimants were happy to accept their Fast
20 Track. To be honest, most of them had waited so long they were happy to resolve it in any
21 way. There was a large tranche of people who received offers of $5,000, or sometimes
22 $12,000, those two bottom categories. And they were very difficult to figure out, because
23 as I said there's no reasoning, you can't tell why they've got these low offers. And so and a
24 number of those were people who had been at the Whakapakari programme, and in the Bill
25 of Rights time, so sometimes we would advise people to opt out of the Fast Track and they
26 would choose not to, it's fine, but then they got a $5,000 offer. And most of — no, some of
27 those people were so desperate for money that they took it and most of them have
28 expressed regret about that at some point since.
29 **MS JANES:** So this is probably an opportune time to — I know it's a complicated exercise
30 because they are not necessarily entirely comparable, but to the best of your ability in your
31 claimant group, can you talk through some examples of what you believe are relatively
32 similar cases and disparities in compensation.
33 **MS HILL:** And can we go to a part of the brief, it might help illustrate that.
34 **MS JANES:** Yes, absolutely.

1 **MS HILL:** So we're in chapter — so it's —
2 **MS JANES:** Chapter 4?
3 **MS HILL:** There we go. So I want to start at about paragraph 1057 of our brief. It's quite near
4 the back.
5 **MS JANES:** Yep, it's probably chapter 9 then.
6 **MS HILL:** Yes. And the material in here, I've skipped over a couple of people and I'll come back
7 to some of those things, but I want to use two people to show the stark contrast between
8 one of those $5,000 offers and someone in a similar situation who wasn't in the Fast Track.
9 So paragraph 1057 of our brief, we've talked about a claimant called BSM. And he
10 was on the Whakapakari programme. But he had a long period of time in care, he was in
11 care for a six year period, up to 2005, foster homes, he'd been into youth justice residences
12 as well as Whakapakari and he'd suffered some serious assaults in the residences. But his
13 worst experiences were at Whakapakari, and some of the detail of that is set out at
14 paragraph 1058 of our brief.
15 And BSM, he's described being placed on Alcatraz, and we talk about Alcatraz a
16 lot; just a reminder it's a small rock off Great Barrier Island, its proper name is Whangara
17 Island, the boys called it Alcatraz because it was a punishment to be left on this island for
18 long periods of time. And he was strip-searched. You could not lawfully strip-search at
19 Whakapakari, you can only strip-search in a residence.
20 **MS COOPER:** And under specific circumstances which are regulated.
21 **MS HILL:** Yeah, so any strip-search at Whakapakari was immediately a breach of the Bill of
22 Rights Act. So, BSM, he chose not to opt out of the Fast Track Process. He was offered
23 $5,000. And against our advice he accepted that offer, because he wanted his claim over
24 and done with. And when we looked at this, BSM was a Care and Protection case.
25 **MS COOPER:** And he was in the Department's custody as well, so he — yeah, he was in their
26 custody.
27 **MS HILL:** So he's got the strongest legal status, if you like, if you think about the different tiers
28 of status. And when we looked at that offer of course we've got no analysis, but the only
29 way we could see him receiving $5,000 was if Whakapakari was discounted completely
30 from his experiences. Because even though the Bill of Rights Act wasn't a factor in the
31 Fast Track, all of those other assaults and the use of Alcatraz would have pushed him up the
32 categories anyway. But it didn't.
33 So we think that $5,000 reflects the physical assaults he experienced in youth justice
34 residences. And there is nothing about Whakapakari.

1 BSM was at Whakapakari at the same time as a claimant called T and I'm up to
2 about paragraph 1060 in our brief. So T and BSM are the two smallest boys on the island
3 at that point. They're there together and they try to run away together. And T had been
4 seriously physically assaulted by a staff member during that, and had received quite a
5 serious head injury. And that was later covered up by the managers of Whakapakari. But it
6 came out in the end the staff member was convicted of assault.
7 But in contrast to BSM, T was only at Whakapakari. So his whole claim was based
8 on that. And unlike BSM, T didn't qualify for the Fast Track, he'd come to us too late. He
9 wasn't in that cohort.
10 And T was a plaintiff that we progressed towards a trial in 2015 alongside the other
11 Whakapakari claims. So T's claim really, and I don't want to minimise his experiences, one
12 serious physical assault, a period of time on Alcatraz and some assaults from other boys.
13 And that issue of the cover up, which wouldn't have come into the Fast Track anyway.
14 T got $60,000 from the Ministry of Social Development in his settlement, plus
15 another $20,000 of wellness contribution. So it's such a stark disparity. And I spend a lot
16 of time trying to explain it and I can't. BSM, he got caught up in the Fast Track, $5,000; T,
17 and we put them — you know we pushed him along to trial. He was looking like he was
18 going to be a trial plaintiff and an offer came in for, as I say, $60,000 plus the other
19 $20,000 of wellness. I think everyone should be the level of T because that's where we
20 should be. I just cannot see how BSM's offer can be fair or reasonable.
21 **MS JANES:** Just to round out the story of the Whakapakari compensation, if we can call up
22 document 30, because there actually was ultimately some litigation. This is a New Zealand
23 Herald article from May 2017. We'll just go to page 3 first and at the very bottom if we call
24 out that whole section under 'The Whakapakari proceedings by tax payer numbers' and
25 have you go through.
26 **MS HILL:** So the Whakapakari proceedings, so four victims. And in the court proceedings they
27 were known as M, Y, Z and T. So 12 years in court, some of that time in court isn't —
28 litigation isn't being progressed but they had very much been progressed at this point in
29 time. MSD had spent $1,065,585 on private lawyers and had made settlement payments to
30 the four victims of $369,000. MSD contributed to Legal Aid costs, $369,159 and Legal
31 Aid had written off costs of $184,590.
32 **MS JANES:** Just looking at page 1 of that document, at that particular time there was quite a
33 reaction to this particular litigation. So we've seen that the numbers on the first page. We'll
34 go to the second page. And particularly call out the paragraphs that are highlighted and just

1 have you go through those.
2 **MS HILL:** So given the timing obviously at that point Jacinda Ardern was the Deputy Leader of
3 the Labour Party and she called the expense and delays extraordinary and questioned
4 whether it was a just or wise use of tax payer money and she contrasted the extraordinary
5 amount spent on legal costs and the small outcomes for victims and said that nobody was
6 going to look at that and think it was a good process.
7 And she cited figures provided to her office showing that $6.5 million had been
8 spent in total by MSD on external legal counsel fighting a handful of historical abuse
9 claims over a decade with only one getting to trial, and she asked whether the huge amount
10 spent to stop cases going before the courts meant — there was a question about whether the
11 Crown was being a responsible litigant. A spokesman for MSD said that the Whakapakari
12 cases were managed appropriately in accordance with Government policy on litigation. A
13 spokesman said the case was complicated by 15 interlocutory applications and appeals, but
14 also by legal issues of significance to the Crown beyond the facts of the particular claims.
15 **MS JANES:** So we've seen that Whakapakari can go from anyone from $5,000, and if my math is
16 correct it's about $85,000 per claimant. So we've got BSM, T and these four.
17 **MS HILL:** T was one of the four.
18 **MS COOPER:** I just note that the other person who was in the tent at the same time as BM and T
19 had already settled and my memory of his settlement was that he got $67,000 in the hand
20 and another $20,000 for wellness. Again, by comparison he'd been in very many
21 placements as well as Whakapakari. He'd been in almost every youth justice residence, but
22 he was also Care and Protection status under section 78 or 101 custody the whole time as
23 well. So again, same tent, same experience, at least at Whakapakari.
24 **MS JANES:** The Commissioners have already heard the Patrick Stevens evidence of $6,000 to
25 $81,000.
26 **MS HILL:** Yes.
27 **MS JANES:** Are there any other cases that come to mind that would be similar?
28 **MS HILL:** There are, I mean in terms of comparators and sometimes you have to be aware of
29 apples with apples, we've mentioned in our brief, although we've not touched on it here, is
30 that we had separate litigation against MSD for breaches of our claimant's privacy, and that
31 was relating to the delays in getting records, which if you take too long to provide
32 information under the Privacy Act, it's an interference with privacy.
33 I think I mentioned briefly that we took some group complaints to the Privacy
34 Commissioner who very kindly certified there had been a breach and sent us off on our way

1 to the Human Rights Review Tribunal and we filed two large group claims I think in the
2 end there were nearly 100 people in that group, although that was whittled down to 68 in
3 the end.
4 **MS COOPER:** 68 or 69.
5 **MS HILL:** Quite large enough, and as we moved through the Human Rights Tribunal we settled
6 all of those claims. There's one claim and it was by BA, I just need to find the part of the
7 brief that it's in, I'll talk to it because I can't think where it is in the brief. Sonja may be able
8 to help me find it in the meantime. So BA, he had a substantive claim against MSD and he
9 also had a claim against the Catholic church. And he was one of these long-standing
10 people who had been caught up in the delays, so he qualified for an offer under the Fast
11 Track Process. And part of that delay, of course, was the delay in getting his records. And
12 BA in about 2016, 17.
13 **MS JANES:** 1103 we've been helping —
14 **MS HILL:** Thank you. 1103. I can do most of it from memory but prefer not to. So he'd been
15 caught up in the Fast Track Process. But prior to the Fast Track Process we settled his
16 claims for interference with his privacy.
17 So for the delay in getting his records from MSD, we settled BA's claim for $11,000
18 and his entire substantive historic claim was settled for $5,000 under the Fast Track
19 Process. So BA received over twice the amount for the interference with his privacy, the
20 delay in getting records than he did for his entire experience in Social Welfare care. So
21 again, these stark comparators. And apples with apples, privacy claims are different. But
22 how can that be right? It shows the failure of the Fast Track Process for so many people
23 and it shows that generally compensation is so far out of step with where it needed to be.
24 **MS COOPER:** Sorry, I was just going to say, BA was also one of the claims that we had referred
25 to earlier whose case had been struck out by the High Court on the basis of the discretion
26 not being exercised in his favour, so he was one, I think, where we were —
27 **CHAIR:** That's the discretion under the Limitation Act.
28 **MS COOPER:** That's correct, Your Honour, so his claim was one of those ones that was struck
29 out, it was either 6 months or 18 months delay. And with he and all those people whose
30 claims had been struck out and discontinued on that basis, based on the representations that
31 the Ministry had made to the Human Rights Commission, so to Ros Noonan, as she was
32 doing her inquiry, where they said that they wouldn't use the Limitation Act as a bar to a
33 settlement, we said well, all those people have to come back in again. So his claim came
34 back in to be assessed under the Limitation Act.

1 So actually the delay was, in some ways worse, because it was the second time
2 around providing his records. And it still took something like 18 months.
3 **MS HILL:** Yes, so for those privacy claims the top settlements were in the 11 to 12,000, and
4 those were people who, as Sonja says, waited 18 months to get their records from MSD
5 which compromised our ability to work on their claims.
6 Did you want me to carry on with the ZYL?
7 **MS JANES:** Yes, I was thinking, if we can do that very quickly because we are in the right part of
8 your brief so let's quickly look at it.
9 **MS HILL:** We'll come back to specifically Bill of Rights Act compensation with LXS later on.
10 So following on from the comments in our brief about BA, we've noted the case of ZYL
11 and that starts at 1108 of our brief. Again a long-standing client, he had met with the
12 CCRT in September 2011 and his claim was filed. And at 1109 we've set out his
13 allegations. So physical assaults in a family home and at other institutions. And sexual
14 assaults as well, and physical assaults at residence at Puketai. So not a Whakapakari claim,
15 to be clear, but still a serious claim covered by the Bill of Rights Act. So a younger client
16 who was in care after 1990. Again, he opted in, well, he was opted in, to the Fast Track
17 Process and against our advice he accepted a Fast Track offer of $5,000. So another bottom
18 rung offer.
19 But as an adult, like a lot of our clients, he spent time in prison. And as a result of
20 the Supreme Court's decision in the *Marino/Gardiner* litigation about the calculation of
21 sentences and how remand credit was treated, he spent 89 days in prison longer than he
22 should have. And he was paid compensation of nearly $30,000 for that time being held in
23 prison. A number of people have received compensation as a result of that decision now.
24 But just contrast that again, the $5,000 for physical and sexual abuse as a child,
25 $30,000 for 89 days in prison. Not to detract from the issue of being held in prison too
26 long, but again, that stark contrast again between the compensation amounts. And I have to
27 say, even if a person is held on Alcatraz for a week or two, an incredibly harsh conditions,
28 they still don't get 30,000 for that either. So how do you marry up a child, teenager on an
29 island versus a grown man in a prison environment, apples and oranges but still the
30 compensation does not add up.
31 **MS COOPER:** I can give a recent example. I've just negotiated a settlement for a young client of
32 mine, Youth Court client who was wrongly detained in the Police cells for 17 hours and
33 without any difficulty at all I negotiated a $10,000 settlement. And that was for 17 hours.
34 And that is a young person.

1 **MS JANES:** We are at the lunch adjournment, so we will return to the Bill of Rights when we
2 come back.
3 **CHAIR:** A neat place. Thank you, we'll take the lunch adjournment.
4 **Lunch adjournment from 1.00 pm to 2.16 pm**
5 **CHAIR:** Afternoon Ms Janes.
6 **MS JANES:** Afternoon Commissioners. We're going to go to paragraphs 1036 to 1077 of the
7 brief of evidence, just to put in context the discussion about the Bill of Rights cases and the
8 compensation. So Amanda, can you take us through, firstly at paragraph 1036 you've
9 outlined that there are four features in relation to Bill of Rights Act. Can you go through
10 those and how they apply and why they're involved?
11 **MS HILL:** So the four features of Bill of Rights compensation is actually taken from the text
12 written by Andrew and Petra Butler, New Zealand Bill of Rights Act commentary, and so
13 the first factor of Bill of Rights Act compensation is that it has to be appropriate. And what
14 that means is that it has to relate to or speak to the nature of the breach. So in criminal law
15 that's often, you know, discarding evidence or something like that. In civil claims that's
16 declarations of breach or compensation.
17 The second aspect of Bill of Rights Act compensation is that it has to be effective.
18 And that's describing the need to have something that undoes the damage caused by the
19 breach. And that concept of effectiveness actually comes from the International Covenant
20 on Civil and Political Rights [ICCPR]. So it's an international law term.
21 So the third principle is that a remedy has to be proportionate. And that captures the
22 notion that it has to strike the right note, marking the seriousness of the particular breach.
23 And I always think of it as the Goldilocks approach of not too much, not too little, it has to
24 be just right.
25 And the last principle is vindication. This is actually a really important one.
26 Vindication was described by McGrath J in *Taunoa v Attorney-General* as upholding the
27 right in the face of the State's infringement, and he wrote that the dual purpose of an
28 effective remedy was vindication and compensation. And he said that's reflected in the fact
29 that when there's a breach of human rights there are two victims, and Tipping J wrote:
30 "First there's an immediate victim. The interests of that victim require the court to
31 consider what, if any, compensation is due. But because the breach also tends to undermine
32 the rule of law and societal norms, society as a whole becomes a victim too. Hence, the
33 court must also consider what is necessary by way of vindication in order to protect
34 society's interests in the observation of fundamental rights and freedoms.”

1 So those are the four principles that really frame what we talk about when we talk
2 about compensation for the Bill of Rights Act breaches.
3 **MS JANES:** Then can you read paragraphs 1037 and 1038.
4 **MS HILL:** So the Bill of Rights Act provides the following key protections for young people in
5 care or who were in care after September 1990. The right not to be subjected to torture or
6 cruel, degrading or disproportionately severe treatment or punishment. That's section 9.
7 The right to be secure against unreasonable search or seizure of the person, property,
8 correspondence [section 21]. So strip-searches, male searches. The third right that is most
9 common, right not to be arbitrarily arrested or detained, that's section 22. And where a
10 person is deprived of their liberty to be treated with humanity and with respect for the
11 inherent dignity of the person. That's section 23(5).
12 So and the next paragraph of the brief I've set out some actions that could constitute
13 breaches of the Bill of Rights Act. I've talked at length already about strip-searching.
14 Really invasive procedure and it's heavily regulated in prisons and in CYFS [Child, Youth
15 and Family Services] residences. And a residence is the only place that you are allowed to
16 strip-search and you have to do it in a particular way. So any strip-search at Whakapakari,
17 anywhere else is immediately a breach of section 21 of the Bill of Rights Act.
18 Secure units and time-out rooms. Secure units in residences again, heavily
19 regulated by what's now known as the Oranga Tamariki Act. There are rules around how
20 long you can be held in secure and you need a court order to hold a young person in secure
21 for longer than three days, 72 hours.
22 **MS JANES:** Can I just interrupt briefly there? We're going to talk about the Ministry of
23 Education processes, but there has been evidence from Trish Grant of the IHC about
24 putting children with disabilities into time-out or isolation.
25 **MS HILL:** Yes. So we are very clear that the use of time-out rooms has no lawful authority. And
26 you can contrast that, so a time-out room, it looks like a cupboard a lot of the time, there's
27 nothing in there, might be carpeted, and often the door can be locked. And these time-out
28 rooms were in residential schools, in some State schools, and CYFS residences and in other
29 residential settings. But they're different from secure units. Secure units, as I say, there's a
30 legislative plan. There is nothing about time-out rooms.
31 And we say that placing a child or a young person in a time-out room is a breach of
32 that arbitrary detention right that I described earlier. And that's been addressed by the
33 Ombudsman in the Miramar Central School investigation and that was the use of time-out
34 rooms for children with behavioural difficulties or disabilities. And any sort of

1 confinement, this arbitrary confinement. Alcatraz is the one we keep coming back to
2 because it's the most obvious. But with Moerangi Treks children were chained up for long
3 periods of time. The Otara Legionnaires Academy, children were chained to their beds. So
4 again that's a false imprisonment, that's a detention under the Bill of Rights Act.
5 And then looking at actions which could constitute a failure to treat someone who's
6 detained with humanity and respect for their inherent dignity. I've talked about chaining to
7 beds. Verbal abuse, there were often group punishments of being urinated on, a lot of
8 verbal abuse, some pretty brutal sexual and physical assaults placement in secure rooms or
9 time-out rooms while you were naked or being made to stay in there overnight or being
10 placed in time-out rooms or secure units that didn't have toilets and having to urinate on the
11 floor and things like that. So not only the detention, but this extra layer of failure to respect
12 the dignity of a person.
13 In our brief I've gone into a bit more detail about things like strip-searches in
14 Alcatraz, but I think I've probably described those enough unless there's anything you
15 wanted me to touch on now.
16 **MS JANES:** Then at 1043 of your brief you talk about compensation for breaches of the Bill of
17 Rights Act and then there are also some examples that — so can you just talk very briefly
18 generally about compensation and then we'll go to the examples?
19 **MS HILL:** Certainly. So, and I think I've described this before, we think there needs to be
20 separate compensation for the Bill of Rights Act breaches when they occur. And it needs to
21 be identified about what is responding to a Bill of Rights Act breach and what that breach
22 is. Because if you are talking about our fundamental human rights instruments, we need to
23 know where the breach was and we need to know how that remedy responds to it to meet
24 those four principles. So there needs to be real transparency, it should be transparency at
25 every step of these processes, but in particular around the Bill of Rights Act.
26 Because, of course, when the State acknowledges a breach there should be reporting
27 of that breach to the United Nations reporting bodies. But if they are hidden and there's no
28 transparency, then there's no reporting. So there's no accountability either. So that's an
29 important aspect of the Bill of Rights Act.
30 **COMMISSIONER ERUETI:** Can I just ask, would this be included as part of the current
31 redressing process, or is it also something that would be part of your one stop sort of
32 unitary scheme that you're looking at?
33 **MS HILL:** I think as you've described it as a one stop scheme, so I think it would have to deal
34 with the Bill of Rights Act, because as you can see, it all rolls together and if you want to

1 deal with a person's whole claim or whole state experience, then you need to deal with the
2 Bill of Rights Act.
3 **COMMISSIONER ERUETI:** In that case why would you stop at the Bill of Rights Act, because,
4 you know, its whakapapa goes way back to UDHR [Universal Declaration of Human
5 Rights] in the 40s and the ICCPR, so why does it have to be 1990?
6 **MS HILL:** The challenge is about what's domestically enacted. We sort of have to work with the
7 tools that we've got. I certainly, and we regularly plead breaches of everything going back
8 to the —
9 **CHAIR:** Universal Declaration.
10 **MS HILL:** Exactly. We've pleaded the Bill of Rights Act 1668 when we couldn't find anything
11 else, so we certainly don't limit ourselves. But I guess we have in New Zealand, the Bill of
12 Rights Act is domestically enacted so it is a New Zealand piece of legislation. It is much
13 harder to seek a remedy under the United Nations conventions because only some of them
14 have complaint mechanisms. So I think the Convention on the Rights of People With
15 Disabilities [CRPD] has a complaint mechanism, and the UNCAT, the Convention Against
16 Torture, and there have been several successful complaints to the United Nations about
17 treatment.
18 **COMMISSIONER ERUETI:** I understand that, but I think if you're designing a scheme, which
19 is what you're recommending, then there's more flexibility, isn't there?
20 **MS HILL:** Absolutely.
21 **COMMISSIONER ERUETI:** You don't have to be confined to the fact it's incorporated into
22 domestic law, the fact that it's been there, it's universal, timeless, so —
23 **MS HILL:** Absolutely, you could certainly build in acknowledging that. I think particularly with
24 some of the more recent conventions around the rights of indigenous people and
25 particularly around the rights of people with disabilities, it is important to recognise them,
26 because why sign them if you're not going to recognise them?
27 **MS COOPER:** Obviously in this context the Convention on the Rights of Children [CRC],
28 I mean that's absolutely critical.
29 **MS HILL:** Yes.
30 **MS COOPER:** I think, believe you me, that's one of the arguments we've made in this litigation is
31 actually breathing life into the conventions and that is definitely a legal argument that we've
32 tried. I remember actually when we did the Crown Health Financing Agency litigation and
33 we got to the Supreme Court level, the Supreme Court actually got us to provide
34 submissions about whether the Bill of Rights Act could be applied retrospectively. And

1 ultimately, I think, although we did both the Crown and we did quite a lot of work around
2 that and we certainly argued it could be applied retrospectively, at the end of the day I think
3 they decided it wasn't a matter that was directly raised by the appeal, so they wouldn't deal
4 with it.
5 So I think actually that issue is still live, that there may still be a case one day where
6 we may get to argue that. But we certainly argue the applicability of the conventions. As
7 Amanda says they're in every pleading and we rely on every convention that we can. And I
8 think to date probably only the Convention on the Rights of the Child has actually been
9 expressly mentioned in a decision, and that was the *Hosking* decision in relation to privacy
10 of — that was about whether their children's images could be published without consent.
11 And there specifically the Court of Appeal acknowledged that the rights, you know,
12 that the rights under that convention protected children's privacy and that there were special
13 rights of privacy for children. So, but a kind of more generic approach, I think Tony Ellis
14 has recently argued a case around disability, again trying to kind of give life to the
15 conventions. And the court's been very clear that in and of themselves the conventions
16 have no legal — I suppose you can't rely on them legally.
17 But I agree with you, I think if we are proposing an alternative body, we could
18 breathe life into them, whether politically there would be a will to do so because that then
19 obviously potentially has a broader scope for application. But I agree with you, why not,
20 that's certainly what we argue all the time.
21 **MS HILL:** There were some other — there was another High Court case that invoked the UN
22 Convention on the Rights of the Child, the name is escaping me right now.
23 **MS COOPER:** That's right.
24 **MS HILL:** But we can locate it for you later. We go to the Bill of Rights Act because it is a
25 fundamental human rights document in New Zealand and it doesn't need to be the only one,
26 it is the only one with a body of law around compensation, though. So looking for
27 something to refer to, I think we — that's our natural go-to. But I agree we don't need to be
28 limited.
29 **COMMISSIONER ERUETI:** I'm just asking, my question is why you focus on BORA [Bill of
30 Rights Act] and not going back to — but it seems like you are, because it arises and it's
31 right back to the declaration.
32 **MS HILL:** We do, but when we're looking at what remedies are available there haven't really
33 been a lot of remedies from the UN conventions. There's a lot of rights in there, but the
34 ability to obtain a remedy under them is quite limited. So when we're talking about redress.

1 **CHAIR:** Could I just ask a question about reporting. Do you know if the breaches which you
2 allege have been occurring are being reported by the Government? It may be a question for
3 Crown witnesses, but I just wondered do you know anything about it?
4 **MS COOPER:** I think actually the reporting requirement is only in respect of section 9 breaches
5 so it's only torture. And given that there has not yet been a successful torture case in
6 New Zealand —
7 **MS HILL:** Well, no, there was *Taunoa*.
8 **MS COOPER:** No, *Taunoa* was section 23, so I think there was —
9 **CHAIR:** We don't need to take up too much time, but at this stage you don't know, it's probably
10 more addressed to the —
11 **MS HILL:** I think Sonja's right, I think there is limited obligations in terms of you'd have to
12 report everything and it may be only that when there's a formal court finding. So it may
13 have overstretched the description there. But I can't be sure of that I'm afraid.
14 **MS COOPER:** Which just historically has meant where we are alleging that more serious level of
15 torture, in the older days we were told by Crown Law that unless there was a court finding
16 to that effect, that they would never settle it on the basis of it being a section 9 breach, and
17 actually all of the settlement agreements contract out of it being a Bill of Rights breach, a
18 section 9 Bill of Rights breach, so that there is no need to report. So every single
19 agreement that covers —
20 **CHAIR:** So the requirement to report in a way is a chilling effect on the ability of the Crown to
21 acknowledge there might have been torture, is that what —
22 **MS COOPER:** Yes, as I say that, for a plaintiff, for a claimant to actually have an allegation of
23 torture accepted, we've been told that would have to be through a court, so you'd have to go
24 through a trial.
25 **CHAIR:** That's right.
26 **MS COOPER:** Yeah, otherwise they contract out of it in any settlement document.
27 **CHAIR:** Thank you.
28 **MS JANES:** Just very briefly before we leave that topic. If, as you envisage and have spoken
29 about an independent agency that was able to collect a body of knowledge about Bill of
30 Rights breaches, what would you say about the ability to therefore quantify those breaches
31 which may be missing in the current process?
32 **MS HILL:** I think it would bring a level of consistency and transparency to addressing that
33 redress that we don't have right now, because MSD's process is the only one that even
34 makes an attempt to deal with the Bill of Rights Act. There is no Bill of Rights Act or

1 human rights component to the Ministry of Education redress or Ministry of Health
2 process. So there is a very inconsistent approach across the board.
3 **MS JANES:** And at paragraphs 1047 and 1048, you've expressed your view about MSD's
4 liability.
5 **MS HILL:** In our view, MSD's liability under the Bill of Rights Act could be very broad.
6 Because it's not just MSD as the State department and its actors, MSD would also be liable
7 for parts of it that — other parts that are engaged to do those public duties, there's that
8 second part that engages the Bill of Rights Act in section 3. And so we'd say that MSD is
9 also liable for any breaches of rights carried out by what we've called section 396
10 providers, or people approved by Oranga Tamariki or CYFS to care for children. And
11 we've seen a lot of actions that would constitute breaches of the Bill of Rights Act on those
12 third party programmes.
13 So very, very broad I think, and particularly given the nature of children in care, I
14 think the seriousness of the breach would be increased because of their vulnerability.
15 **MS COOPER:** And so that's one of the reasons why the trials we have tracking for next year are,
16 again, important, because they test all of these issues. They are raising sexual abuse,
17 physical abuse, they are, you know, section 396 providers, they cross straddle the kind of
18 jump between care and protection and youth justice. There's time-out issues, there's use of
19 secure, there's strip-searching. So it covers — also too just the various kind of behavioural
20 modification regimes that were in place at some of the residential education schools, and
21 whether they actually were a form of punishment.
22 So there's a lot of issues that are completely unresolved at the moment, and as I say,
23 at the moment the Ministry gets to decide whether they're breaches at all and usually they
24 say no, they're not. And also too, what compensation might attach to that.
25 **MS HILL:** The other point that I would make before we leave this topic is that there is certainly
26 jurisprudence that the Bill of Rights Act imposes not just a duty not to harm, but a positive
27 duty to keep people safe. So it goes further than don't breach, it is a positive obligation to
28 keep people who are detained by the State safe.
29 **MS JANES:** Then at paragraph 1050 and following, you go through some examples. Can you
30 just pick out the ones that you think are most pertinent at this point?
31 **MS HILL:** The most important example is at paragraph 1050 where we've given the example of
32 the claimant we've called LXS who was in care for eight years between 1996 and 2004.
33 And he was placed in a number of foster homes, several CYFS residences and the
34 Whakapakari programme. In a way he had a very unusual settlement because it was split

1 into two parts. He received a settlement for all of his experiences except for Whakapakari,
2 because at that time we were working with MSD about what quantum of compensation
3 Whakapakari attracted.
4 So LXS settled all of his claim and then we were left with the three key allegations
5 from his time at Whakapakari; a strip-search, placement at Alcatraz for one week, and a
6 serious physical assault from a member of the flying squad. Now I don't think we've used
7 that term before, the flying squad were the senior boys at the programme who acted on the
8 instructions of staff to chase down absconders and to beat boys to keep them in line.
9 So those were the three allegations that were outstanding for the claim by LXS.
10 And MSD only offered to settle in relation to the strip-search and their week on Alcatraz.
11 And after quite a lot of negotiation, LXS received $20,000 for the strip-search and the time
12 on Alcatraz. And this is the only time that we've managed to isolate those things to say this
13 is how much compensation you should receive for these breaches.
14 But he's the only one we've ever been — we've ever had that level of transparency
15 for. And it's worth contrasting him, we talked earlier about BSM, who had been at
16 Whakapakari and had those experiences and got $5,000 under the Fast Track Process. And
17 we can also contrast the LXS claim with SEM who we've talked about at paragraph 1053.
18 SEM made a number of allegations about his time in care, and again, like LXS,
19 youth justice residences and at Whakapakari. And while SEM was at Whakapakari he was
20 assaulted a number of times by staff members. That's serious assaults with implements and
21 weapons. There was an attempted rape by a group of boys while a staff member watched.
22 He had a pat down search which is still an unlawful search, regular beatings by the flying
23 squad and at least two weeks on Alcatraz. And SEM, he was eligible for a Fast Track offer.
24 And he was eventually made an offer of $12,000 in relation to his time in care.
25 So all of those allegations that I've described. And our analysis said that that
26 $12,000 probably applied to everything except Whakapakari, but it was in full and final
27 settlement of his claim. So SEM received less for his entire experience than LXS received
28 for two aspects of his time at Whakapakari.
29 And MSD is likely to say that it was SEM's choice to take that Fast Track offer. He
30 had a choice, he could have rejected it and waited for the full investigation for however
31 long that may have taken. But it really reflects for me the State's position of power here.
32 He'd been waiting a long time, everyone in the Fast Track group had. And he'd been
33 released from prison, he was desperate for money, he felt compelled to take it. He'd waited
34 10 years to have his claim resolved.

1 And it really, if we go back to those model litigant principles of not taking
2 advantage of poor people, I cannot think of a better illustration than these people.
3 And we've already covered the examples of BSM and T and those claims also
4 reflected how the Bill of Rights Act was treated when you weren't in the Fast Track
5 Process.
6 **MS JANES:** Then there was also WM.
7 **MS HILL:** Yes. Now, sorry, Hanne which part of the brief are you at?
8 **MS JANES:** I was hoping you weren't going to ask me that.
9 **MS COOPER:** I think I can talk to that. So I looked at WM. So WM was — and I looked at him
10 because when I read the brief saying that if — that only, that clients were excluded from the
11 Fast Track Process and limited to the $5,000 only if they had no status with MSD. So WM
12 was the same as BM, he was also in the custody of the Chief Executive or the Director
13 General at that stage. He also had very serious allegations including at Whakapakari and he
14 also received a $5,000 offer.
15 So he's just another case where we say that evidence that you have before you is
16 incorrect, we can give, and they were two examples straight away. There were many
17 clients also who got $5,000 offers where they were in other institutions. I think I talked
18 about that, so places like Kohitere or Epuni or Hokio and WW was one of those. But there
19 were multiple. I pulled up I think about 10 to 12 just without any difficulty at all. And they
20 were all people who we had assessed as being at least category 4 if not higher. So $20,000
21 and higher, because they were in known placements, they had identified known staff
22 members, they were talking about serious assaults and other — and that's because the Fast
23 Track, unlike other processes, actually compensated for sexual assaults by other children,
24 whereas other iterations of the process do not.
25 So, you know, it's like if you looked at that, and we'd already been through that
26 moderation process ourselves, and as you know, our figures were pretty much the same as
27 the Ministry's when they did the same exercise. So for them to have got $5,000, it was
28 clear it was the effect of the moderation process. And perhaps, I mean there were a
29 disproportionate number of clients with the surname starting with W who had $5,000
30 offers. That was just — it was just an observation, but again, we had a reasonably large
31 number of them.
32 And then thankfully a few of them did actually reject the Fast Track offers. And all
33 of their offers were considerably higher, except for one.
34 **MS HILL:** There's a mix of two different things in the example Sonja's talking about. WM was

1 an under the Bill of Rights Act and the others were not. That reflects the dual issue, the
2 Bill of Rights issue and also going back to the Fast Track issues as well. There's one other
3 example that I'll give before we leave this section. It was a man who was placed at
4 Whakapakari, it was the only place he went in care, and he was there under a Family Group
5 Conference plan. So he didn't have any custody orders, he had no Youth Court orders, this
6 happens every now and then, and it was agreed that his parents would pay the camp fees
7 but that — no CYFS paid the camp fees.
8 **MS COOPER:** CYFS paid the camp fees.
9 **MS HILL:** And he was sent off to Whakapakari on the understanding that if he completed the
10 programme his charges would be —
11 **MS COOPER:** He'd get a 282 discharge so a clean slate.
12 **MS HILL:** And he had to complete the Whakapakari programme to do that. So he had physical
13 abuse there and he certainly did not have a good time there. But he had no sexual abuse,
14 and he received $30,000 in settlement. That wasn't a Fast Track offer, and it's an outlier
15 claim, because it doesn't fit the mould of the trial track, it doesn't fit the mould of being
16 under custody, but CYFS accept the responsibility for him, and so he received what was a
17 very good offer, given his —
18 **MS COOPER:** His (inaudible) status.
19 **MS HILL:** — allegation and his status. So it was just an unusual case that sort of fell somewhere
20 in the middle of all of these things and we're not — we're certainly very happy for him, but
21 in terms of consistency, it was a strange one.
22 **COMMISSIONER ALOFIVAE:** Was he a first offender?
23 **MS HILL:** I can't remember, he wasn't a serious offender, he wasn't up there in the Youth Court,
24 so I don't think he had much Youth Court time under his belt at that point.
25 **MS COOPER:** Yes, he was just one of those rare people, and I even can think of in my own
26 youth advocate experience, I can think of maybe one that we sent on a Family Group
27 Conference plan. It's very unusual, usually you were there under a supervision with
28 activity order, because essentially it was only meant to be for the serious offenders, that
29 was part of the criteria of the programme anyway, which was why it was concerning that a
30 lot of the clients that we've talked about who've had settlement offers were actually really
31 young and were there with Care and Protection status typically only Care and Protection
32 status. And they were meant to go there.
33 **MS JANES:** So just rounding out, from what we've heard, you've done a review of the 5,000
34 payment offers, some accepted, some not accepted and we've gone really right up to 85,000

1 as we saw. I suppose if you put yourself in the Crown's shoes they've got a backlog of
2 claims, they are trying to devise a process that will allow them to be dealt with more swiftly
3 than full assessments, but your evidence is that the full assessments certainly gets you to the
4 higher end of the compensation spectrum.
5 **MS COOPER:** Well, I have to say that they certainly got more than what they'd, you know, the
6 $5,000 offers, but I could not say that the offers they ultimately received were generous.
7 And I mean I think we'll talk about that more, but our general feeling about the current
8 batch of offers is that they are lower again than we would have expected before the Fast
9 Track Process.
10 So no, they were not — I mean yes, they were probably, you know, at least two
11 times, three times higher than the offers made under the Fast Track, but still prior to that
12 process for those sorts of claims we would have been expecting a minimum of $20,000
13 offer, and that tariff level seems to have fallen to between 12 and 18,000. So it's a big drop.
14 When one thinks that, you know, most of these survivors have spent years in care and
15 suffered catastrophic harm that has caused them long-term impacts, and this is all it's worth.
16 **MS JANES:** If you were devising a scheme because the Commissioners have heard evidence,
17 certainly from people who have had very long processes, and if they could go back they
18 would obviously like them to be much faster, versus hearing from the Sammons sisters who
19 said no, actually they needed that full assessment because otherwise it wasn't meaningful.
20 So if you're devising a process, how do you balance between speed but proper
21 acknowledgment versus the 10 to 15 years' experience where you're just retraumatised?
22 **MS HILL:** Like any process first of all has to be transparent, so people know what to expect.
23 And with that information then they can make some choices. And so there may be people
24 who want to take a financial package reasonably quickly and get it over and done with,
25 because sometimes that is — that's what they want. And if they understand what that
26 means and what it covers and there's transparency around that, and if that's what they want
27 then that's fine.
28 And if people want to take the longer process then that has to be okay too. But the
29 outcomes have to be the same, and the rules have to be known before you start. It's okay to
30 have different processes and it's really good to tailor to people, because not everyone's the
31 same. But they've got to know what they're getting into.
32 And they can't just — you can't just unilaterally change it halfway through. Once
33 they're in a process they should be able to stay in the same process unless it gets better of
34 course, but certainty, certainty and transparency. And you can have as many different

1 processes as you like, but they've just got to know.
2 **MS COOPER:** I think too we need to come back in terms of this client group and just focus on
3 the vulnerability. We are typically dealing with people who are poor, who are uneducated,
4 who have mental health issues, alcohol and drug abuse issues, are very inculcated within
5 the criminal justice system, have fairly bleak outlooks, and no money and no housing,
6 mostly no jobs, no car, nothing. So for those people the prospect of a quick cash settlement
7 may seem really good to cover a short-term crisis.
8 So there I think it's really essential that everybody has some advice, some
9 independent advice, and because this is a legal process, and we can't say it's not, we apply
10 law all the way through this process, that should be independent advice from a lawyer who
11 can say "These are the pros and the cons, this is what you might be entitled to if you wait
12 longer, but if you say now this is what you might get".
13 And I also think we need to be able to say for those people who have an urgent
14 financial need, and they do, and/or may not be yet in a position where they can talk about
15 all their experiences because it's confronting, as we've heard, to talk about your abuse to
16 complete strangers, and it takes a while to build up that rapport and that trust and even for
17 people to kind of understand themselves what has happened to them and how that might
18 have impacted on them, I think it's important that they be able to come back and ask for a
19 top-up. And that's even, as I say, if more information is developed.
20 So as, you know, for example if — when they first come to a process and a
21 particular staff member is not known as an abuser and so that particular allegation might
22 not be accepted, but as the body of information builds up and it becomes known, yes all
23 right, we've now got five, 10 people, they should be able to come back, that should be
24 reviewed or they should be — there should be a process and if it was an independent
25 process, they could be contacted and said "We'll give you a top-up because we now accept
26 that allegation".
27 So I mean we saw it with Kerry, we went back to St John of God as that process
28 developed and as he had counselling and he was able to actually identify one of the
29 perpetrators that he hadn't been able to identify at that very beginning of the process. They
30 were prepared to look at it again and give him an additional top-up. So and there are other
31 organisations that have done that as well.
32 So I think if we've got an independent organisation that would be able to say this
33 might be just an interim or a partial settlement and we might just leave that open so that —
34 because we know you've been in other parts, other placements that you're not ready to talk

1 about yet, we'll leave that open. But what happens in these current processes is that
2 claimants are tied into full and final settlements that effectively shut off their rights to come
3 back again.
4 And I think just, as I say, we need to constantly remember the vulnerability of this
5 group and say is that proper.
6 **MS JANES:** There's actually a document, but if we go to number 55 MSC for committee ending
7 in 617, but before we look at that document, has there been a stage that MSD has a revisit
8 policy as you two have been describing?
9 **MS HILL:** No.
10 **MS COOPER:** No.
11 **MS HILL:** Not until this document.
12 **MS JANES:** So this document has been provided, it's dated July 2020, it's a new policy guidance
13 Ministry of Social Development request to register second claims or revisit claims policy
14 guidance. So if we can just call out the highlighted paragraph. And I'll have you —
15 **MS HILL:** "The Ministry provides a claims process where the general expectation is that each
16 claimant brings only one claim against the Ministry relating to their time in care and any
17 resolution currently agreed upon is in full and final settlement".
18 **MS JANES:** And moving to the next page. Call that out thank you.
19 **MS HILL:** "However, there may be the occasional situation where it is appropriate to consider a
20 request for a second claim to be registered or for the Ministry to revisit a claim where a
21 payment has already been made. The permitting of second claims or revisiting a claim is
22 consistent with principle 3 of the Crown resolution strategy" — I won't read that out we
23 touched on that before.
24 **MS JANES:** No, we visited that this morning.
25 **MS HILL:** "Though the strategy is also clear that the settlement will generally be full and final".
26 **MS JANES:** And moving to the next page.
27 **MS HILL:** "When considering a request to revisit a claim or allegations within a claim the
28 following factors are likely to be relevant. The Ministry may have found a missing file that
29 contains relevant material information, or there may be new material information that was
30 not available at the time of the previous claim".
31 **MS JANES:** And to the next page thank you.
32 **MS HILL:** "If a second claim is registered only the new allegations are to be assessed unless the
33 Ministry has agreed to revisit other allegations. If a claim is being revisited, the assessment
34 will likely take the form of a detailed assessment or review".

1 **MS JANES:** So having recently received this policy and considered it against the light of your
2 claimant categories, what comments or recommendations would you like?
3 **MS HILL:** It's a pretty narrow ground, I have to say, to allow a second claim. I talked yesterday
4 about John Ngatai. The Ministry's obviously received some form of new information about
5 him, because as you'll recall they didn't accept him as an abuser for a very long time, denied
6 a lot of claims, but suddenly did. We still don't know why.
7 So what happens to the people who were abused by him and had their claims
8 declined apart from the fact that we haven't had any contact with them for years, nobody's
9 going to try and locate them, if they do come back, do they fit that policy? I'm — is that
10 new information, certainly we don't know what the information is. So I think there's a lot
11 of problems with that, it's —
12 **MS COOPER:** It's ambiguous.
13 **MS HILL:** It's better than what we've had, but when you have nothing, everything's an
14 improvement I guess.
15 **MS COOPER:** And I think because we're actually going through that with a client at the moment.
16 And we're actually kind of debating whether, so he just wasn't able to fully disclose, as we
17 hear was the problem, all of his experiences at particular placements, he talked about the
18 placements but he just couldn't talk about all of his experiences. And we're presently
19 having a debate with MSD about whether that fits within the new policy because they're
20 saying, you know, we've already given him money for those placements, but we're saying
21 yes, but not for those aspects of his claim because he didn't tell you about them.
22 So again, it's kind of unclear how it's going to be applied and how it will play out in
23 a real life situation, it's watch this space. We're debating it now.
24 **MS JANES:** This is probably an opportune time to look at the categories.
25 **MS HILL:** Yes.
26 **MS JANES:** So as a compare and contrast exercise, Amanda, you're going to look at the
27 document you were talking about this morning, the draft categories that you saw versus the
28 ones that have now been published. So we can go to document witness 94-113 and that's
29 the revised accelerated payment draft categories from 2014.
30 **MS HILL:** These are actually the actual categories.
31 **MS COOPER:** So these are the ones we received once we got the Crown's documents from
32 recollection.
33 **MS HILL:** So there was an earlier set, but we'll just deal with these ones because this was what
34 was imposed in the end. So if we can go to page 2, because that's just got the exhibit

1 sticker in the middle of it. Then we can see there, so this is the Fast Track, to be clear, this
2 is the Fast Track Process from 2016. And category 1, that top category, we can have a look
3 at that. So prolonged and serious abuse.
4 So we were talking this morning about this, so serious physical abuse perpetrated by
5 a staff member or caregiver, and/or serious sexual abuse perpetrated by a staff member or
6 caregiver with the additional requirement that the abuse has been repeated and sustained
7 over a significant period of time. And in bold there it's expected that most claimants in this
8 category will have suffered both serious physical and serious sexual abuse.
9 And as I've described before, the terms "serious sexual" and "moderate", they're all
10 the subject of a separate set of definitions that go with this document. And you can see
11 them underneath. So that second half of the page — sorry, I meant the second half of that
12 category, apologies, the definitions section there. So that defines what "serious physical
13 abuse", "serious sexual abuse" and "false imprisonment" are.
14 And as I've said, anything that carries a maximum sentence of 10 years or more in a
15 criminal sense is serious sexual abuse. False imprisonment is as legally defined, i.e. held
16 without any legal cause and includes being held in any form of alternate care without legal
17 basis. That's quite a strong definition of false imprisonment compared to what we have
18 now and I'll compare and contrast on that soon. So just remember that definition is there
19 for the Fast Track.
20 So we have a look at category 2 now, so category 1, $50,000, category 2, $40,000.
21 So serious abuse multiple incidents. So this requires serious physical abuse by one or more
22 staff members on more than three occasions, and/or serious sexual abuse perpetrated by
23 staff or caregivers on more than three occasions, or periods of false imprisonment. So it's a
24 bit of a mix and match situation.
25 And actually fitting this to a claimant's experience is at times quite challenging. But
26 you can see the sort of things that it requires to get into these categories. There wasn't any
27 movement between the categories either, like the offers would come in at 40 or 20 or 50,
28 there weren't ranges. And so as you can see in bold, it's expected that most claimants will
29 have suffered both serious physical and serious sexual, but perhaps not over such a
30 prolonged and sustained period of time as category 1.
31 And there's another set of definitions in that box. It's the same definitions as
32 category 1 there, "serious physical", "serious sexual abuse" and "false imprisonment".
33 **MS COOPER:** Can I just also focus on the serious physical abuse, because you'll see there it was
34 a requirement resulting in broken bones or other trauma and would ordinarily require

1 medical attention or hospitalisation. So that was the caveat on the serious physical abuse.
2 And many of our clients, their injuries would have been in that category, but they never got
3 any medical treatment. So that would automatically push them down.
4 **MS HILL:** So we'll have a quick look at category 3. This is the $30,000 category. So serious
5 physical abuse by staff members or caregivers, so one or more had to have multiples, one or
6 more, on three or fewer occasions, and/or serious sexual abuse by one or more staff
7 members or caregivers, three or four occasions, or more than three weeks in secure care
8 without reasonable cause, and physical or sexual abuse either while in secure care or in
9 other placements.
10 **MS JANES:** Can I just ask you, if somebody had been held in secure but had not suffered
11 physical or sexual abuse?
12 **MS HILL:** Then they wouldn't meet that requirement. So the first two bullet points are the one
13 option and the second two are the alternate but you have to meet both arms of those bullet
14 points.
15 **MS COOPER:** Also too, it's those words "without reasonable cause". I mean to this day we have
16 a different view from the Ministry about what those words mean. Yeah, so that again was
17 very subjective, not defined. One would have thought if it was in breach of the regulations
18 or the statute that was sufficient, apparently not.
19 **MS JANES:** This is going back to the first document we saw this morning where you actually
20 were trying to seek clarification about it.
21 **MS HILL:** Yes. Just noting that secure care without reasonable cause is different to false
22 imprisonment, they're two different terms there. Category 3 — no we've done that one,
23 category 4, $20,000. Moderate abuse. This is where we start getting into the moderate
24 terminology. So $20,000. Moderate physical abuse by one or more staff members or
25 caregivers, and/or moderate sexual abuse by one or more staff members or caregivers, or
26 serious sexual abuse by other residents, or more than three weeks in secure care without
27 reasonable cause.
28 As Sonja identified earlier, the Fast Track did provide for sexual abuse by other
29 residents. This is — I mean this was a very good thing about the Fast Track because there
30 is an immunity built into the Children and Young Person's legislation, now it's still there
31 until the Oranga Tamariki Act, that MSD will not be liable for torts committed by other
32 residents in care.
33 **MS COOPER:** Unless they were at the direction of staff.
34 **MS HILL:** Or they occurred due to inadequate supervision, which is the other way that we —

1 **MS COOPER:** Argue it.
2 **MS HILL:** — push that through, yeah. But showing inadequate supervision in a residence is
3 quite challenging in and of itself. And you'll see the definition there of moderate physical
4 abuse, assaults with or without hands that result in visible injury such as bruising and
5 abrasions and ordinarily require the need for medical attention. And I think that Sonja's
6 comments about medical attention are just as relevant there.
7 There's also a definition of "moderate sexual abuse" which goes over the page, it's
8 offences that attract a maximum penalty of less than 10 years. And they've also defined
9 without reasonable cause as no identifiable or documented rationale for placement in secure
10 beyond that period of time.
11 So for people who aren't familiar with the Crimes Act sentencing, the short point
12 around the moderate and serious abuse, moderate abuse would constitute forced
13 masturbation, touching, those sorts of things, serious sexual abuse would be forced oral sex,
14 and any form of rape.
15 **MS COOPER:** And if you were a 12-year-old there were specific provision visions, the younger
16 the child the more seriously —
17 **CHAIR:** These come from the Court of Appeal tariff cases in sentencing, do they?
18 **MS COOPER:** They come from the Crimes Act.
19 **CHAIR:** From the Crimes Act?
20 **MS COOPER:** From the Crimes Act, yes, these were definitions we pushed because otherwise
21 we thought again it was too loose.
22 **CHAIR:** It gave some solidity to the definition.
23 **MS COOPER:** Exactly. We were very keen also to push definitions around physical assaults as
24 well because, again, that's quite well-defined in the Crimes Act, but we didn't get there.
25 And we were also pushing cruelty and neglect because they're actually offences under the
26 Oranga Tamariki Act, but — and in the Crimes Act, but those were not part of the process.
27 **MS JANES:** In response to the concern that was raised when you received the response about
28 there being no real criteria and subjectivity, this appears, from what I'm hearing in your
29 evidence, to be your way to try and put at least some parameters around the categories.
30 **MS COOPER:** Well, yes, I mean we were very clear that we wanted it to be as transparent as
31 possible, because I mean as you will obviously have gleaned from our evidence, where
32 there's a lack of transparency it wobbles, and I think we wanted to remove the basis for
33 wobbles as much as possible, so that if they fit that criteria in terms of their allegations,
34 that's where they sat.

1 **MS JANES:** And you've described already that you did the assessment and then the Ministry of
2 Social Development did the same assessment, and got at least the same number or
3 slightly —
4 **MS COOPER:** That was obviously prior to — that was when we were saying you haven't
5 budgeted enough for it. So yeah, that was at that point. But yes, we did, they actually had,
6 I think, somewhat higher than we did there, they were double us in category 1, I think they
7 were higher than us in — we went through it, I think category 2 as well, so yeah.
8 **MS HILL:** To have a quick look at the remaining categories, so there's a bit of hand editing on
9 there, I'm not sure who did that. That was —
10 **MS COOPER:** It looks like my handwriting.
11 **MS HILL:** But the exhibit came from MSD so I think it was a mutually agreed change. So
12 category 5 was $12,000 and it's described as low level abuse, a lot of our clients got
13 $12,000 offers, of course. That describes low level physical abuse by a staff member or
14 caregiver, and/or sexually inappropriate behaviour, or sexual abuse by other residents, or
15 being held in secure care for less than three weeks without reasonable cause, and having
16 suffered low level physical abuse.
17 So this category includes more serious sexual assaults by other children that don't
18 constitute the same breach of trust as above, which is an interesting description of that. So
19 sexually inappropriate behaviour is defined as watching or inappropriate touching or
20 exposure.
21 And then the last category, the $5,000 category, claims with insufficient particulars.
22 The claimants made claims of physical abuse or ill treatment where the claimant has been
23 unable to provide sufficient particulars or where the claimant readily identifies a practice
24 failure that did not result in abuse. Just contrast that category with BSM for a minute and
25 what we told you about his claim.
26 **MS COOPER:** And if you look at WW as well, same.
27 **MS HILL:** So those are the 2016 Fast Track categories. Would it be useful to bring up the
28 current categories, or do you want me to talk to them a bit first?
29 **MS JANES:** I think talk to them a little bit first. While you're doing that, because we've heard
30 from several of the survivor witnesses a young child how terrifying it was to be put into
31 secure, even without any abuse of any kind. So in those categories, are they in the bottom
32 $5,000 category?
33 **MS HILL:** Just to be placed into secure?
34 **MS JANES:** Just to be placed.

1 **MS HILL:** It would depend on how long and whether there was reasonable cause to do it. But if
2 you were placed there and you didn't meet that test of reasonable cause, then I don't know
3 that you would have got anything under the Fast Track.
4 **MS JANES:** I'll call up the document while you're doing that.
5 **MS HILL:** Yesterday we talked about obtaining the categories and the Ombudsman describing it
6 as a take it or leave it process. In our brief we've described the lead-up to the new process
7 even though there's been many iterations, but it's easiest to call it the current or new
8 process. And there was a consultation held by MSD in light of the Waitangi Tribunal
9 claim, there was a consultation over how MSD could better respond to Māori claimants in a
10 way that would better reflect tikanga. And there was also some consultation with ourselves
11 and other professionals about improving the claims process.
12 And as I described yesterday, we were sent some brochures about the new process
13 and also alerted to the fact that it was being implemented. That was in April 2019, the
14 process was actually introduced in November 2018.
15 And I've described getting the rules of that process yesterday. And when we finally
16 got the rules, it included categories that reflected similar sort of payments, but in the detail
17 it’s quite different.
18 **COMMISSIONER ERUETI:** The FTP [Fast Track Process] process (inaudible).
19 **MS HILL:** To the categories you've just seen. There's a couple of things I want to say about the
20 language and how those categories are managed before we look at them. The first thing is
21 that MSD's new process no longer accepts or rejects allegations, things are taken into
22 account for the purposes of settlement. There's a change of language there which is quite
23 difficult for our clients to understand, and I think most claimants would be quite confused
24 by that. Things that are sort of generally taken into account, there's no clear accept or reject
25 anymore, which makes things a lot less transparent.
26 It also — we also raise the query about, if you're not accepting or rejecting, how are
27 you learning, how do you collate that information when you say you want to learn and give
28 this information to Oranga Tamariki to improve things? We don't know how that happens
29 when you just sort of amorphously take things into account.
30 And the reason that that has changed is on the face of it the new process changes the
31 burden of proof. Up until now, except for the Fast Track, there has been a position of
32 starting from a position of disbelief. You have to prove what you've experienced. And
33 when the new process was introduced it was described to us as having a shifted burden of
34 proof to starting from a position of belief. Much like the Fast Track, taking things on their

1 face unless something strongly says that you weren't(?) in the institution.
2 But it's more complicated than that. The new process only applies that better
3 burden of proof for low level allegations. As soon as an allegation reaches a threshold of
4 serious, the burden shifts back to a position of disbelief. And the assessor takes what's
5 called a step 2 analysis.
6 But so I want to clarify that for you because that language is important when you
7 look at the categories, and I'll explain what a step 2 analysis involves. But if we can put
8 these categories up so we can see the difference. So this is the current categories for the
9 MSD process.
10 **MS JANES:** This is document MSC ending 657. And it's the MSD historic claims business
11 process and guidance from October 2019.
12 **MS HILL:** So the categories start at the top, so we've got seven categories now. And category 7
13 is for compensation above $55,000. You'll see in that far row the percentage of all claims.
14 And think back to those percentages that we looked at for the Fast Track Process. And
15 that's the first strong indication we had that we might have ourselves a bell curve again, or
16 that claims were being spread in a way that fitted our budget.
17 So category 7 is the most serious claims. But the description of it, if you could
18 just — no, that's all right. Clear aggravating factors in the mix of abuse detailed in category
19 6 with circumstances and conditions that are exceptional. So it could involve a level of
20 violence, death, exposure or injury that sets it apart from other claimant experiences.
21 So just pausing on that, if you die in CYFS care, you will probably be a category 7.
22 Somewhere above $55,000, like, and yet you contrast with T who got $60,000, he's very
23 much alive and well as a result of his experiences, although obviously impacted by them.
24 **MS COOPER:** But they don't accept claims for dead people.
25 **MS HILL:** Also that.
26 **MS COOPER:** So it would be irrelevant if you've died in care because you can't — your whānau
27 can't bring a claim.
28 **MS HILL:** That's another complicated matter altogether.
29 **MS JANES:** We'll return to that shortly.
30 **MS HILL:** The description is quite startling for category 7. As we go down we see then it starts
31 to go into ranges. So category 6, it says $50,000 but actually it's a range there of 46 to 55.
32 So there's a bit of room for the people assessing to move within that range and that's — this
33 is where the descriptions get quite hard. Chronic and serious sexual abuse and physical
34 abuse by a responsible adult and/or high levels of inaction contributing to extreme abuse

1 and a context of chronic wide-ranging practice failures that contribute to a prolonged and
2 severely harmful care experience.
3 There are a lot of moving parts in that category. And all of the words that are
4 underlined are defined by MSD. A responsible adult is usually an approved caregiver or
5 staff member. High levels of inaction or — and practice failures, they obviously refer to
6 social work practice failures which were not included in the Fast Track Process, it's a much
7 more detailed assessment.
8 And there's a note there for guidance for a claim to reach this threshold, there's an
9 assumption of increasing severity and may also involve serious abuse when the child was
10 profoundly vulnerable.
11 I would say any child in care is profoundly vulnerable. And so this is obviously for
12 the assessors, your manager will provide further guidance. So that's quite a hard thing, it's a
13 lot to untangle in there. There's a lot of different things going on. But there is no mention
14 of false imprisonment and there's no mention of secure units or being detained.
15 **MS COOPER:** Category 5 or the Bill of Rights Act.
16 **MS HILL:** That is, yeah, that's dealt with separately as well. So there's a mix of cumulative,
17 serious, physical and/or serious sexual abuse which is frequent and chronic by responsible
18 adults, and/or high levels of inaction contributing to serious chronic physical or sexual
19 abuse.
20 Serious abuse at a time when the child is highly vulnerable, and a continued impact
21 on wide-ranging practice failures. So just sort of moving down and becoming less serious
22 again, no mention of false imprisonment or secure units.
23 Now the italicised part of category 5 is important. So it will involve an increasing
24 chronic and serious physical and/or sexual abuse and then the second to last line, this has
25 been evidenced by a step 2 to be in scope. So that step 2 analysis that I mentioned before.
26 And I'll come back to how that happens.
27 And if we move down category 4.
28 **MS JANES:** Before you move on, just doing the math on category 7, 6, 5, that's 9% of claims.
29 **MS HILL:** Yes.
30 **MS JANES:** Would you like to take a break now or would you like to complete this little section?
31 **CHAIR:** This will take a little while. How many more categories?
32 **MS HILL:** We go down to 1.
33 **MS JANES:** So we've got four categories, so —
34 **CHAIR:** I think we should take a break now and we'll come back fresh to it. We'll take a break,

1 thank you.
2 **Adjournment from 3.30 pm to 3.46 pm**
3 **CHAIR:** Ms Janes.
4 **MS JANES:** We'll just wait for our registrar to race to get our document. And we were at
5 category 4.
6 **MS HILL:** You'll see a reference in the italicised part of category 4 to a definitions matrix which
7 describes these words "chronic" and "frequent" and "responsible adult". So these are all
8 defined terms. And it notes that wide-ranging — if inadequate practice, because that's
9 another level of social work failure, is wide-ranging, this could be considered an
10 aggravating factor and justify a recommendation for a higher payment in the band. That
11 band for category 4 is $26,000 to $35,000. That's 12% of all claims according to MSD's
12 calculations.
13 The next category down is category 3. That band is $16,000 to $25,000. And MSD
14 says this is about 31% of all claims. And it describes a mix of low and moderate abuse of
15 all forms by a responsible adult with the experience of more frequent abuse and there's
16 again that terminology, it may include acute or infrequent incidents of more serious abuse
17 and/or medium levels of inaction contributing to abuse, including abuse by third parties,
18 such as family, friends or other young people, and multiple or wide-ranging practice
19 failures for a prolonged period, a context of practice that has allowed the above more
20 serious abuse to occur.
21 So it's slipping less, it's less about the abuse aspects at this point and more about the
22 practice failures. And for the first time it says here — no, I've lost it. From category 3 or
23 higher abuse by a responsible adult and inaction are the drivers for recommending that
24 payment, one or both may be present but not necessarily so. Inadequate practice may also
25 be present as the care context but would not likely reach a category 3 or higher payment.
26 And then category 2 underneath that, it says $10,000, but it ranges from between
27 $6,000 and $15,000. Again, 31% of all claims, low level abuse of all forms by a
28 responsible adult that may increase in frequency. There might be incidents of more
29 moderate abuse or low levels of inaction, investigating concerns, assessing home or care
30 circumstances. So a lot of those social work practice failures, and/or multiple practice
31 failures that impact on the standard of care, contribute to placement and schooling
32 instability, lack of access to health and education, access to family and culture, or harsh or
33 excessive physical discipline.
34 So again, there's a lot going on in that category. We've talked to you about the use

1 of words like "harsh physical discipline". Now unless it's corporal punishment it's an
2 assault, there's no in between in the terminology. That's why I always take umbrage at the
3 phrase "excessive corporal punishment". You either have corporal punishment within the
4 rules or you have assaults.
5 But as you can see from this it's a lot more around the social work aspect. And none
6 of the categories that we've gone over in the last 10 minutes or so have mentioned false
7 imprisonment or secure units or any form of detention.
8 Then there's the last category, category 1, ranging from between $1,000 to $5,000,
9 15% of all claims. Predominantly inadequate practice, such as concerns not being
10 investigated or failure to visit a young person, monitor, supervise, plan or assess, and where
11 minor practice failures did not contribute to abuse. There's a lack of training and skills,
12 poor decision-making, lack of proper process, case note recording, failure to enable contact
13 with siblings or whānau. So the guidance says claims within this range will likely be at the
14 minor end of inadequate practice, one-off concerns, or for a short period of time.
15 Just picking up a couple of those things. If you don't investigate concerns, you don't
16 uncover abuse, and if you don't take records there are no records to support allegations of
17 abuse. So the flow-on effects of some of those category 1 aspects could be significant. But
18 there's no erring on the side of the claimant there. Those practice failures are treated as
19 minor and they get the lowest category of payment.
20 So you see those bottom three categories account for 62, 77 — quite a lot of the
21 claims.
22 **CHAIR:** Nice save.
23 **MS HILL:** I said before I wasn't a mathematician.
24 **MS COOPER:** It's about 64%, anyway just the last three are 64%.
25 **MS HILL:** Yes. Category 2 and 3 were 31% each, so that's 62 plus another 15%, it might take us
26 to 77 I think. We got there in the end. So the bulk of these claims MSD says are category
27 1 to 3. To me that is a very bottom-heavy bell curve. So those are the categories that are
28 currently applied.
29 And I mentioned before a step 2 analysis. And you'll see that from $26,000 and
30 above, if we could scroll back up a little bit to the green category 4. So that bit where it
31 says that "we recommend this level of payment, a step 2 analysis is required". So a step 2
32 analysis is triggered by allegations of moderate or chronic physical abuse, serious physical
33 abuse, moderate and serious sexual abuse or a high level of inaction. So that category 4,
34 that's a ceiling because to get in that category or above the burden of proof shifts back and

1 it starts at a position of disbelief. That's what a step 2 analysis is.
2 Because everything under that is accepted on its face, it starts with a position of
3 belief because there's not a lot of compensation for the ones that you accept without much
4 work. Because when an assessment starts, it starts only with a claimant's personal and
5 family file. There's a very narrow amount of information. And only when the step 2
6 analysis is triggered does that information widen. So not only is there more information
7 looked at, but the burden shifts as well.
8 **CHAIR:** So it's the inclusion of the step 2 process that you say shifts the burden, is that right?
9 **MS HILL:** Yes, that's my understanding from both the business process document and from the
10 evidence of Linda Hrstich-Meyer.
11 So you have to get through a step 2 analysis to get anything more than $25,000. So
12 it's a split burden, but that's not ever clearly explained. And you sort of have to — it takes a
13 while when you work through the business process document to understand what that really
14 means.
15 So it's going back to where we were, that that position of disbelief, for most claims
16 that make any form of serious allegation. And I think I said at the end of yesterday, that we
17 had made a fresh Ombudsman complaint about the substance of this process. And so while
18 I'm talking about the main concerns, we're happy to provide a copy of that complaint to the
19 Commission which really does set out in a more granular way our concerns with this
20 process, because we don't have the scope for me to take you through all of these things.
21 No mention of solitary confinement at all. And detention is reduced to a footnote in
22 this process. And it's incredibly concerning, because the footnote for the assessor, the
23 guidance given is that many people will claim false imprisonment when they're put in
24 secure units or time-out rooms, but the Department almost always had lawful reason to put
25 them there. So there is a presumption built into this process that detention will be lawful
26 and there is no provision in the categories for the times when it is not.
27 The other reason this is a problem is the way MSD categorises those occasions
28 when it might not be in accordance with regulations. So say a young person is placed in a
29 secure unit, there is a strict requirement that a notice is sent to their social worker and their
30 parent that they have been placed in secure. And that notice enables their youth advocate
31 or their parents to seek a review of that placement. If that notice isn't sent, then that's a
32 breach of the 1989 Act. That rule still applies now. We say if you don't meet all the legal
33 requirements of that placement then that's not lawful.
34 Another example, held in secure for too long. So you're only supposed to be in

1 there for 72 hours. If you're held in there for 80 hours or longer without a court order, then
2 that's a detention that is not in accordance with the Act. MSD doesn't call this an unlawful
3 detention or a false imprisonment. They call it an administrative failure. And it is treated
4 as a social work failure, not a false imprisonment. And so you see in the categories where
5 that would fit. Very low.
6 **MS COOPER:** And so just the importance of that when you think about the *Marino* cases that
7 we've talked about with the adult prison inmates and even that young person I talked about
8 held in Police custody for 17 hours, when you think about that, that's a huge amount of
9 potential compensation that has no recognition in this process at all.
10 **MS JANES:** And so is that why you have said in your evidence that there should be explicit
11 recognition, transparency around the Bill of Rights Act failures, breaches.
12 **MS HILL:** There's two things. The Bill of Rights Act is engaged when you are arbitrarily
13 contained after 1990. These categories apply to everyone, pretty well post 1990. So if
14 false imprisonment is missing, that's what you would rely on, prior to 1990. That's a tort,
15 it's not covered by ACC, and so it's an enormous factor. Solitary confinement is one of the
16 most damaging things you can do to a child. And if you haven't read Dr Sharon Shalev's
17 report "Thinking Outside the Box" then I really encourage you to do that.
18 And when you talk to claimants they'll talk about being in a secure unit and they'll
19 say "I was in there for months". They might have only been in there for days, but
20 childhood memories stretches time and it felt like months, even three days is far too long.
21 But it has an enormous impact. And for it to be absent from this process is inconceivable,
22 especially when it was such a large part of the Fast Track Process.
23 The last thing I need to talk about is the Bill of Rights Act in this process. It's not
24 there. The Bill of Rights Act, much like secure, is reduced to a side note. If the assessor —
25 bear in mind the assessors aren't usually lawyers, we've talked about them being former
26 social workers, although that may be changing now. If they think there's been a breach of
27 the Bill of Rights Act, then they might ask for help from MSD's legal team to identify
28 whether a breach has occurred.
29 And then there's a discussion and as part of that assessment there may be an
30 additional amount of compensation allocated to reflect that breach. It's not identified to a
31 claimant as a separate amount. There's no indication in the offer or the response from MSD
32 that the Bill of Rights Act has been considered. So if there's an additional amount, nobody
33 knows what it is or what it is for.
34 We don't know if any of the offers we have received under this process have a Bill

1 of Rights Act component, and we're very clear that some of them should have.
2 **CHAIR:** If I might ask, how do you know what you've just told us about how the assessors do it?
3 Is it written in writing?
4 **MS HILL:** Yes, so remember I talked about the business process document, that's the whole
5 document.
6 **CHAIR:** Yes, that's in there.
7 **MS HILL:** This is only the categories.
8 **CHAIR:** Okay.
9 **MS HILL:** So I think we received the latest iteration last week.
10 **CHAIR:** So it is written down as part of the process?
11 **MS HILL:** Yes, there's an entire process document and the definitions and everything are in there
12 as well, we just don't have the scope to take you through entire thing.
13 **CHAIR:** No that's fine.
14 **MS HILL:** The last thing to note is two of the offers we've received under the — second to last
15 thing to note — two of the offers that we've received have been for plaintiffs tracking to
16 trial, the ones we're talking about for next year. So there's no recognition of the Bill of
17 Rights Act for them. There's also no recognition that they are on a trial track. Litigation
18 risk or the cost of litigation is not a factor.
19 They were treated just like everybody else and they certainly were not treated like
20 the previous trial tracked plaintiffs that we've talked about in the Whakapakari claims. And
21 there was no recognition of the cost of litigation that you would have when you're in any
22 other context where you would look at the cost benefit of going to a trial versus making an
23 offer. So litigation risk is — it's clear from the iteration of the process we received last
24 week that litigation risk has been removed as a factor.
25 So the last thing is the amounts. We have been receiving offers under this process
26 for some time. We receive groups of them every Friday.
27 **MS COOPER:** For about the last month.
28 **MS HILL:** And they are universally low. They are far lower than we would assess using these
29 categories. And I think the way the categories are framed, the aggregation of things has
30 meant that they have been pushed into categories that may be lower. But they're also
31 moderated. And that is not clear on even the business process document and it's taken us a
32 little while to understand how that happens.
33 In the business process document, there is a compatibility panel, that's what it's
34 called. And they assess groups of proposed offers, they do it in groups. And they assess

1 them to ensure that they are consistent with past offers. So we've talked about the way
2 offers of compensation have been arrived at and the compatibility panel's job is to make
3 them consistent with the wider variety of settlement offers done to date.
4 When we asked does that include the Fast Track, we got a very unclear answer.
5 And I understand that it does include the Fast Track offer. So if we're looking at averaging,
6 that's a significant impact on what an average claim would be.
7 But also, they're wildly different. How do you be consistent with all of these
8 different processes, it's not possible. And should you be? I don't think you should be for
9 the reasons that Sonja set out. You are consistently staying in line with something that is
10 flawed which means that everything that you're doing is still going to be flawed.
11 **MS COOPER:** And you're not building on the knowledge that you should be increasing all the
12 time, you're not adjusting for inflation, none of that adjustment. And I think one of the
13 things that we've talked about already, but it's a very significant factor, is not only the
14 aggregation of experiences, but the minimising of them. And Amanda read out that
15 excessive discipline or chastisement.
16 There isn't such a concept. And what we are seeing with many of our clients,
17 particularly those who were in places like Epuni or Hokio or Kohitere, they're quite nasty
18 assaults. Being kicked with steel-capped boots, being thrown down hills, being whacked
19 with sticks, having medicine balls thrown at your stomach, being hit over the head with
20 keys, being beaten, they must be being categorised in this excessive chastisement because
21 that's where those offers are placed. Because they're all around $14,000, $16,000. So the
22 only way that can have happened is if those assaults have been repackaged as somehow just
23 a little bit over the top, legitimate chastisement.
24 And the same way we said, you know, we're seeing this minimisation of when
25 social workers should intervene by calling hidings or beatings by parents from the records,
26 being again redefined as acceptable corporal punishment because that was the standards of
27 the day. And as I said in my evidence, beatings or hidings were never allowed. I mean
28 throughout our language that would have had a connotation that says it went beyond
29 acceptable corporal punishment.
30 So that's the kinds of things that we are now seeing every Friday in the offers that
31 we get through. And it just makes you despair. I mean you know, as I was preparing to
32 come here, you know, I was reflecting on the fact I've been doing this work for 25 years
33 and in so many ways I feel like I've gone backwards. You know, yeah. It feels that for
34 whatever progress we make there are other things that step back again, and, you know, we

1 just have to keep pushing forward. But for claimants, I just think the experience gets
2 worse.
3 **MS HILL:** We're certainly seeing that in these offers. They are almost across the board lower
4 than people who had similar experiences and who settled under earlier processes. And the
5 amount of compensation attributable to things like practice failures, there was a time when
6 practice failures were compensated at a very generous level by MSD and they've just
7 plummeted. So how consistency can be achieved, even though we say it shouldn't be, but
8 it's not.
9 **MS COOPER:** As Amanda said, one of the things about this new process is that we have the
10 invidious situation where we've had offers coming in which say "We accept it was a minor
11 practice failure not to keep records and that the social worker didn't visit this placement
12 enough", while on the same hand denying the claimant's allegations of abuse in that
13 placement because there aren't any records.
14 **MS HILL:** "There is insufficient information to support this allegation". And it's in the same
15 document. And trying to explain that to a claimant, and even a person with incredibly
16 limited education goes "That seems self-serving doesn't it". And we go "Yes, yes". And
17 that is why the Crown can't investigate itself.
18 **MS JANES:** So one of the principles that MSD is seeking to achieve is to treat like claimants with
19 like claimants. But to check my understanding, if you have a two-path process which
20 results in a large number of very low offers from $5,000 or not much more, that would
21 appear to depress or superficially downgrade what then becomes your base that you start
22 treating like —
23 **MS HILL:** Yes.
24 **MS COOPER:** Yes.
25 **MS JANES:** This is a big topic and we haven't got much time for it, but if you're looking at
26 claimants saying where is the equality, the fairness, the equity on that like to like
27 comparison and if they got that I deserve this, what does one say to claimants?
28 **MS HILL:** Literally have to say, like for the earlier ones, some of them we say "You did well but
29 that was lucky". For the bulk of them we have to say "I'm sorry you're getting, you know,
30 you're in the process at a time when lots of other people are, money appears to be scarce
31 and you're not going to do as well as people who have a similar situation".
32 And you can really see that with Georgina Sammons and Tanya Sammons, not that
33 Tanya's settled her claim yet, she's in that group of people who rejected a Fast Track offer
34 and are still waiting. But the disparity between what Georgina settled for and what Tanya

1 was offered was significant at that time.
2 **MS COOPER:** And add to that the settlement that Georgina got when we come to actually
3 compare apples and pears, you know, when we look at the settlement offers generally
4 against other Crown settlements, I mean these are abysmally low anyway. You know,
5 I mean, what, Georgina got $32,000 for years of repeated sexual abuse, and being shifted
6 and being physically abused. And, you know, other claimants have — in other processes
7 have got three times that for, you know, for a one-off event potentially.
8 So you know, and that's why I come back to when you actually look at the
9 economic cost to these people, the economic cost on their lives of this level of abuse, it is in
10 the hundreds of thousands of dollars. I mean our youngest clients that we're tracking to
11 trial, I mean the actuaries have assessed their economic loss up in the $800,000, $900,000.
12 I mean, you know, this is the actual economic loss to them of these lost opportunities due to
13 the abuse because they've had such impoverished lives.
14 So when you think about that and then you look at what they're actually being
15 offered and are being compelled to accept in this really imperfect system, isn't it grossly
16 unfair? Isn't it gross?
17 **MS JANES:** But a thought that occurs to me, and I don't know whether you are able to answer it,
18 but almost an unintended consequence of having something like a Royal Commission is a
19 lot of claimants come forward and then if you have this bell curve and you have this
20 moderation, in effect from what you're describing, does that then lower even further the
21 potential offers?
22 **MS COOPER:** We don't know because we have no transparency around it. We just don't know.
23 I mean we get our five offers a week and I mean, you know, we're providing you the
24 information on the basis of our years of involvement with this. But in terms of the internal
25 mechanisms, what that does, we don't know. You know, you would think that would be
26 logical because when you look at the Fast Track Process you'll see there had to be this
27 certain number of claims and it had to fit within this budget. And I would have thought
28 that's exactly the same now, that there will be a budget to resolve a certain number of
29 claims. And so this panel that is looking at the claims every week as they go out will be
30 like okay, so we've got — this week we've got, I don't know, $200,000, it's just a figure, so
31 we're going to have to fit these offers within that budget that we've got this week, or this
32 month. So I —
33 **MS HILL:** Because there'll always be a budget, this is Government, nothing happens without a
34 budget, there's a ceiling there. We don't know what it is, but I mean this — yes, they just

1 keep coming. I despair at how many people still contact us. Because how do you — there's so many, there are so many and I just don't know what to do with all of these people. And you think surely it will get worse if it carries on in this trajectory, more people, same amount of money, I cannot see it getting better under the current system.

5 **MS COOPER:** And the sad thing for us is they are getting younger and younger. So the legal barriers one would have thought are less because we're filing them to protect them against the Limitation Act, they have clear Bill of Rights claims. But none of that's reflected anywhere in any process in any settlement offer, they are treated just the same as anybody else and those hurdles that we went through just are applied across the board to everyone.

10 **CHAIR:** Could I just ask a practical question, these Friday afternoon offer dumps, are they being dealt with chronologically? Do they deal with all the old ones first, have you any sense of — were you going to ask that?

13 **MS HILL:** Our next question would be.

14 **MS JANES:** Perfect segue.

15 **CHAIR:** That's my question, but you might want to elaborate on that.

16 **MS JANES:** No, that was exactly where we were going next.

17 **CHAIR:** Okay.

18 **MS JANES:** You'd like to talk to us about the prioritisation process.

19 **MS HILL:** Ideally — I say ideally — MSD deals with claims from the oldest first. That is disrupted by a number of things. First of all for some time MSD was prioritising represented people — sorry, other way around, self-represented people over legally represented people. They were getting dealt with faster and I think we have a document —

23 **MS JANES:** We do have a document, if we can call up witness 94 document 275. And just identifying that it's a Cooper Legal letter to Crown Law dated 24 April 2015, and I'll call out the highlighted passages and I'll get you to talk to those Amanda.

26 **MS HILL:** Sonja may wish to chime in given she's the author. We're talking about a gentleman who instructed Cooper Legal in 2009 and his letter of offer had not been completed. "In short his claim is far less advanced than those on behalf of hundreds of other clients of this form. It is in that context we are concerned to be advised that this client's claim has been expedited not due to the client's own health reasons but because his wife is terminally ill.

31 We have notified you and/or MSD of a significant number of this firm's clients who are ill (some terminally ill). We have asked for their settlement offers to be dealt with expeditiously. To be blunt we have not seen much evidence of that".

34 We actually had another document that was a series of e-mails about a represented

1 person. So slightly different topic, but similar problems. With the represented person they
2 came to our attention, it's in the bundle, where a self-represented person had received an
3 offer of settlement faster — aah, there we go.
4 **MS JANES:** Is this the one?
5 **MS HILL:** Thank you Hanne. If we go —
6 **MS JANES:** Second page, probably —
7 **MS HILL:** Bottom of the first page. So this is actually in response to the query about this
8 gentleman. This is MSD writing.
9 **MS JANES:** And we're in December 2017.
10 **MS HILL:** Mmm. "With some exceptions we try to be fair by working through claims in date
11 order from when people first contacted us. We are not sure as significant analysis would be
12 required to determine this, exactly what has led to this disparity. However, one aspect is
13 that until recently claims were categorised as either historic, being pre-1993, or
14 contemporary, 1993 to 2007, and were managed and assessed by two different teams. We
15 are now dealing with all the claims in one team and plan to take steps to address the
16 disparity in allocation timeframes as quickly as possible. We will be maintaining a close
17 focus on this issue to ensure that in the future claims are allocated for assessment as fairly
18 as possible irrespective of whether they are represented or have come to us directly, or what
19 time period they cover".
20 **MS JANES:** Just to orientate that, is it correct that this arose because there were two different
21 teams within MSD who were prioritising?
22 **MS COOPER:** No, I don't think that was what it was about. I think what they were
23 acknowledging here is that for reasons they didn't — they weren't prepared to acknowledge,
24 non-represented, non-legally represented claimants had been tracked much more quickly
25 and their claims had been dealt with much more quickly than legally represented claimants.
26 And that was something that became obvious to us when a person who had gone initially
27 through MSD without legal representation came to us saying that he was to receive an offer
28 imminently and he had only been waiting something like 18 months and we had clients
29 who'd been waiting seven, eight, nine years. And so we actually asked whether it was
30 correct that non-represented claimants were being dealt with more quickly and this was
31 their acknowledgment that they were, but they would try and resolve that.
32 **MS HILL:** From memory this gentleman was not a contemporary claim. And so while it
33 certainly created problems of its own, this mashing together of the two teams, because there
34 was once that quite arbitrary split between the types of claims; it really was a case of

1 legally represented people being put to the back of the queue, or certainly dealt with more
2 slowly.
3 **MS JANES:** So this was not a sole example from your experience?
4 **MS HILL:** No, it's really for us to have visibility, of course, because we don't talk to
5 self-represented people in any quantifiable way, and so we only tend to find out these
6 things by accident.
7 **MS JANES:** Is there anything else that you want to talk to about the prioritisation policy?
8 **MS HILL:** There's a really — MSD will only prioritise claims when someone is terminally ill or
9 they appear to be at risk of harm from themselves. And we alert MSD to this as soon as we
10 have information, we have to provide or at least view medical information to be able to
11 push someone up the queue as it may be. Even then the process is very slow. Sometimes
12 we've had a quick turnaround, and I think Patrick Stevens reflected that reasonably fast
13 process.
14 At other times, despite repeated follow-ups and advice that a client is becoming
15 sicker, the settlement isn't completed in time. We've had clients pass away with offers of
16 settlement sitting in their letterboxes and we've had people signing their offers on their last
17 days of palliative care. It's a horrible situation.
18 **MS COOPER:** And I mean I can give an example that's literally just, you know, last week. I was
19 chasing up MSD a couple of weeks ago in respect of a client who has a terminal illness who
20 I wrote to and sent a medical certificate for in January of this year, and have chased up and
21 I chased up, I think two weeks ago, to say look, what's happened, it seems to have dropped
22 off and we got an offer for him in last Friday's batch.
23 But I mean he could — in the nine months he could have easily died. And that's
24 something that we face often. We have a client whose care straddles the Ministry of
25 Education and the Ministry of Social Development. She was diagnosed as being terminally
26 ill last year. We are still waiting for her Ministry of Education settlement. She is probably
27 going to die before she gets an offer from the Ministry of Education, and we are hounding
28 them every couple of weeks to say what is going on. So this is actually something that we
29 deal with often.
30 **MS HILL:** And it's one of those horrible things that our clients are dying before their claims are
31 being resolved, even though they have been waiting years and this year has been
32 particularly striking in the number of client deaths that we have had, both through illness
33 33 and through suicide. And it's a really horrible thing and a list of deceased clients grows
34 longer and there are difficulties in dealing with claims once people have died as well.

1 Nothing demonstrates that more than Alva Sammons where she took the details of
2 her claim to MSD in 1992 and she told her story to the Ministry, and when she found out
3 that Georgina and Tanya were suffering the — had suffered the same abuse, she [died].
4 And the Ombudsman recommended that the Ministry engage with her claim and MSD
5 declined. That was in June 2016. I think about every six months to a year I check in with
6 the Ministry to see if they've changed their mind yet and have a conversation about that,
7 because we're not going to stop looking for justice for Alva or Hope, and even if Alva has a
8 settlement, settlements for people who have passed away are fraught.
9 So the Administration Act has a role to play here. So even if we can get a
10 settlement and usually the details of the claim need to have gone to the Ministry, there's
11 been recent changes like there's been many changes in the last few months, there's been
12 changes to this policy as well.
13 So if — for most of our clients they have no estate, they don't have savings or a
14 house or anything that could be called an estate. And so the settlement of their claim might
15 be the only thing in their estate. And if it's under $15,000, you don't need to obtain letters
16 of administration. You just need someone to act as the personal representative and the
17 whānau need to agree on how the money will be dealt with, in accordance with the rules.
18 This is a motivating factor for a person who has passed away to never get any more
19 than $15,000 because that's the easiest way to manage a claim if there is no administrator.
20 Very few of our clients write wills. Despite us saying, I think in every mass
21 communication, every newsletter, "Please write a will, this is where you can go to do it".
22 It's just not something that many of our clients turn their mind to because they don't have
23 anything unless they get a settlement.
24 Most settlements aren't big enough to pay to obtain letters of administration, there's
25 virtually nothing left by the time we find a commercial lawyer even at cut-price rates, and
26 we have some very kind commercial lawyer friends, there's not enough left. And if you
27 have more than one child, it's almost not worth the effort, because whānau is often fractured
28 and it can be really, really challenging.
29 **MS COOPER:** I should add there that when we first struck this problem, for a couple of years the
30 Ministry agreed to actually fund the cost of us getting lawyers to do letters of
31 administration realising that that was just another cost for — because typically whānau are
32 vulnerable themselves and have no assets or income. And then just unilaterally said no,
33 we're not going to do it anymore.
34 And so I mean we said well can we get around this by just having informal

1 settlements. But again it's like no, if the offer's over $15,000 it's covered by the
2 Administration Act and you must have somebody appointed as the administrator, so — and
3 that's expensive.
4 **MS HILL:** So we can obtain legal aid for some of that, but we're in an interesting position where
5 we ask for funding to locate next of kin and to make those arrangements and to get the
6 funding we need to tell them what else is in the estate, who the beneficiaries are, who the
7 next of — so we have to tell Legal Aid the information that we need the funding to go and
8 look for. So we have a group of deceased clients whose claims are stuck. And sometimes
9 we can't find next of kin, and sometimes we can't find all of their children, and for —
10 there's always someone in the whānau who wants to bring that resolution and it's a really,
11 really hard position for people to be in.
12 And the last point I want to make about that is the recent case in the Supreme Court,
13 the Peter Ellis appeal. The Supreme Court haven't issued a decision yet, but there has been
14 a lot of discussion about the need for redress, even though a person has died. I believe the
15 phrase is mana tangata, that mana lives on after death and if that had been taken into
16 account for Alva Sammons perhaps they would be in a different position. And if MSD
17 were truly committed to a tikanga-informed process then those are the conversations that
18 we should be having.
19 **MS JANES:** Just circling back to the Alva Sammons case, if one looked at what the process —
20 because I understand the issue being MSD disputes that her claim was ever raised in the
21 way that they expected it to be raised, but going back to 1992, you've talked about Alva
22 engaging with MSD advising the nature and extent of the abuse. So in your view, aligned
23 with what processes of the standards of the day, where would you put that notice?
24 **MS COOPER:** I mean it's as much information as we would put now into a form that we have to
25 fill in to register a claim.
26 **MS HILL:** In fact it's probably more.
27 **MS COOPER:** More.
28 **MS HILL:** It's more than you would put in a registration form which it would preserve the rights
29 of someone now if they died.
30 **MS COOPER:** But let's also step that back a bit, and say that the Ministry also has the lived
31 experiences in the same placement at the same time of her two sisters, and they've got her
32 records which also documents at least some of this. So isn't that enough? I mean you
33 would have thought so.
34 But I think this just demonstrates the impossible evidential burden that's imposed

1 for a start. But also too the kind of air of unreality about it, I suppose. And I know again it
2 will be about setting a precedent, you know, if Alva's allowed to get — if Alva's children
3 are allowed to get some money then there'll be presumably lots more families coming and
4 making claims. But why not?
5 **MS HILL:** And also, Alva's situation is so specific.
6 **MS COOPER:** Yeah.
7 **MS HILL:** How could you call it a precedent? If someone has done what Alva did of telling their
8 story to the Ministry and then passing away, then that should be a proper ground to engage.
9 We're not suggesting that whānau for people who have never approached the Ministry, you
10 would need something more. And there are ways and means of dealing with that, but I
11 don't think it's the kind of precedent that you would think it would be.
12 **COMMISSIONER ERUETI:** You'd impose that condition that there be some sort of approach
13 made to MSD?
14 **MS COOPER:** I wouldn't because, you know, I think for those people, I mean we — I think there
15 are many people who have taken their own lives, and we know that, I mean you heard
16 Kerry talking about that. And I mean I think let's acknowledge, a lot of it is documented if
17 there is a sufficient documented record of that then compensation should follow.
18 **MS HILL:** I certainly agree with Sonja if there is any form of documented —
19 **COMMISSIONER ERUETI:** We're talking about MSD, the context of MSD but this is —
20 **MS COOPER:** It should apply across the board.
21 **COMMISSIONER ERUETI:** Does MOE, does Ministry of Education, Ministry of Health have a
22 similar policy?
23 **MS COOPER:** Ministry of Health won't even engage if a person has died. So even if we've
24 started a process, and I think that's Ministry of Education where we're waiting to see. So
25 the Ministry of Health, if somebody dies, even if we have said that we're in the process of
26 preparing something they won't because they won't engage. They say that their settlement
27 payments are wellness payments, so if the person is deceased, nothing — no wellness
28 needed.
29 So Ministry of Education I think are sitting a little bit on the fence at the moment.
30 We have a younger client who died in a car accident and we filed his claim after his death
31 but within the one year, and because he's a younger client it's the Bill of Rights obviously
32 and he was in both the Ministry of Education residential school and also under care of the
33 Ministry. And I think, as I say, the Ministry of Education's kind of sitting on the fence at
34 the moment about whether it will deal with his claim, so watch this space again, we don't

1 know.
2 **COMMISSIONER ALOFIVAE:** So there should be a principled approach across the board,
3 across all of the agencies.
4 **MS HILL:** I have to add to Sonja's comments about the Ministry of Education. Given how
5 slowly they are moving in the face of a client who is currently terminally ill, I have low
6 expectations about the Ministry of Education's willingness to engage once people have
7 died.
8 **MS JANES:** Just rounding out that discussion, superimposing and going back to the 2009
9 December resolution of claims which applies to all of the agencies, and the Crown
10 litigation strategy of meritorious claims settled morally if not legally, can you just
11 summarise why you think Alva Sammons and other deceased claimants who have made,
12 there is some record?
13 **MS HILL:** I think they should be treated in the same way as any other claim. Alva's claim
14 certainly meets the meritorious claims test, as amorphous as that test is, but there is
15 corroborating evidence from her sisters, there's support in the records, she had substance
16 abuse issues which meant she would probably surmount the Limitation Act, certainly at the
17 time she raised her claims; she meets all of those requirements of a meritorious claim.
18 Certainly in a foster placement with what was widespread abuse, there is absolutely a moral
19 liability there.
20 **MS JANES:** Conscious that we're romping towards 5 o'clock. Before we finish on the MSD
21 processes, there were some responses that you wanted to talk about in Ms Hrstich-Meyer's
22 brief of evidence just to quickly highlight some areas for the Commissioners.
23 **MS HILL:** Which one, what would you like to deal with first?
24 **MS JANES:** So you have started at paragraph 3.39.
25 **CHAIR:** Is this the brief in reply?
26 **MS JANES:** This is the brief in reply and the supplementary brief.
27 **MS HILL:** I actually started earlier at 3.5. 3.39 deals with the categories for the new processes
28 which we've —
29 **MS JANES:** Start at 3.5 and you move through as you wish.
30 **MS HILL:** This is Ms Hrstich-Meyer's reply brief. At 3.5 she refers to the intractable claims
31 process, which I talked about earlier. And Ms Hrstich-Meyer says that there was
32 insufficient focus on resolution and that was why MSD unilaterally withdrew. But the
33 whole process was designed to resolve stuck claims and it never got tested.
34 So I don't know why MSD says there was insufficient focus on resolution. That

1 was the whole point of it. What I think was — because it was an independent fact finder it
2 perhaps wasn't resolution in the way the Ministry would have liked. And it feels — it
3 doesn't feel like a good justification for going so far into that process and then withdrawing.
4 And at 3.9 of her reply brief Ms Hrstich-Meyer says that she can't find any
5 documents acknowledging that MSD had not sought enough funding for the Fast Track
6 Process, and we've identified that that was actually in the decision *XY v Attorney-General*.
7 **MS JANES:** We haven't got time to go to the document, but they're found at paragraphs 49 and
8 53.
9 **MS HILL:** Which says under the fiscal envelope it could not compensate claims at face value so
10 instead introduced moderation instead of increasing the funding. That was the finding by
11 Gendall J.
12 **MS COOPER:** But actually, I think in any event some of the documents that you've taken us
13 through today show clearly that there was correspondence from the Ministry that said
14 exactly that anyway, so I'm — it's kind of surprising that the Ministry wasn't able to find
15 that documentation itself.
16 **MS HILL:** Ms Hrstich-Meyer goes on at 3.10 of her reply brief to say claims under the Fast Track
17 Process were not moderated to estimate the budget. Obviously, the High Court decision is
18 really clear about that.
19 **MS COOPER:** And again, I think the correspondence we've looked at today shows that too.
20 **MS HILL:** At 3.12 of her reply brief Ms Hrstich-Meyer says that MSD accepted liability for
21 Whakapakari and other section 396 providers, where a young person who is under the
22 custody or guardianship of CYFS, but people who had that status received offers that
23 clearly indicated Whakapakari had been excluded from consideration. We've talked a lot
24 about that today, so I don't think we need to go over that again, I think we've demonstrated
25 that on the information we've been over today.
26 At 3.18, Ms Hrstich-Meyer addresses the counter-offer process. And under the
27 current processes this is called a review, and it's actually done by a panel which looks
28 remarkably similar to the compatibility panel which moderates the claims in the first place.
29 I believe it's called a review panel, but it is still made up of senior MSD officials.
30 **MS COOPER:** We think they are the same people who were the original.
31 **MS HILL:** But of course we can't tell, so we're speculating at that point. We call them
32 counter-offers and we go and say this offer isn't enough for these reasons and this is the
33 compensation we think is appropriate.
34 In response, which can take a very long time, the Ministry hardly ever shifts on

1 anything factual. It may take a few more practice failures into account, but even when it
2 takes additional allegations into account, it may not shift on compensation at all. And if it
3 does shift it will only be a very small amount.
4 **MS COOPER:** And WW is a good example of that. In the reply, a whole lot of new material was
5 accepted, but the offer only went up by $2,000. And to this day I've never had a proper
6 explanation as to why all this new information that had been accepted only resulted in an
7 additional $2,000.
8 **MS HILL:** And the last point that I think is important out of her reply brief is at 3.27 where
9 Ms Hrstich-Meyer refers specifically to factual findings in the *White* decision, but that's
10 not — it doesn't connect well with recent correspondence with MSD where it says it will
11 not always consider the *White* decision binding on it.
12 **MS COOPER:** She actually says in her brief, which is interesting, just because the Court reached
13 a factual finding in *White* about a particular issue does not mean that it will be appropriate
14 to adopt that finding for every claimant that attended that residence. So that's her actual
15 evidence.
16 **MS HILL:** Which is in conflict with the way Gallen J approached things in 2009. You will recall
17 that he took the view that if there was something that closely aligned then it should be taken
18 into account. So I feel like that's quite a shift from what Gallen J was talking about in 2009
19 as well.
20 **MS COOPER:** Well, again, and again I think it's a lack of transparency and, again, lack of
21 independence just, I think to me, it reflects very strongly the conflicted position that the
22 Ministry is in; it has had an independent fact finder, making findings about at least two
23 residences that the Ministry picks and chooses whether it accepts it will apply in other
24 cases.
25 **MS JANES:** And I think you've probably already covered, but correct me if I'm wrong; you have
26 raised the issue about the categories for the new process, no secure unit, so that was in
27 response, but I think we've covered — there's nothing further that you want to say about
28 that?
29 **MS HILL:** I did not think so.
30 **MS JANES:** Then just turning to the supplementary brief of evidence, I think at paragraphs 3.2
31 and 3.3 of that you wanted to make a comment?
32 **MS HILL:** Sonja, did you have something? Sorry. We just need to —
33 **MS JANES:** It outlines MSD's new approach to education.
34 **MS COOPER:** Oh, yes, yes, so this is just another change again that has happened very recently.

1 And I think it's very interesting and curious this is happening while this Royal Commission
2 is hearing the matter around dealing with redress. But in this latest correspondence we
3 were told that where a claimant is abused by a teacher in a MSD or Social Welfare
4 residence, MSD will no longer accept liability for that teacher's conduct and that aspect of
5 the claim now has to go by way of a claim to the Ministry of Education. So even though
6 they are staff working in a residence, because they are a teacher and the person or the
7 organisation paying them is education, that will now no longer be dealt with by the
8 Ministry of Social Development. So that's just another —
9 **MS HILL:** When you think about the practicalities of that you're extracting what is usually,
10 almost always a physical assault out of that case and then they have to take that to the
11 Ministry of Education, register a new claim and —
12 **MS COOPER:** Get new funding.
13 **MS HILL:** And the Ministry of Education probably wouldn't compensate for that assault in
14 isolation anyway.
15 **COMMISSIONER ALOFIVAE:** Often in the residences there are a number of programmes that
16 could actually be run by a number of different ministries, so are you inferring you'd then
17 have to take it against each individual agency?
18 **MS COOPER:** We don't know. We've only had the Ministry of Education specifically pulled
19 out, but you're right, with the younger clients, particularly where there may be a number of
20 programme providers, I suspect what we will see increasingly is "That's not us". And that's
21 its whole argument, you know, so it's an expansion, in a sense, of the 396 argument, that's
22 not us, they're an independent contractor. You know, so even though they're working in
23 our residence, and we're supervising them and we're funding them and if — I think now if,
24 you know, about my young people, my young clients who are in Oranga Tamariki
25 residences and they are being educated, who would they complain to if they were assaulted
26 by a teacher? They would complain to the staff at the residence. And who would they
27 expect to do something about that? The staff at the residence. They wouldn't be expecting
28 to haul in the Ministry of Education to deal with that. So it's a real disconnect between the
29 reality, isn't it?
30 **COMMISSIONER ERUETI:** This is a new policy you're saying that.
31 **MS COOPER:** Yes.
32 **COMMISSIONER ERUETI:** How did you find out about that?
33 **MS HILL:** We were sent a letter and it's in the bundle. I think we had it — we've only received it
34 very recently, in the last month or so, as it changed. But when you think about the

1 principles of vicarious liability, to my mind that teacher is an agent of MSD. And it doesn't
2 matter so much who's paying them, but when you look at everything, as Sonja said it's like
3 the section 396 providers, they're an agent in that organisation, MSD should remain liable
4 for what happens. And it's inconsistent with all these previous settlements, there was a
5 teacher of long-standing, lots of records about how he was cuffing the boys and was
6 actually just a terrible man all around, and MSD has been compensating for abuse by him
7 for years. So it's a real change of position.
8 **MS COOPER:** That was after we reminded them that we had records from the *White* trial about
9 him which they had mislaid themselves for some years, so we had to re-provide them to
10 them.
11 **MS HILL:** So, shifting ground.
12 **MS JANES:** Any wrap-up comments you would like to make about MSD processes, because
13 tomorrow we'll move on to —
14 **MS HILL:** Shifting ground really does demonstrate where we are, we adapt to one process and
15 we're constantly responding to these changes and things that come in. We're constantly
16 telling our clients sorry, that situation has changed, or the process has changed, or the
17 categories have changed. And it's just this on-going uncertainty which is incredibly hard on
18 them. When, you know, you ring your — our clients ring and say "What's happening with
19 my claim?" And you have to say "I don't really know, it's sitting with the Ministry, it's
20 been there for five years, hopefully we'll hear soon".
21 And all of these different moving parts, like the high tariff offenders' policy, which
22 we haven't really talked about, held up the claims of people who were serving life or
23 preventative detention, but only the ones that MSD knew about because they didn't have
24 any information sharing. So we're all Googling our clients to see what they've been
25 sentenced with, and we think that was how MSD was implementing that policy as well,
26 because lots of high tariff offenders slipped through the gaps and still got compensation and
27 I'm very unapologetic about settling their claims. But the high tariff offenders policy was
28 an enormous block for a long time for a lot of people.
29 **MS JANES:** Can you recall approximately how many years from the introduction to —
30 **MS HILL:** Yes, we first heard about it in 2014, it was known as the high-end offenders policy.
31 And it came on the back of publicity, the Sensible Sentencing Trust was quite central to all
32 of this. And the political will was that people who had been sentenced for serious
33 offending at that time, it was anyone who had been sentenced to 10 years or more in prison,
34 should not be compensated for childhood abuse. And then MSD spent around three years

1 trying to find a way to implement that political will. And nothing happened, but nothing
2 happened with those claims either, they were stuck. And an Ombudsman's complaint was
3 made about the high tariff offenders policy or HTO policy.
4 **MS COOPER:** By us.
5 **MS HILL:** By us and it had the startling consequence where the Ombudsman said either
6 implement a policy or settle their claims. And these people also were not entitled to Fast
7 Track offers, they were excluded from the Fast Track Process. And what we know now,
8 and we didn't know then, was a proposal was made by MSD to treat compensation for high
9 tariff offenders a lot like the Prisoners and Victims Claims Act process where the
10 compensation was held on trust and dealt with and allowed victims to claim on it.
11 And I know, and I have to acknowledge this, it was MSD itself that said it was not a
12 workable policy, and very clearly said we don't think this is a very good idea. But the
13 political will of the time was to introduce that and what we learned when the Government
14 changed in 2017, one of the first things that I did was write to the Minister of Social
15 Development to say please don't implement this, and the response we got was that the new
16 Government had determined not to.
17 And it finally, after three or four years, released those people from the stalemate and
18 so we have since been able to at least receive settlement offers or settle claims for those
19 people who were just stuck for so long. And even our most disabled client was able to say
20 "Why am I being punished for things I've already been punished for when these things
21 happened to me as a child?" And I had to give the answer that I have to give so often, "I
22 don't really know". But we were very — we saw how close we got to having that policy
23 implemented and I am deeply grateful that it was never put in place.
24 **MS COOPER:** Yeah. Yes indeed. That also demonstrates, you know, that we have to lobby, we
25 have to continue lobbying for our clients to get treated with any justice and mercy really, so
26 that's what we continue to do.
27 **MS JANES:** Do the Commissioners have any questions on MSD processes? Tomorrow we'll
28 move on to the Ministry of Health and the Ministry of Education, and hopefully solution
29 focus.
30 **CHAIR:** I've just got one question, I don't want to open again another can of worms. Redress is
31 redress, and it includes compensation. Is any thought ever given in any of these
32 Government processes to redress other than money?
33 **MS HILL:** Yes, so 17 years after the first Crown litigation strategy mentioned wrap-around
34 support, MSD is piloting a wrap-around service at this point. We have a client who will

1 hopefully engage with that soon, it is only a pilot. We are working —
2 **CHAIR:** Is there a policy, is there something written down? Do you know how it works?
3 **MS HILL:** You will have to direct that question to the Crown for any substantive documents.
4 **MS COOPER:** We literally got an e-mail told literally today, I mean we were told it was being
5 contracted for about three weeks ago, but today we literally got an e-mail saying that the
6 contract negotiations have been finalised and so —
7 **CHAIR:** To provide these wrap-around services?
8 **MS COOPER:** Yes. I should also say that some of our younger trial track clients, you'll
9 remember they also had a wellness component of their settlement. So that was specifically
10 around treatment programmes, payment of removal of tattoos, education programmes, but
11 then they unilaterally revoked the wellness payments for the more recent claimant group.
12 So that lasted, I think we had wellness payments for maybe five clients, four or five clients,
13 and then they've been withdrawn again.
14 So it's kind of come and gone, it is something that we've always asked about
15 because, you know, I mean one of the things is that our clients have many needs, they don't
16 have housing, they don't have jobs, they don't have the skills to be able to do that. They
17 want to reconnect with whānau and I mean they were all the wonderful things that CLAS
18 [Confidential Listening and Assistance Service] was doing. But yeah, so as I say, it's been
19 for a very small, like literally probably a handful of clients and then withdrawn. But then
20 we've now got this brand new pilot.
21 **CHAIR:** Another something for the future.
22 **MS COOPER:** Quite.
23 **MS HILL:** I guess the last thing I'd like to say is we are lawyers and we deal with the legal aspect
24 and it has to be compensation, but we want so much more for this claimant group. We
25 heard Chassy Duncan talking about how he'd love to have made his disclosures in a
26 therapeutic environment. You know, there should be end-to-end support.
27 **MS COOPER:** Yep.
28 **MS HILL:** All the way through for claimants as well as these wrap-around services, I cannot
29 emphasise that enough. And decent apologies that don't look like templates, that's also
30 important. Redress is many things, we've talked a lot about money today, but as clients tell
31 me you can't unbreak a person, and money is a vindication but there's a repair aspect.
32 **MS COOPER:** Well, in fact our UN obligations require not only compensation but rehabilitation,
33 and that part has been always overlooked.
34 **COMMISSIONER ERUETI:** I won't even start on apologies, but I do want to just briefly clarify

1 something. You talk about the compatibility panel under the new structure, and they could
2 be watching, you speculate they could be doing their work with reference to a budget. But
3 we don't know what that budget is, right, whereas with the FTP Fast Track Process you
4 know what the fiscal envelope is in that category but not the other category.
5 **MS HILL:** I think if you did a line by line analysis of MSD's budget allocation you might find it,
6 but I've never gone looking. If you do find it, please let us know.
7 **COMMISSIONER ALOFIVAE:** Just one question, just in terms of the wrap-around,
8 I appreciate it's a pilot, but is there an assumption that the client will be able to have a big
9 say in what that wrap-around looks like?
10 **MS HILL:** We honestly don't know how this is going to go at this point. We're really hopeful,
11 because I think it would be an incredibly valuable service, but it's taken 17 years to get to a
12 pilot, so we're just going to work with it in good faith and do the best that we can and see
13 what happens.
14 **MS COOPER:** And we will support the client through that to actually maximise, you know, what
15 can be provided through that service, so I mean that's something we've said to Legal Aid,
16 normally we would step out at the point of discontinuing the claim in the High Court, but
17 we've actually said to Legal Aid, "Look because this is a pilot and because it may have an
18 impact for the client, will you allow us to stay in until, you know, we've seen what it looks
19 like and is it going to be of benefit?".
20 **MS HILL:** And that really is keeping our legal retainer with him and being available to help if
21 there's any problems, that sort of thing.
22 **COMMISSIONER ALOFIVAE:** Is there an end point to the pilot?
23 **MS HILL:** We don't know.
24 **MS COOPER:** I should say too it's just what we were also made clear about today, it is just the
25 greater Wellington area at this stage, so it will be geographically restricted.
26 **MS HILL:** Yes, I'm hopeful we'll learn more about it as we go along and perhaps when the
27 Crown comes to talk to you then we will learn some more then.
28 **MS JANES:** Just a final quick question following up from that, in terms of that non-monetary
29 redress, just looking through the 25 years that you have been engaged in this work, in terms
30 of counselling from the beginning and through the process.
31 **MS HILL:** It's been made available recently.
32 **MS COOPER:** Yes, getting that's recent.
33 **MS HILL:** We are invited to put our clients directly in contact with MSD to access that. I don't
34 know if has ever got the off the ground. MSD's first response is to direct them to ACC

1 counselling, which they're entitled to anyway. I've got no visibility from the couple of
2 people we have referred as to whether they have engaged in counselling or how that's gone.
3 It's something that we should probably follow-up. In terms of capacity it's not something
4 that — they haven't come back and complained, put it that way, but we would need to
5 check in to see what that has looked at like. But I'm talking maybe five people out of
6 1,400.
7 **MS COOPER:** And we have been told that for our prison clients it may not be possible, so and
8 given that that is probably our biggest client need group for counselling, that's, you know, a
9 significant deficit in terms of the service.
10 **COMMISSIONER ERUETI:** This again is another new policy?
11 **MS COOPER:** Yes.
12 **COMMISSIONER ERUETI:** Like in recent months?
13 **MS COOPER:** That, again, has been within the last four months maybe, maybe a bit longer?
14 **MS HILL:** No, the counselling offer has been there for a year or so.
15 **MS COOPER:** Has it been that long?
16 **MS HILL:** But it's just been something we referred people to MSD who wanted it, but we haven't
17 heard anything further. So that's slightly different from the wrap-around service which is
18 much newer, the sort of general access to unspecified counselling is something that's been
19 on offer for maybe a year, it's a bit hard to tell sometimes with time.
20 **MS JANES:** If you were to propose in a counter-offer something rehabilitative like education,
21 training, access to other services, how would that fit in and be responded to?
22 **MS HILL:** It wouldn't, it wouldn't be part of a response at this stage. We're hopeful, and you
23 have to stay hopeful when you do this work, we're hopeful that maybe this is something
24 that can come online as a result of the wrap-around pilot, but previously when we have put
25 this forward, as Sonja said, when we've tried to have a wellness component that's been
26 declined.
27 **MS COOPER:** I should just say that's only the Ministry of Social Development, it's certainly not
28 on offer from the other Government agencies at all.
29 **CHAIR:** We'll come to the other agencies tomorrow. I think we've all had quite enough for one
30 day. You've valiantly sat there and answered questions all day and thank you for that. We
31 will now invite karakia, ki a koe e pa.
32 **Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei**
33 **CHAIR:** Tēnā koe kōrua.
34 **REGISTRAR:** This hearing is now adjourned.

1 **Hearing adjourns at 5.08 pm to Friday, 2 October 2020 at 10 am**

ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

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

TRANSCRIPT OF PROCEEDINGS

COOPER LEGAL – SONJA COOPER AND AMANDA HILL
Questioning by Ms Aldred 619

1 **Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei**
2 (10.00 am)
3 **REGISTRAR:** This sitting of the Royal Commission is now in session.
4 **CHAIR:** Ata mārie ki a koutou katoa. Welcome back to everybody for the last day of the first
5 part of our hearing. Morning Ms Janes.
6 **MS JANES:** Tēnā koutou. We again have Amanda Hill and Sonja Cooper on their previous
7 affirmation.
8 **CHAIR:** Yes, thank you, welcome back to you both.
9 **MS JANES:** Before we start, yesterday there were two documents that were mentioned that we
10 felt it would be useful to produce to the Inquiry as exhibits, so the first one you heard there
11 had been a wrap-around support service pilot, and we have the e-mail dated 1 October 2020
12 that outlines what that entails. We would like to produce it as an Exhibit 1 but subject to
13 the general restriction order as it does name two claimants, and they should not be
14 publicised.
15 **CHAIR:** Are you going to put that up or are you just producing it as a document?
16 **MS JANES:** I'm just going to produce it, so I have copies.
17 **CHAIR:** Thank you, for the Commissioners. Just so that we're very clear, I see there are some
18 brackets around two areas and they were the ones that are to be covered by the general
19 restriction order.
20 **MS JANES:** They are.
21 **CHAIR:** So we will keep these close.
22 **MS JANES:** Thank you very much, then they will be redacted and can be produced as the exhibit.
23 **CHAIR:** Thank you.
24 **MS JANES:** And the second exhibit, Ms Hill mentioned the latest complaint to the Chief
25 Ombudsman and that is dated 16 September 2020 and again we will produce that as Exhibit
26 2, but it also requires a redaction.
27 **CHAIR:** Yes.
28 **MS JANES:** That is a name that appears, in fact it's a sentence that appears at paragraph 68. So
29 it's a name and a statement of allegation, and that should be —
30 **CHAIR:** Paragraph 68?
31 **MS JANES:** 68.
32 **CHAIR:** It's just it's not marked on this.
33 **MS JANES:** No, so at line 12 you'll see a name.
34 **CHAIR:** Oh, I see towards the end.

1 **MS JANES:** Towards the end.
2 **CHAIR:** Third line up from the bottom. Thank you, I'll just put a note. And that's the only?
3 **MS JANES:** Yes, there is an appendix but they're all anonymised, so subject to that one redaction,
4 that should also be able to be produced as an exhibit.
5 **CHAIR:** Thank you very much. That's Exhibit 2.
6 **QUESTIONING BY MS JANES CONTINUED:** With that, we will go to the Ministry of
7 Health and Sonja Cooper is going to be dealing with this topic.
8 **MS COOPER:** I want to deal with this in two parts, so first of all the resolution of the 320-odd
9 claims against the Crown Health Financing Agency and then stepping through to the
10 current Ministry of Health process. Because we did a lot of the detail of the litigation
11 process in the contextual hearing, I won't repeat that, except to say that we had to go all the
12 way through to the Supreme Court to defend, I suppose, the Crown's application to strike
13 out all of these claims on the basis of the immunity provisions in the Mental Health Act
14 1969.
15 And yes, that was a four-year process starting in 2005 and, as I've already said, it
16 was two levels of argument in the High Court. At that very first level we were also arguing
17 about the Limitation Act 1950 as well, but the Crown left that to one side after the initial
18 ruling and it was just the immunity that then went through to the Court of Appeal and on to
19 the Supreme Court.
20 It still interests me that the Crown presents that as a decision that actually was in its
21 favour, because it actually was substantially in our favour and in fact the appellants had a
22 costs award made, so there was a costs award made against the Crown. And the effect of
23 that decision was to say that the 1969 Mental Health Act did not apply to any informal
24 patient, only to those who were committed patients.
25 That was important because most of the clients in this group had been children,
26 teenagers — well, in fact, our youngest client was eight when he was taken to Porirua
27 Hospital. And so that was a really important outcome, because for the vast majority of
28 clients, their claims were not covered at all by the immunity.
29 Where we also had got to by the time of the Supreme Court decision, the Crown's
30 arguments about pretty much everything being an act which was in pursuance of the
31 legislation and therefore covered by that immunity, that had also been mostly knocked out
32 by the Court of Appeal decision, which said you had to take the pleadings as they were, and
33 if they were pleaded as assaults or threats of assaults or punishment, that was all outside of
34 the immunity provision and the burden then shifted to the Crown to prove that they were

1 acts of treatment. So again, that meant that there were actually only very few claims that
2 had to be discontinued or stopped in the High Court process at that stage. My memory is it
3 was only about six.
4 So that ended in 2009, but as you'll be aware, we were right in the middle of the
5 withdrawal of aid process at that time and so Legal Aid continued to ruthlessly withdraw
6 funding for this client group as well, so we were still embroiled in the litigation around the
7 withdrawal of aid.
8 **CHAIR:** Just to be quite clear about this, the case that went to the Supreme Court was all argued
9 on the papers argued on the pleadings and assessed according to the pleadings, so although
10 you got rulings in terms of the immunity provisions of the Mental Health Act, you didn't
11 get any rulings in terms of the merits of the case?
12 **MS COOPER:** No, that was —
13 **CHAIR:** That was entirely procedural.
14 **MS COOPER:** It was entirely procedural, it was all about whether the claims were to be struck
15 out.
16 **CHAIR:** Yes.
17 **MS COOPER:** So, in a sense we were back to the beginning again.
18 **CHAIR:** Yes. It meant you could proceed with the civil claims if you needed to.
19 **MS COOPER:** Absolutely. We still obviously had all the Limitation Act issues there, but with
20 this group, in a sense, many of the clients were still in the mental health system and we
21 certainly thought that for a lot of them the barriers in terms of getting through the Mental
22 Health Act were going to be less difficult to surmount. But as I say, we were still
23 embroiled in the withdrawal of aid process.
24 We had one judicial settlement conference and this was after Miller J in 2010
25 brought all of the parties into court and I think I've explained that where he said, “Look,
26 there may be legal difficulties but the Crown has a moral obligation at least in terms of
27 these claims, and you should be looking to try and settle, you know, the stronger claims.”
28 So, we had one judicial settlement conference and I have to say it was not
29 successful. The Ministry of Health or the Crown Health Financing people were not
30 prepared to budge at all from a very low offer. And it was a frustrating experience, I think,
31 for us and for the judge, from my recollection. So judicial settlement conferences were not
32 going to be an option.
33 What happened then was on 20 June 2011 we got a letter out of the blue from
34 Crown Law on behalf of the Crown Health Financing Agency saying that they were in the

1 process of making settlement offers to each plaintiff and that was going to be a modest
2 ex gratia payment along with a written apology and also payment of the Legal Aid debt.
3 So, as you can imagine, after — well, from 2002 through to 2011 now this process had
4 been going, we were rapt.
5 We told Legal Aid this in a letter on 30 June, and, as I said, I think it was yesterday,
6 unbeknown to us Legal Aid was already aware that these offers were going to be coming
7 because there had been two conversations between the Chief Financial Officer with David
8 Howden of Legal Aid in November 2010 and again in December 2010. So, six, well, six,
9 seven months before we were told that the offers were coming, Legal Aid already knew that
10 approval was in the wings for that.
11 We then arranged to meet with the Chief Executive and the finance — the Chief
12 Financial Officer of Crown Health Financing Agency to discuss what those offers would
13 look like and to see again how we might help with the settlement process. At that meeting
14 we were told initially that everyone was going to receive the same offer, and it was not
15 going to — there was going to be no offer made to those very small number of clients
16 whose claims we'd had to discontinue.
17 We proposed that actually there be bands of payments to reflect that different
18 people had different experiences, some of which were much more serious, and the impact
19 had been considerably greater, and also too that a number of our clients had been incredibly
20 vulnerable because of their age. As I say, we had clients as young as eight being admitted
21 to the psychiatric hospitals where they were for a long time. And our teams were also there
22 for a long time. You heard me read the evidence of Beverly Wardle-Jackson who was there
23 for some years on and off, so you know what that experience was like for teens.
24 So, the Crown Health Financing Agency agreed to revise its original decision to
25 provide bands of offers and what we agreed was that Cooper Legal and Johnston Lawrence,
26 which was the other firm doing this work, would work through our client claims and help
27 the Crown Health Financing Agency with that.
28 As we explained in our evidence throughout this process, there were funding issues,
29 but anyway, we boxed on regardless of that, continuing to work quite extensively with the
30 Crown Health Financing Agency to get this settlement process and, ultimately, we were
31 able to agree on four bands of payments, that had to be fit, again, within a budget.
32 So, the top payment was $18,000, the middle band — I'm getting a bit rusty now
33 and I can't remember whether it's 12, I think it was 12 and then the next band down was 8
34 and the lowest band was $2,500. And that band was for the clients whose claims had had to

1 be discontinued, so we could bring them back in.
2 Also, as part of that agreement, the Legal Aid debt was paid, and we had a small
3 handful of clients who were privately funded and it was agreed that their debt would be
4 paid, and that each person would receive a letter of apology. And so we were actually able
5 to work through and get all those settlements done I think by about July 2012.
6 And it's important to say, I think, with the length of time it had taken to get to that,
7 which, you know, I mean, you've heard about other settlements, that was still a very modest
8 settlement bracket, but most people were actually really pleased to have got some
9 compensation. And, actually, it was a very lengthy apology, I remember that the apology
10 letter was almost two pages. It was a templated apology, but it was actually a long apology
11 letter, and most clients were actually really thrilled with the apology letter. And, of course,
12 all of the debt was taken care of as well. And that was significant not to have that burden
13 of the Legal Aid debt or the private debt on top of that.
14 I have to say that there were some clients who were deeply disappointed with that
15 and this was particularly clients who'd already had a settlement through the Lake Alice
16 process, where those payments were obviously substantially higher. I mean the bottom
17 figure there, from recollection, was $20,000 through to $140,000. And I know that there
18 were some clients in that group who felt that their experiences in other psychiatric hospitals
19 had been profoundly more traumatic. And so, for them, the difference in the compensation
20 was really difficult to explain, and they found that very difficult. And I know, and I still
21 recall this, that we had to attend the funeral of one of those clients who actually just could
22 never accept that settlement who later [died].
23 But for the majority, this was a good outcome, they felt satisfied and we were able
24 to settle 320 claims. By that time Roger Chapman, who was the partner at Johnston
25 Lawrence, had retired and we also took over settlement of the Johnston Lawrence claims as
26 well.
27 **MS JANES:** Can I just clarify a point there, Mr Knipe in his evidence thought it was 330 claims.
28 Are you able to comment on that?
29 **MS COOPER:** There were some — a very small handful of people, I think Joan Bellingham was
30 one, who were not represented by either Cooper Legal or Johnston Lawrence, so that
31 probably makes up the 10. And I remember we were placed in the invidious position of
32 having to categorise those claims as well, even though we didn't — and we actually said,
33 "Well, we actually can't do that because we don't know about these people, we've got no
34 details about their claims, you can't really put us in that position of having to do that job."

1 So yeah, as I say, I know were categorised because we got all the workings, but I
2 think we were very clear we couldn't do that with any integrity.
3 **COMMISSIONER ERUETI:** Can I also seek a point of clarification about, so compared to the
4 Lake Alice settlement there was an arbiter independent, a judge who assessed each claim.
5 **MS COOPER:** Yes.
6 **COMMISSIONER ERUETI:** And made an award, whereas in this case you don't have a third
7 party, it's actually you and the Ministry negotiating over the bands?
8 **MS COOPER:** That's right, well, I mean, what we had was very much like the Fast Track
9 processes, we had a pot of money and I mean, as I say, initially it was just everybody was
10 going to get the same and we said, “Well, that's not really fair”. So yeah, we negotiated the
11 bands and we knew that we had to fit, you know, like we had, say, 70 claims that we could
12 put in — it wasn't that many but say we had a certain number that could be paid $18,000, so
13 actually very much like the Fast Track process, except here we, knowing our clients and
14 knowing the claims intimately, we got the job of, you know, having to do that difficult task.
15 And I acknowledge, as we talked about the Fast Track yesterday, it's not a great task to
16 have to do, but at least we felt that we had some control over that more, and were able to
17 reflect that in terms of our knowledge of the clients and their claims rather than Crown
18 Health Financing Agency doing it, for example. But I agree with you, it would have been,
19 you know, preferable if somebody independent could do it. But we felt we were at least a
20 better option than the Crown Health Financing Agency doing it.
21 **MS JANES:** So, you'd finished, you'd settled your 320 claims and if you could pick up from
22 there.
23 **MS COOPER:** So, we know there were some that did not settle, there were a number of clients
24 from Johnston Lawrence who had come to us who didn't accept their offers. And I still
25 don't know what happened to them. I still don't know whether they ever received some sort
26 of settlement.
27 And I also mention *J*, because you'll remember that her claim was dismissed on the
28 basis of the Limitation Act. But the High Court Judge was very clear in his decision that
29 but for the Limitation Act, she would have got a modest award of damages. And we just
30 could not persuade the Crown Health Financing Agency to give her anything. All they
31 were persuaded to do was contribute to her Legal Aid debt, but she did not get anything in
32 her hand.
33 So, we then, of course, had to move then to — so we settled that, we had a period of
34 calm, but — and then the Crown Health Financing Agency transferred all of its residual

1 liabilities, because it wound up at that stage, so all of its residual liabilities then were
2 transferred to the Ministry of Health.
3 **MS JANES:** And before we move to the Ministry of Health, in the settlement of the Crown
4 Health Financing, apart from the compensation, the settlement of legal debt and the
5 apology, were there any other non-monetary or wellness services offered?
6 **MS COOPER:** No, and I think that's because the Crown Health Financing Agency had a finite
7 time, so it was wanting to wind up, and, in any event, I think it's important to say that the
8 sole purpose of the Crown Health Financing Agency was to settle any residual liability of
9 the old Ministry. So that was its sole purpose for being. It certainly was just to deal with
10 distributing money, so — but no, there was no wellness component. So yes, so we then, of
11 course, started to have people come through to us who had psychiatric hospital claims up
12 until the new Mental Health Act came into being, and so we then went to the Ministry of
13 Health and said, “We've got new claims coming forward, what are we going to do about
14 them?”
15 So we were told in August 2012 that the Ministry of Health was developing its own
16 process for investigating and assessing these outstanding claims, and it was made very clear
17 to us that the Crown Health Financing Agency process was done and dusted, so it would be
18 different from that, and we were also told very clearly that the Lake Alice settlement
19 process would not apply. So, this was going to be a stand-alone settlement process.
20 So, in January 2013 we were told that the Ministry would review allegations made
21 by a claimant, that had to be based on written material about their experiences in
22 psychiatric care, and they would review any available records. And if the Ministry were
23 satisfied there was a legitimate basis for a claim, it would then offer an apology and a
24 settlement payment up to $9,000, so we're half the maximum payment of the Crown Health
25 Financing Agency process.
26 And it was interesting for us, because what was made very clear was that the
27 purpose was to acknowledge a person's experiences as well as being available to meet the
28 costs of wellness-related services, so counselling or therapy. But this again was going to be
29 a full and final settlement of any claim.
30 It's fair to say that we were unhappy about that and we endeavoured to persuade the
31 Ministry to make it at least comparable with the Crown Health Financing Agency process
32 which was already modest but we were told essentially, and I think that's confirmed in
33 Mr Knipe's evidence, that there was no budget anymore, this would have to come out of, I
34 think from recall, the legal budget. And so that was what was on offer.

1 And I have to say, we were pretty worn out by that stage. We also still obviously
2 had Legal Aid funding issues, but by then we had the Court of Appeal decision in terms of
3 Legal Aid saying that we could be granted funding for alternative dispute resolution
4 processes, so, you know, our clients had been channelled through that Ministry of Health
5 process since.
6 What I also should say is that we did reach agreement with the Ministry that if we
7 were able to provide evidence that a client was able to get through the Limitation Act, that
8 then the Ministry would consider making the payments more in line with the Crown Health
9 Financing Agency process. But again, that required the cost of a psychiatric report and, in
10 my recollection, we've only had funding for maybe three of those reports. And we — they
11 were only in cases where we were pretty confident that we could get the client through the
12 Limitation Act, because otherwise we knew Legal Aid wouldn't fund it. So, there's all that
13 additional cost.
14 **CHAIR:** Do you mind if I ask a question here. You started your evidence this morning by relying
15 on Miller J's observation.
16 **MS COOPER:** Yes.
17 **CHAIR:** If the Crown didn't have a legal claim it certainly had a moral claim.
18 **MS COOPER:** Yes.
19 **CHAIR:** To what extent the processes you've been describing, the Crown funding agency,
20 Ministry of Health, were based upon moral responsibility as opposed to legal
21 responsibility? Of course, I'm asking that —
22 **MS COOPER:** Yes.
23 **CHAIR:** — because you're now saying that in the Ministry of Health they're raising, you know,
24 you only get through if you pass the limitation hurdle.
25 **MS COOPER:** Well, yeah, I mean, I think as we've highlighted throughout our evidence, this
26 moral liability has really been relied on to bludgeon offers down to their bare minimum, in
27 our view, and I think it distorts the reality that for many of these claimants there would also
28 be a legal liability. You know, there are claimants who would get through the legal
29 barriers. There are claimants who would get through the limitation bar, there are claimants
30 who would have got through the Mental Health Act bar. There are claimants whose claims
31 would have been pre-ACC, or some of their — the components of their claims were not
32 covered by ACC.
33 But, you know, so as you know, we're caught in that funding hurdle, we're caught in
34 that very litigious process where if we'd wanted to challenge any of that we would have

1 forced these really vulnerable, damaged people into a litigation process that probably would
2 have gone for years. So yeah.
3 **CHAIR:** But the reason for my question really is to say if that was based on the moral obligation,
4 and it's interesting that you say that of course that may have had negative implications in
5 terms of quantum.
6 **MS COOPER:** Yeah.
7 **CHAIR:** But nonetheless, the Limitation Act was still being relied on to establish, A, whether
8 they were going to get any moral compensation, or B, whether or not — the limit of that.
9 So in some cases you've said that people who would have been — that discontinued
10 because of the Limitation Act got something but they only got a little bit.
11 **MS COOPER:** That's right.
12 **CHAIR:** Was that regardless of the merits of the claim, regardless of the substance of the claim?
13 **MS COOPER:** Well, they were all people who'd filed claims, so yeah, yes, you're right, that was
14 regardless of the substance of the claim. But they were all people who'd made reasonable
15 allegations. I think under the new process certainly the Ministry of Health had reserved
16 itself the right to say, "No, nothing, you don't get anything."
17 **CHAIR:** Because of the Limitation Act?
18 **MS COOPER:** No, on the basis that it felt that the allegations didn't merit any compensation,
19 yeah. So, and again, just to clarify, the Limitation Act kicked in if we were arguing for
20 above the $9,000. So Limitation Act not applied if it's $9,000 and below. But if you
21 wanted the Crown Health Financing Agency top payment of 18, then you had to provide
22 evidence to show that you could get through —
23 **CHAIR:** You then had to cross the legal threshold.
24 **MS COOPER:** That's right.
25 **CHAIR:** It wasn't a moral matter, it was a legal matter.
26 **MS COOPER:** That's right.
27 **CHAIR:** That's really the point I was trying to get to.
28 **MS COOPER:** Yes, sorry.
29 **CHAIR:** Thank you.
30 **MS COOPER:** Yeah, and again, you know, when you compare that with Lake Alice, at the end of
31 the day, that was a moral liability, completely comparable. All of those claimants would
32 have been limitation-barred potentially, ACC-barred clearly because it only applied during
33 the period that ACC was in force from my memory. I think it started from 1974. So they
34 had the same legal hurdles, the same mental health legislation applied. So that was a moral

1 decision as well in terms of liability. But as we've seen repeatedly, for every other claimant
2 in this group, a different standard has applied.
3 **MS JANES:** So just on that point, given that there is a consistent Crown litigation strategy that
4 applies to all of the agencies, and that includes settling meritorious cases earlier on the basis
5 of the moral liability that the Chair has discussed with you, how would you say in terms of
6 consistency and equity and transparency the Ministry of Health process lines up with that?
7 **MS COOPER:** Well, in terms of consistency it's right at the bottom, like this is literally the
8 bottom of the barrel in terms of ex gratia payments. In terms of — so there's no
9 consistency with the other agencies. And indeed, it sort of sits out on its own as an island
10 almost. I mean one of the things that we raise, or we've been focused on in terms of this
11 limitation policy, Ministry of Health's never been part of this discussion. And if it's an all-
12 of-Government approach, where's the Ministry of Health in this, why is the Ministry of
13 Health not required to engage in a stop-the-clock process? Particularly given, you know,
14 the very real vulnerability of those who've been in psychiatric hospitals. Many of whom
15 are still in psychiatric hospital care. So where's the Ministry of Health in that?
16 So yes, it fails on a number of grounds. I think where it is different from all of the
17 other agencies, it has a low threshold in terms of the quality of evidence that you need to
18 provide before it will accept, and I mean one of the realities is records are often really hard
19 to obtain. Oakley Hospital, for example, you're lucky to get any records. Records for the
20 South Island, the lower South Island psychiatric hospitals have been inaccessible for now
21 about two years because they were stored in a basement that's asbestos-contaminated, so
22 we've not been able to get Sunnyside or Cherry Farm records for about the last two years,
23 we still can't get them.
24 And even Lake Alice or Kimberley records, I mean the Kimberley records all seem
25 to have disappeared. And we're just lucky that with Paul Beale that we actually had got
26 them earlier, because for other people that we are asking for their Kimberley records, and
27 indeed when we re-requested a copy of his records, we're told there are none in existence.
28 So thank goodness we've got some, not all of them by any means, but we've got some. So
29 what's happened to all the Kimberley records?
30 So what we are forced to do there, and I feel sorry for unrepresented clients, but
31 what we're forced to do there is we're forced to collect in Corrections records and ACC
32 records and other medical records and hope to goodness that somewhere in those huge, you
33 know, files of records that the client will have mentioned that they were in a psychiatric
34 hospital, or there will be a report, you know, criminal justice report showing that they have

1 been in a psychiatric hospital.
2 But imagine an unrepresented person trying to do that. Because there has to be
3 some record somewhere that says, you know, at least on a — again I use that term a sniff
4 test, that they've been where they say they have been. And, you know, for clients who've
5 been in multiple psychiatric hospitals it's an ordeal collecting in all those records. We
6 sometimes have to request records from up to seven DHBs [District Health Boards]
7 because the DHBs still hold the records, they're not centralised anywhere.
8 But as I say, you know, once we have collected in the records and then you set out
9 the claimant's story of the narrative of what happened to them and then reference any
10 helpful records which we also provide to the Ministry of Health, we typically get a response
11 within a couple of months. And indeed, the only time when — we've only had two times
12 when we've had a longer delay and once was when the Ministry was involved in litigation
13 which was going through to the Court of Appeal or Supreme Court. And that slowed it
14 down, and they were also preparing evidence for the Waitangi Tribunal, from memory.
15 And that's the only time, we waited about six or seven months, and then the only
16 other time is obviously during Covid. But those are the only two times that we've had
17 delays of more than six or seven months, otherwise we get responses very quickly. I mean
18 the team is very small, it's just Phil Knipe and he's got a — I should remember his name,
19 my apologies I don't — another person who's helping and then his personal assistant and
20 that's the three in the team that we deal with. So those ones, you know, are quickly done
21 and we get quick responses.
22 There's no formal settlement documentation either. They sent a letter with the offer
23 in it and the client just has to sign that letter. It does say it is a full and final settlement, so
24 there are legal consequences there. But once they've returned that letter and sent it off then
25 away we go and the process is done very quickly.
26 All of the ministries have agreements, separate agreements with Legal Aid about
27 contribution to the Legal Aid debt, so the Ministry of Health has an agreement with Legal
28 Aid that it pays half of the debt and Legal Aid writes off the rest. We have to do
29 submissions about that. But that's the agreement that there is.
30 **COMMISSIONER ERUETI:** Can I just ask a quick question about coming back to the stop-the-
31 clock agreement. So you have one with MSD [Ministry of Social Development], you're
32 trying to negotiate one with Ministry of Education and you've also tried to negotiate one
33 with the Ministry of Health.
34 **MS COOPER:** Well, initially, when we first re-engaged with the Ministry of Health in relation to

1 these claims, we discuss a stop-the-clock agreement and they basically said no. We've been
2 through the litigation, there are lots of legal problems with these claims and they just
3 wouldn't contemplate it. As I say, you know, I'd like to say, you know, we — maybe we
4 could have been a bit more forceful, but as I say we were pretty worn down by then. And it
5 was important to ask that there be a process that the clients could engage in.
6 But I think since we're back, you know, since the issue of a Government stop-the-
7 clock is back on the table, it should really cover all Government agencies that do these
8 processes, it shouldn't just be the Ministry of Education and the Ministry of Social
9 Development. It says it's a Government policy, so it needs to be all-of-Government,
10 because as we said, Oranga Tamariki is also sitting outside it at the moment too. So we're
11 very clear about needs to be all-of-Government.
12 **CHAIR:** I think we should move on Ms Janes.
13 **MS JANES:** Absolutely, I just wanted to clarify just quickly your thoughts. You've described a
14 process at least up to the $9,000 threshold of a quick process, low level of requirement to
15 have an evidential burden. Have you had any thoughts about whether that is because of the
16 low level of the compensation and that type of process is able to be much faster and less
17 investigative?
18 **MS COOPER:** Well, it's hard to say, because the Lake Alice process, I mean, we still have clients
19 making Lake Alice claims. That's not much slower, and the amount of information we
20 provide for those claims is not much more detailed. So, I mean, you know, if you compare
21 apples with apples, the processes are not — there's not demonstrably any different process
22 that we can see and there's not demonstrably longer timeframes that seem to be applied. So
23 I can't say that there's any transparency around that.
24 **MS JANES:** And then unless there was anything more about the processes you wanted to say,
25 were there any comments that you just wanted to pick up about Mr Knipe's evidence before
26 we move on to the Ministry of Education?
27 **MS COOPER:** Yes, there was one point which I wanted to pick up and that's his argument that
28 the reason why it started at this half the Crown Health Financing Agency payments was
29 because of this application of this notional Legal Aid debt. So what I think the argument
30 there is that the people who went through the Crown Health Financing Agency had much
31 higher legal costs, so that justified their higher payment. But they didn't have to pay their
32 legal costs. That was a separate part of the settlement process. And it's the same argument
33 that the Ministry of Health applied to the second group of Lake Alice claimants, they again
34 deducted this notional Legal Aid, or legal cost. And Mr Zentveld, one of the claimants in

1 that group challenged it at the District Court, and the District Court said that the Ministry of
2 Health was wrong to do that, and so they're still topping up that second group because they
3 deducted like 40% of the settlement. So to be still relying on that as a legitimate basis for
4 this claimant group getting half just doesn't wash.
5 So that's the only comment I wanted to make. I hadn't realised that until I read his
6 brief and I was quite incensed, to be honest, because there's been litigation about this very
7 issue and the Ministry of Health has been criticised and told that's not a legitimate
8 argument. So that's the last one comment I wanted to make.
9 **MS JANES:** Thank you. And unless the Commissioners have any questions we'll move to the
10 Ministry of Education.
11 **CHAIR:** Thank you.
12 **MS JANES:** So Amanda Hill will take over for the Ministry of Education processes and
13 effectively that evidence is paragraph 677 to around 745. Before we actually start into what
14 the process looks like, can you just briefly explain the eligibility.
15 **MS HILL:** So the — our understanding of the Ministry of Education process is set out in our
16 brief, and it addresses incidents of abuse that happened in residential special schools after
17 1993, and that quite arbitrary date is also in Helen Hurst's evidence for the Ministry of
18 Education. That's an extension of where the process started.
19 But when I went to the Ministry of Education website this morning, the eligibility
20 criteria is different, it's the old process. And so on the Ministry of Education website the
21 information that it gives about the eligibility criteria is that it only deals with abuse in
22 residential special schools before 1989, which is the earlier criteria, and primary schools
23 before 1989 and any State school which is closed.
24 So that extension to the eligibility criteria mentioned by Ms Hurst to incidents after
25 1993 is not on the Ministry of Education website. So any non-represented person who was
26 looking to engage with the Ministry of Education would not get the correct information,
27 and I am concerned that people who rely on that information would believe that they were
28 not eligible. So that's just a concern I wanted to highlight, and it really shows that the level
29 of information publicly available about settlement processes is insufficient. So I just
30 wanted to address that as an initial issue.
31 I spent a lot of time yesterday talking to you about the Ministry of Social
32 Development process, and the key thing I need to say about Education is that it is worse
33 than the Ministry of Social Development process.
34 And one of the interesting things that we can see from the Education evidence, is

1 that the MOE [Ministry of Education] process was modelled on MSD's processes in 2010.
2 So those identified issues that we talked about yesterday of the MSD process are copied
3 over into the MOE process, but I don't believe — MSD has had many iterations of its
4 process since 2010, MOE's process appears largely unchanged. So it might have been
5 consistent in 2010, but it's certainly not consistent now.
6 **MS JANES:** If we call up document witness 94-316, Cooper Legal had sought an OIA [Official
7 Information Act 1982] about information on claims resolutions with the Ministry of
8 Education. If we can just orient ourselves with the document. So it's the Ministry of
9 Education reply to Cooper Legal, it's date stamped 7 August 2017. Just take us through
10 quickly, we're not going to spend much time on the front page, but just one comment about
11 table 1.
12 **MS HILL:** So table 1 shows the claims received by the Ministry of Education up to 30 June 2017.
13 The total at the bottom there shows 75 claims received, 31 resolved and 22 of those, of 31
14 claims, are ones where some compensation's been paid. So roughly a third, if my maths is
15 correct.
16 **MS JANES:** And just going to the highlighted paragraph above, it caveats —
17 **MS HILL:** There is a big caveat there, we'll just call that out. "The information provided does not
18 include claims received by the Ministry of Social Development that include education
19 elements which MSD resolves in consultation with the Ministry of Education. Any
20 information concerning those claims should be sought directly from MSD".
21 **MS JANES:** And then go to page 2.
22 **MS HILL:** So there's just the key issue there is the initial step required to start a claim, so we'll
23 just pull that up. "The initial step requires an extensive search for historical records held
24 about the claimant and any information relating to the allegations made. The historic
25 nature and sensitivity of the claims means that the time taken to resolve a claim can be
26 lengthy, however we endeavour to resolve claims as quickly as possible".
27 **MS JANES:** Just a quick question, is the complexity of Ministry of Education claims better,
28 worse, same as any other historical abuse claims?
29 **MS HILL:** The complexity comes from who's responsible, and I'll come back to the vexed issue
30 of the legal landscape and only briefly. But the actual claims itself, there's usually only one
31 school, so like Chassy Duncan, for example, was in Waimokoia, Kerry Johnson in
32 Campbell Park. There's usually only one institution, sometimes two, and usually for a
33 period of some years. The younger clients usually only there for — Waimokoia or
34 McKenzie for a year, Campbell Park could be five or six years. But factually not overly

1 complex, certainly not at the level of, say, the Chassy Duncan's MSD claim which was
2 immensely complex.
3 **MS JANES:** Thank you, if we can move over the page.
4 **MS HILL:** We'll come back to compensation, but if we just highlight that bit there. So MSD at
5 that stage had paid a total of $293,000 to claimants and if we can just bring that table up.
6 That's the range of payments made to claimants at that stage. You'll see it's very bottom
7 heavy. So the bulk of the claims are in that bottom range of between zero and $10,000.
8 And the top level payment there of between 25 and $30,000, usually that is only when
9 abuse is substantiated by a staff member who's been convicted.
10 **MS JANES:** If we can move to the next document number 52 witness 94-295. As that's coming
11 up, this was the letter that Cooper Legal received from Crown Law Office dated 28
12 September 2015. I'll call out paragraph 2, but then we will go through the others as you
13 briefly move through the document.
14 **MS HILL:** So by way of background, we had written a lengthy letter to Legal Aid extensively
15 and quite bluntly setting out our concerns about the Ministry of Education process and then
16 quite awkwardly sent it to Crown Law in error, and then we received a response from
17 Crown Law. It's not an ideal way to communicate, but here we are.
18 And so the writer is from Crown Law, and she says, "You have indicated to Legal
19 Aid that you intend to file claims for all your clients with a claim against the Ministry. You
20 say that this is a necessary step as the Ministry's approach and processes adopted under its
21 ADR [alternative dispute resolution] have been extremely unsatisfactory. You refer to the
22 following matters as an example of this".
23 And the reason we are stepping through this letter from 2015 is that very little has
24 changed. So every concern I address in this letter is still a concern now. So, 2.1, "That the
25 assessment findings in recent cases appear to have been watered down to justify low
26 monetary amounts". And what we see, we talked a little about this yesterday, is the
27 aggregation and minimisation of complaints, often reducing things to acceptable corporal
28 punishment or “standards of the day”. And when you can bring an allegation down to that
29 level, of course, then you compensate at a very low level as well.
30 2.2, "The delays in receiving offers from the Ministry have forced some clients to
31 accept the unsatisfactory offers received". And at that stage there had been only a handful
32 of settlement offers, by and large they had been $5,000 or less, and the clients had been
33 waiting so long, a bit like the Fast Track process really, that they took it because they could
34 not see any resolution in sight otherwise.

1 **MS JANES:** We talk about how they have been waiting so long, what timeframe are we looking
2 at?
3 **MS HILL:** It varies, so in 2015 some of these claims had been raised a number of years earlier,
4 from memory, I couldn't give you an average time, but most of the claims we filed that year
5 in 2015 remain outstanding. So and as we've explained in our evidence, we filed a lot of
6 claims against the Ministry of Education that year because of the Limitation Act concern.
7 Most of them are outstanding still.
8 **MS COOPER:** And you'll remember that Kerry Johnson, I highlighted that letter which we did
9 send formally to complain to Crown Law about all the delays. So Kerry Johnson was
10 somebody who was in that group who'd been waiting for, oh, I think already by then, I can't
11 even think now, I think it would have been 13 years perhaps. So that's how long he'd been
12 waiting.
13 **MS JANES:** I don't want to jump you ahead but this does seem an opportune time to talk about
14 the legal landscape and defendants.
15 **MS HILL:** Yes, and Ms Hurst and I are in agreement that the legal liability issues around
16 residential schools are complex and we have all addressed that in our briefs. And it comes
17 down to the fact that prior to April 1972 schools like Campbell Park had a mixture of staff.
18 MSD's predecessors employed the hostel staff, the matrons, the housemasters, the
19 gardeners and then there were the teachers who were employed by the Department of
20 Education. And to be honest, no one really has a very clear idea of the line between those
21 two entities.
22 And then after 1972 there was the split, the Department of Education separated from
23 what became known as the Department of Social Welfare. So the liability changed, so
24 pre-72, post-72, for responsibility in the institutions and then the liability is also affected by
25 how a person came to be in the school. State wards were just dropped in there really. If
26 you were a State ward you could just be admitted by who was known as the superintendent
27 of the Child Welfare division. But some children were admitted to places like Campbell
28 Park under the Education Act. That was usually through a referral from the psychological
29 services group at the time. And that, the status of the child, affected the level of
30 responsibility as well.
31 Now I could talk for a very long time about the complexities of that, but actually at
32 paragraph 691 of our brief there's a matrix there which helps, in a probably simplified form,
33 just sets out the different outcomes.
34 And when we first started the claims, we understood that Campbell Park, in

1 particular, because that's where the bulk of the claims came from, had been managed by the
2 Ministry of Social Development, and so claims were directed to MSD. And MSD accepted
3 those claims and settled a number of them.
4 And as time went on it became clear that there was a more complicated issue around
5 liability and both Crown Law and ourselves, we had an evolving understanding of how that
6 affected the claims.
7 And the most useful way to demonstrate this is in our evidence we have a case study
8 of a man called GGH and he was in Campbell Park, claim was filed in 2004. It was only in
9 2016 that Crown Law said to us, "You need to join the Ministry of Education in relation to
10 Campbell Park." So there was a change in the way those claims were dealt with.
11 For most of our clients, that has resulted either through evolution or our newer
12 clients we have start out with joint claims, Ministry of Education and Ministry of Social
13 Development. And they are complex and mired in delays because the two processes
14 between MSD and MOE are so different, and the MOE process is far slower, even
15 compared to the Ministry of Social Development. And there is, and of course, we've got no
16 visibility over the discussions between the two departments.
17 We understand now that back prior to 2015 or so the Ministry of Social
18 Development settled claims and may have recouped some money from MOE, but like I say,
19 we have no visibility over that, but we know that there were discussions. We were never
20 party to those discussions. And MSD did not say you need to go to MOE, they accepted
21 responsibility for a long time.
22 And if you're in commercial litigation a defendant would say there is another party
23 who should be before the court and they would go to join them and that didn't happen,
24 although, as I say, in 2016 in relation to Campbell Park, MOE was joined to litigation that
25 had been in the courts for 16 years for the oldest claim.
26 So I could talk a long time about joint claims and I won't, except to say that they are
27 in their own area, they have their own problems and so any problems in one process are
28 doubled. And then the aggravating factor is that there is — there appears to be an argument
29 at times between MSD and MOE over who contributes what, who does the work and who
30 pays the costs. And that seems to be an on-going problem there.
31 **MS JANES:** And you've referred yesterday even to a development, a very recent development
32 about carving out teachers.
33 **MS HILL:** Yes, we talked late yesterday about carving out even single allegations against a single
34 teacher. So just think about how that would work when we've talked about these processes,

1 we extract one allegation, we don't have a limitation agreement so we might have to file
2 that, and to be honest for a single allegation against a single staff member, you have to
3 think proportionately is that a good use of resource? Probably not.
4 **MS COOPER:** And time.
5 **MS HILL:** And time and that goes into the MOE process. So we might hear back, five, six, seven
6 years about that single aspect. It's not workable, but this is what we're in right now.
7 **COMMISSION ERUETI:** So can I just ask about, so that's the MSD and MOE, but Ministry of
8 Health, is that — do you have cases that overlap all three, or is that because you settle
9 substantially?
10 **MS HILL:** MOH is its own beast, Sonja's explained that's got a very different processes so it
11 doesn't ever interact with these. Although many State wards were placed there, usually
12 MSD's response to our allegations "These are State wards, you had an obligation to monitor
13 them and visit them"; the response is, "We might not have visited them so that's a practise
14 failure", or "They were under the care of the hospital and so we didn't have the obligation at
15 that point". There isn't the cross-over problems that we have here.
16 **MS COOPER:** I think you've had that really illustrated really well in the cases of both Chassy
17 Duncan and Kerry Johnson, we're just still waiting.
18 **COMMISSIONER ALOFIVAE:** Because they're relying on the legal status of which the young
19 person was placed in that particular institution under a 101 or mental health order?
20 **MS COOPER:** It's more that — so with Kerry it's Campbell Park so that's now fallen to the
21 Ministry of Education, and initially of course that claim was brought against the Ministry of
22 Social Development, but that's now been handed over to the Ministry of Education, so he's
23 waiting. With Chassy, the Ministry of Social Development has made an offer and that's
24 been accepted but he's still waiting for the Ministry of Education to settle in respect of what
25 happened to him at Waimokoia.
26 **MS HILL:** The delay isn't really about the legal complexity so much as MOE's process is just
27 mired in delay because it's under-resourced which I'll come to.
28 **MS JANES:** Just before we move on, Amanda spoke about the GGH case study. I just wanted to
29 point that it's paragraph 533 to 561 so unless you want to very quickly talk — otherwise
30 we'll just orient the Commissioners in the transcript.
31 **MS HILL:** I think it's probably more useful to move on. It does demonstrate how these joint
32 claims are dealt with.
33 **MS COOPER:** He's one of our most elderly clients who's been a client since 2002 and still
34 waiting for those two claims to be dealt with, well, to be resolved.

1 **MS HILL:** There have been, it's protracted. If we go back to the issues set out in this letter and
2 we get to.
3 **MS JANES:** 2.3.
4 **MS HILL:** 2.3. "The standard of proof required by the Ministry to justify a payment exceeds
5 both a civil and a criminal standard". And we say that the standard of proof that Ministry
6 of Education require is somewhere near almost beyond reasonable doubt. It isn't just a
7 balance of probabilities as you should have in a civil proceeding, or that, sort of, is it
8 reasonable to accept it, it's a very high standard which most historic claims struggle to
9 meet.
10 **MS JANES:** Have they ever articulated why they apply that particular standard?
11 **MS COOPER:** No. And I think —
12 **CHAIR:** A question before that I think, Ms Janes, how do you know, I mean is it something you
13 sense, or have they actually said it?
14 **MS HILL:** It's something we sense from the way the offers are responded to, so the ones that
15 we've had responses to, even with evidence supporting an allegation, it will not be
16 accepted.
17 **MS COOPER:** Again, I think Cheryl Munro's evidence on behalf of James was a really good
18 example of that. What was very clear in that judicial settlement conference and other
19 conferences we attend is that the Ministry gives absolutely no weight to propensity or
20 similar fact evidence. They were very clear they do not take that into account.
21 **CHAIR:** No, we've heard all that evidence.
22 **MS COOPER:** Yeah.
23 **CHAIR:** I just wanted to know if they actually said it.
24 **MS COOPER:** It's based on that.
25 **CHAIR:** But it's based on all of that.
26 **MS COOPER:** Yes.
27 **CHAIR:** Now Ms Janes, your next question.
28 **MS JANES:** Yes, so 2.4.
29 **MS HILL:** The process employed by MSD and the Ministry to resolve filed claims. That's about
30 the allegations against both agencies being unclear and lacking consistency and I think I've
31 dealt with that.
32 **MS JANES:** And you've probably dealt with the stop-the-clock.
33 **MS HILL:** Stop-the-clock.
34 **MS JANES:** So we'll move on.

1 **MS HILL:** That was our list of issues from 2015, I think. I think there were more over the page.
2 There is the Crown response. It's lengthy, so I'm not sure we need to go into that. No,
3 we're going to look at those paragraphs.
4 **MS JANES:** Just very briefly, so if you just pick out the things that you think are pertinent for the
5 moment.
6 **MS HILL:** So Crown Law did not agree with our list of issues. And there's material in there
7 about the proposal to stop-the-clock and we've covered the limitation agreement issue.
8 At paragraph 4, Crown Law says the Ministry's been working hard to resolve its
9 historic claims through its ADR processes and addresses in particular the Roxburgh cases,
10 that's Roxburgh Health Camp where there was claims about the school at Roxburgh, and
11 when we look at compensation we'll see that the resolution was in that $5,000 bracket.
12 And at paragraph 5 it addresses, because that's where we see that they were
13 watering down the allegations, it denied the allegation that we had made about that. And
14 the Ministry's assessment the abuse complained of in the Roxburgh complaints can be
15 classified as low-level abuse that the education board investigated at the time. And further,
16 aside from the broad allegations made, there were insufficient particulars to assess the
17 gravity of abuse.
18 **MS JANES:** In 6 it talks about delays, it's really the second part of that paragraph.
19 **MS HILL:** And Crown Law said, "Invariably there is delay because of the large number of
20 claims, the complex nature of these claims and the difficulty in locating, researching,
21 collating the information and managing these claims in conjunction with the relevant
22 parties within the Ministry's available resources".
23 **MS JANES:** So if one accepted that that was the case, is that why you now are proposing that
24 effectively there should be a single agency outside of the Crown that would be able to
25 resolve end-to-end.
26 **MS HILL:** Yes. The Ministry's process is so severely under-resourced that it cannot possibly
27 cope. There are two assessors and, as Sonja has said yesterday, they are both — they both
28 have relationships with the Ministry of Education which means that they cannot be
29 considered objective or independent. Very few of our clients have met with the MOE
30 assessors and there's quite a long delay once they have. And Chassy Duncan described
31 meeting with Murray Witheford in October 2019 and we're still waiting to have a response
32 to Mr Duncan's claim. And Kerry Johnson has not met with the assessor.
33 While that meeting is optional, I'm going to take a slight digression here to say that
34 it became apparent to us that people who did not meet the assessor didn't have a credibility

1 assessment and so what we saw is that people who met with the assessor, credibility came
2 into play for the Ministry of Education claims, and remarks were made about a client being
3 considered credible and that seemed to have increased the likelihood of their claim being
4 accepted. But for people who hadn't met with the assessor, that element is missing. So
5 there is — and it's not a mandatory meeting, so there's some inconsistencies there.
6 **COMMISSIONER ERUETI:** Could I, in the gap, just ask about, we talked about MSD and
7 there's consistency with tikanga and te reo Māori about the MOE process?
8 **MS HILL:** We have not seen anything to suggest any reflection of Te Tiriti in the MOE processes
9 at all.
10 **MS COOPER:** That would also be the same for the Ministry of Health.
11 **COMMISSIONER ERUETI:** Thank you.
12 **MS JANES:** You've effectively said in your evidence this morning that from your perspective the
13 MOE process is modelled on the 2010, it has not evolved.
14 **MS HILL:** Mmm.
15 **MS JANES:** What would you please say was happening in latter years, say 2016 and onwards?
16 **MS HILL:** We know joint claims have been taking up a lot of space for MOE, I think there's been
17 a lot of negotiation with the Ministry of Social Development about that but largely it's
18 unchanged. It's the same process but just so overwhelmed that it's just mired. So we see
19 very few responses. Even when someone is terminally ill, we have one person who was
20 terminally ill that we got a settlement for in time but there's still one outstanding, a woman
21 that Sonja mentioned earlier in her evidence. So even when there is a really tight
22 timeframe it's exceptionally slow.
23 **MS COOPER:** And I note that response was to offer no compensation on the grounds that her
24 allegations were not accepted as reaching sufficient standard to be accepted. So all was —
25 just her Legal Aid debt was the offer to contribute to that.
26 **MS JANES:** We know the Waitangi Tribunal claim was against the Ministry of Social
27 Development processes, but one would assume that could reverberate through the other
28 agencies and cause them to take a look at their processes. Has there been any indication of
29 change reflection?
30 **MS HILL:** We understand, although again we've limited visibility, that MOE commissioned a
31 review by Allen & Clarke. We only know that because we had a consultation session with
32 them about MOE's process, and told them much the same as we're telling you now.
33 **MS JANES:** When was that?
34 **MS HILL:** That was during the Covid lockdown in March or April. We don't know whether a

1 report has been made, we haven't heard anything since.
2 **MS JANES:** And you sought information, at paragraph 752 of your brief you talk about seeking
3 information under the OIA about the number of claims resolved, but I think we've looked at
4 that at the 293,000.
5 **MS HILL:** That's the definition in the tables, yes.
6 **MS JANES:** So unless there's anything else that you wanted to say?
7 **MS HILL:** No, we can have — we can look at some compensation issues, but one thing I do want
8 to address is the issue of boards of trustees. And I think perhaps before we go on to
9 compensation it's an issue. And, of course, the 1989 Education Act brought in the
10 governance model of boards of trustees being responsible for schools and that's why the
11 Ministry of Education process cuts off at that date for State schools unless the State school
12 is closed. And we're on the same page as Helen Hurst with that.
13 There's been a slight misunderstanding about evidence on this point. So where we
14 are instructed to bring a claim that relates to abuse post-1989, we approach a school's board
15 of trustees. I have to say that boards of trustees are ill-equipped to deal with these claims.
16 As everyone knows, boards of trustees are made up of people who are elected, they have a
17 range of skills, some schools will have, and dare I say it, high higher decile schools will
18 have lawyers and accountants and people like that, some schools will have concerned and
19 interested parents, but the skill sets could be quite different. Some boards are insured, some
20 are not, it's patchy. And the responses are patchy as well. So I think there is an issue there
21 about how we deal with that situation.
22 One issue that Helen Hurst picks up in her reply evidence, and it's at her reply brief
23 in 3.3, is that slight misunderstanding where we've said that boards of trustees are agents of
24 the Ministry of Education. That comment related to special residential schools. So because
25 even after 1989 the boards of trustees, even of the schools that are still open now, they're
26 largely appointed by the Ministry, they're a different beast. And so when you see a board
27 of trustees that's largely Ministry-appointed, the Ministry of Education shouldn't be able to
28 say it's the board of trustees' issue. And so there are still residential special schools open
29 today and that's just something to be aware of as well.
30 **MS JANES:** Before we go to compensation, and taking you to the morning adjournment, in terms
31 of, because we're going to talk about the financial compensation aspect, can we cover off in
32 the time that you have dealt with these claims either under the MSD and/or the Ministry of
33 Education processes, what has been available to claimants either from the beginning of
34 filing a claim or at the end in terms of non-monetary wellness or other?

1 **MS HILL:** Nothing. The Ministry of Education offers an apology at the end of a process, but
2 there is nothing offered in terms of well-being, counselling or support. There is a
3 suggestion that in — and perhaps for self-represented people that something may be
4 available, but we have never seen anything like that.
5 **MS COOPER:** Again, just the Legal Aid debt is paid for as well, so the Ministry of Education
6 also has an agreement with Legal Aid. And it pays half the debt, and the rest is written off
7 by Legal Aid.
8 **MS JANES:** We have 10 minutes, so we can launch into compensation or you could take a
9 slightly earlier adjournment, entirely in your hands.
10 **CHAIR:** I think we should rock on until 11.30. Let's see if we can get it done by 11.30.
11 **MS JANES:** Yes.
12 **MS HILL:** Did you want to bring up that table?
13 **MS JANES:** Yes.
14 **MS HILL:** What we have in our brief, and I'll take you to it and we're going to put it up on the
15 screen, I understand, as well, is appendix B to the MOE chapter. And it's on page 193 of
16 our brief of evidence. It's probably the easiest way to talk about compensation in a short
17 period of time.
18 **CHAIR:** Appreciate that.
19 **MS HILL:** While we're seeing if we can bring up the document.
20 **CHAIR:** Ms Janes, have I made life difficult for you?
21 **MS JANES:** No, unfortunately it looks like the wrong document has been loaded, so if we do go
22 to the briefs of evidence and we look at our briefs of evidence rather than bringing it up.
23 **MS HILL:** Yes, so page 193 of the Cooper Legal brief. That's a table of settlements by MOE up
24 to January 2020. It covers off a number of different factual circumstances. On that first
25 page I talked earlier about the Roxburgh Health Camp claims, there's three people there,
26 PJB, HC and MP. And as a cluster they were all offered $5,000 each. And that's August
27 2015.
28 Now two settled, one didn't. In the table there it sets out the — there we go, up on
29 the screen, it sets out the allegations by three of those claimants of physical abuse, verbal
30 abuse and being locked in a cupboard and all these of the claimants made those allegations.
31 There were additional allegations by MP of a sexual assault and witnessing the same person
32 sexually assaulting another boy. And, just under that, MOE's assessment found that
33 between 1975 and 1979 there were a series of complaints about Mr and Mrs R at the health
34 camp school. These complaints did not relate to those three people but did raise similar

1 issues concerning the use of harsh behaviour management practices such as smacking
2 children, placing children in the storeroom and shouting at children. These practices did
3 not comply with standards at the time, the allegations received media attention, and we'll
4 just scroll down a little more, it was reported that 50 children were withdrawn.
5 **MS JANES:** And over the next page.
6 **MS HILL:** While the investigation was carried out. So the Education Board had investigated
7 Mr and Mrs R and they left the school in 1979. And there was no evidence found by MOE
8 of complaints being investigated about the sexual misconduct, there were no personal files
9 for a claimant and there were very few records recovered from the school. So the Ministry
10 described the $5,000 offer as a gesture of good faith and to settle the claims. The Ministry
11 was prepared to accept the possibility that these three clients were subjected to behaviour
12 management practices that were not consistent with policies and practises of the time.
13 This response is not unusual for health camp claims. We almost, when we get an
14 offer from MOE, and it's very rare, almost all of them have been $5,000. It's a tariff but
15 with no sort of transparency about how we get there.
16 So if we could keep that table up, if we can. I'm not going to go through every box,
17 I just want to highlight a couple of things. So the next box down, GB, a Campbell Park
18 claim from 1971. Now this is one where MSD settled the claim for $14,000 in July 2017.
19 And although Ministry of Education was employing half the staff there, it wasn't involved
20 in the assessment. And as I've said before, there's no visibility over what contribution in a
21 monetary sense MOE may have made.
22 As we move down, the next box is relating to a claim about Mt Wellington
23 residential school in the 60s. That's a $7,000 offer. It relates to allegations about sexual
24 assaults by named housemaster. MOE's response was that it had been unable to find any
25 records for a staff member of that name, there were no allegations made or notes on the
26 records of the other children involved. But MOE had found the complainant credible.
27 That, coupled with the fact that the Ministry was aware of concerns that there were low
28 levels of staff at Mt Wellington, and there were concerns about the capability of the staff,
29 led MOE to accept the claim.
30 So this is one person who had met with the assessor, so credibility is clearly really
31 important here. And we've just noted there this offer is on the low side given the nature of
32 the abuse accepted. But we think that was deflated because of the lack of documentary
33 evidence. I'll skip over SH. You'll see at the bottom of that page there's another Roxburgh
34 Health Camp claim, another $5,000 offer relating to the same staff members. And again, if

1 we go over to the third page.
2 **MS JANES:** There's another Campbell Park one of a similar —
3 **MS HILL:** Yes. So just noting there, again an allegation about sexual assault. So that will be
4 disconnected from the first allegations of sexual assault, they won't have taken those
5 allegations into account at the same time. But similar allegations, so locked in a classroom,
6 physical assaults, but the other allegations not accepted.
7 Just note there that last bullet point before we come on to the Campbell Park claim,
8 "Given the number of children who attended the school each year it is thought likely that
9 there would have been some disclosure either on the residential side or upon a child
10 returning home if Mr R was sexually abusing children". Someone would have complained
11 about it and somebody would have written it down, but because those things did not
12 happen, we're not going to accept that allegation.
13 At the bottom of that page, MLA, and I've noted there there's another case study in
14 our brief about MLA. And so there is a more fulsome description of his claim. That's a
15 Campbell Park claim where it was settled for $14,000. And interestingly, $12,000 of that
16 was for the allegations being accepted, $2,000 for being mucked around with a claim going
17 to MSD first and then later being told to take it against MOE.
18 This is one of the very few times that we see an additional amount to acknowledge
19 delay. This has happened on one other occasion that I can recall, they got an additional
20 $3,000 for delay. But when we point out that our other claims have been waiting as long,
21 we're met with silence about whether this will become a regular occurrence. We do seek it
22 now just to see if we can get it.
23 **MS COOPER:** Actually, it was expressly refused in the case of another client who'd been waiting
24 a similar period of time.
25 **MS HILL:** So we don't know why there is that approach. In terms of the other claims I wanted to
26 highlight, we'll skip over to page 198. And I just wanted to note there the claim of RP. So
27 again this is a Campbell Park claim directed to MSD, so an earlier one. And they received
28 an offer of $6,000 in February 2018. That was rejected and the offer — and the claim
29 hasn't settled yet. But just noting there, MOE doesn't appear to have been involved in the
30 assessment. So even though it's a defendant, it's got no involvement, it's relied on MSD to
31 do the work and it's not clear whether they've made a financial contribution.
32 And the last one I want to talk to is SP. Waimokoia. This is a Waimokoia claim.
33 You'll see a sudden spike here, it's $35,000. And it's terrible when you're so used to seeing
34 $5,000 that you're a little bit thrilled when you get an offer like that for a claimant because

1 you think finally someone's having their experiences recognised. And you'll see that we've
2 got a named staff member in there, Mr McCardle and Mr Wallis. Now they're named
3 because there was a trial and a conviction and the only reason SP got $35,000 is that that
4 staff member has been convicted in relation to him. That's the standard that you need to
5 meet to get what we say is an appropriate settlement.
6 But to be honest, even that amount for being sexually and physically assaulted by
7 two different staff members is still very low. And I also note there the allegations of the
8 time-out room Waimokoia and there's been publicity about the time-out room at
9 Waimokoia, the time-out room was horrendous.
10 I think that probably is as much as we want to go over there. The only other one —
11 I'll leave you to read over those in your own time, I think.
12 **CHAIR:** You can be assured, of course, we are taking account of all of this.
13 **MS HILL:** Absolutely. I think that table really highlights the real inconsistencies there.
14 **CHAIR:** It's very helpful to have it in tabulated form, I must say, it really assists us, so thank you
15 for doing that particular work. I think it's time we took a break.
16 **Adjournment from 11.31 am to 11.49 am**
17 **CHAIR:** Thank you Ms Janes.
18 **MS JANES:** We're actually now going to move to — we've been looking at the processes and
19 we're now going to look at compensation levels generally, and also with a slight contrast,
20 obviously not comprehensive, but what's available in redress schemes internationally.
21 **MS COOPER:** So I'm going to deal with this section. I have to say it's reasonably difficult
22 finding material and we've tracked through, for example, with the Ministry of Social
23 Development, old media articles that we had and information we had received under the
24 Official Information Act requests for that kind of information. But I just wanted to do this
25 in a very broad-brush way.
26 So obviously starting with the Ministry of Health, you have the Lake Alice claimant
27 group, there the payments ranged from $10,000 to $120,000 with an average of $68,000.
28 So that's the first round. And then the second round received payments ranging from
29 $20,000 to 124,000 with an average payment of $49,000. I'm not sure whether that
30 includes the top-up that the Ministry of Health had to make. I suspect that would have
31 made that range higher again.
32 So then you compare that with the settlement processes, the psychiatric claims that
33 we've been involved with, so that looks, as I understand it, it considers the Crown Health
34 Financing Agency settlements as well as the Ministry of Health settlements. So the average

1 payment there is $9,607 dollars excluding legal costs. And we think that with on-going
2 settlement claims in the new process the average will have lowered since then. Because
3 this was material dating back to 2011, so — no, sorry, 2015, so it will have probably
4 changed by then.
5 We don't actually have any comparable information about Ministry of Education
6 data at all. There isn't anything that — and it was very interesting in New Zealand's
7 reporting on settlement processes, I think it was either to the Human Rights Committee or
8 the committee against — the Ministry of Education was just not there at all, so whereas
9 there was a lot of focus on the settlement processes and settlement payments by the
10 Ministry Social Development.
11 But it's been interesting monitoring that through the various bits of information we
12 collected over the years. So, for example, in May 2014 the information we had was that
13 there were settlement payments ranging from $1,100 to $80,000. I just note that's in the
14 timeframe that should have included the *S* and *W* settlements which, of course, were in the
15 $140,000 range, so they just seem to have dropped out of any stats here.
16 So at that stage the average payment was close to $20,500 excluding legal costs.
17 And then we had other media reports in November 2014 which said that there had been —
18 the average was $16,500 and that the reported payments had varied between $4,500 and
19 $45,000, so within a reasonably short timeframe quite disparate information.
20 Then there was another Stuff report in May 2015 where MSD said it had paid
21 $8.4 million in 583 cases it had resolved then, averaging just under $14,500, so that's
22 tracked down again. And then we have another media report to 31 March 2015 which said
23 that the average payment was $20,221, but I note that that report was silent about whether it
24 included the contribution to legal costs, so we don't know that.
25 And then Dr Winter prepared a good, you know, a really useful report in 2018. So
26 the information provided to him was that MSD had settled 1,632 claims and it had paid
27 1,315 settlements. And at that stage the mean average was $19,124. And then just a short
28 time later, as I said, the Ministry was reporting to the United Nations Committee Against
29 Torture. So it said as at June 2018 MSD had resolved 1,727 claims and it had made
30 apologies and payments to 1,398 people, totalling over $26 million. So we calculated that
31 then the average was about $18,598. So again, that's different information again.
32 And then in the final report of the Government to the United Nations Committee
33 Against Torture in September 2019 the figures had changed again. So then MSD reported
34 it had resolved 1,794 claims, it had paid $27.6 million to 1,450 people ranging from $1,150

1 to $80,000, said that the most common payment was between 10 and $25,000. So we
2 calculated that being an average of just over $19,000, but again, completely silent as to
3 whether that included any contribution to legal costs. So that information's quite difficult, I
4 think, to work out the accuracy of it.
5 One of the things that we referred to is the Social Services Committee report. And
6 I highly, you know, ask that you read through that because that actually sets out a range of
7 Crown payments made by various Government agencies and in respect of various
8 settlement schemes and that's where I got the Lake Alice data from. But one of the things
9 I highlighted is that the people who had contracted Hep C through contaminated blood each
10 got $69,620 each.
11 And if you look through that paper, what really struck me is that other than Police
12 claims, and they will be typically for wrongful arrests or wrongful detentions, which will
13 typically be for quite discrete periods of time, so short periods of time, our claimant group,
14 so those abused in care, the figures were significantly lower. Significantly lower. So, well,
15 you've heard the figures that I've been talking about.
16 **MS HILL:** If I can just make one addition to that. So after that report was written obviously in
17 August this year there was publicity about an ex gratia payment to a former soldier who
18 was harmed during a training exercise and suffered a long-term physical injury, and while
19 the actual amount is confidential, it's recorded to be what struck me as probably over
20 $100,000, but I have to speculate there, but a very, very high amount. And interestingly the
21 Minister dealing with it referred to the Government's moral obligation to make that
22 response. So that may be another interesting comparator.
23 **MS JANES:** You've said you've speculated, but was there a basis on which you were able to band
24 where it was likely sitting?
25 **MS HILL:** Media reports suggested it was a six figure settlement, but you need Cabinet approval
26 for anything over $75,000, and it had been approved by Cabinet, so it's a bit of a guess
27 within those parameters.
28 **CHAIR:** Probably at least $75,000.
29 **MS HILL:** At least, yes.
30 **MS COOPER:** And if it was six figures then we assume it was over $100,000. So then I know
31 that you're interested in the international comparison. Again the data is a little bit hit-and-
32 miss. I did my best because I'm studying this obviously at the moment, so I have got some
33 data and also again Stephen Winter's done some really, really helpful comparative work
34 here. So he compared particularly Ireland and New Zealand. And he noted that the bands

1 and awards in Ireland range from — this is converted to New Zealand dollars — $87,000,
2 that's the bottom, through to a maximum of $522,000, and that's, as I say, converted to
3 New Zealand dollars.
4 And he said that the average payment in Ireland is over $108,000. Interestingly he
5 makes the point there is it reasonable to assume that abuse suffered by New Zealand care
6 leavers is 555% less serious than that suffered by those in Ireland, you know, taking into
7 account that our average is 19, just over $19,000 for Ministry of Social Development.
8 **CHAIR:** Was Ireland limited to sexual abuse or did it cover all forms of abuse?
9 **MS COOPER:** It's quite comprehensive, yeah. So my recollection of reading it, it is a very
10 comprehensive scheme covering all forms. Because I think the work of the English Royal
11 Commission is still underway, we haven't seen any statistics yet, and I was only able to find
12 quite historic Canadian settlement figures. So in Canada, as at 2014 the payments under
13 settlement schemes had ranged from $10,000 to $100,000, just over $100,000. I did get
14 information in relation to the Australian redress scheme, which you'll recall was introduced
15 in June 2018, so that's under the national redress scheme which sets — I'm pretty sure the
16 maximum there is $150,000. So as at 1 November 2019 that scheme had paid — sorry, it
17 had made 716 decisions, it had paid 700 claimants about $56.9 million, and under that
18 redress scheme the average payment was just over $80,000, 80,000 Australian dollars.
19 So again, you can see generally looking New Zealand — at New Zealand
20 compensation, it is well below, well below what our neighbours are paying for similar
21 abuse.
22 **MS JANES:** Just to orientate the Commissioners, the information relating to the Dr Stephen
23 Winter comparison with New Zealand and Ireland is in his submission part A and it's an
24 appendix to that document.
25 **MS COOPER:** And I'm sure the Commission can collect in other resources as well. I would
26 really think there's probably more up-to-date Canadian information, for example, and
27 clearly the Australian scheme will continue to produce, I think, six-monthly reports about
28 what it's paying under its redress scheme.
29 **MS JANES:** While this is a hearing into redress against State, abuse in State care, Cooper Legal
30 has also been involved in settling claims against faith-based institutions. So for
31 comparative purposes, what would you say in that regard?
32 **MS COOPER:** Well, I think that's had a significant shift, the faith-based payments, I think under
33 the watchful eye of the Royal Commission. We had, with some — and I'm going, with one
34 Anglican organisation we just had no traction at all, and it was very legally-based. And as

1 a result of the Royal Commission that's now — it's actually set up a whole process that
2 Amanda's just been taking through — a number of our clients through, they want to model
3 the way for the Anglican Church in terms of leading process issues making it more
4 claimant-friendly, and also model what are appropriate levels of compensation, and we've
5 been very pleasantly surprised with the first round offers.
6 St John of God is one that I've had extensive dealings with and obviously you heard
7 something about that with Kerry Johnson's evidence. They're Australian, so — and we deal
8 with Australian lawyers, so they're certainly used to paying high levels of compensation.
9 We know that the New Zealand survivors get less than their Australian counterparts do, and
10 that's — there is a discounting factor for our Accident Compensation, we know that. But
11 even still, compensation for that client group is considerably higher. You know, you're
12 almost — I think Kerry's actually the lowest, in the recent rounds of settlement he is the
13 lowest at $50,000, and indeed one we've just negotiated settlement for $110,000, and legal
14 fees are paid on top of that separately.
15 Other agencies, one of the things that we've been really pushing with the Catholic
16 diocese is that the process is quite laborious and slow, it involves being interviewed by a
17 former police officer, often. And the settlements have been some okay, but often very
18 modest. And where we've been in prolonged discussions has been about the contribution to
19 the legal fees. And we've just, just I think, set a precedent very recently to get them to
20 contribute separately to legal fees.
21 And I have to say about my gratitude, or our firm's gratitude to the Royal
22 Commission because it is certainly having an impact, same with the Salvation Army, the
23 settlement payments have risen significantly. But yes, they are getting better.
24 **MS JANES:** We're going to move away from this topic and start scene-setting for
25 recommendations for solutions. So if there are any questions from the Commissioners
26 about compensation? No, excellent.
27 So we just want to touch on four topics very briefly. You will have already heard
28 about it through the evidence. But just to really set a little bit of ground work, I'm
29 conscious of the time, so we'll do that relatively speedily. We're going to talk about, firstly,
30 independence. Sonja, you were going to talk about that, accountability; Amanda, I'll
31 actually let you just run, transparency and delays, briefly.
32 **MS COOPER:** I mean, I think, obviously you've heard a lot about the issues that we say about the
33 lack of independence and how that compromises the settlement processes. One thing I just
34 wanted to highlight more with the Ministry of Social Development processes, the handbook

1 says where an allegation is a staff member, the allegations are put to that staff member, they
2 get the opportunity to comment, they get shown a draft of any response to that, so they get
3 to comment on that as well.
4 And I just think that reflects a lack of independence where you give staff members,
5 who obviously have a vested interest in maintaining their positions and their employment.
6 And as we saw in the *White* trial, it is common to deny allegations of abuse, of course
7 because of the potential criminal consequences as well. So to give that opportunity and,
8 again, we have no transparency around that, we don't know it's happened, but I suspect that
9 where we get very blunt denials of allegations in relation to current staff members, that will
10 be because they've been questioned and they've denied the allegations. And their word will
11 typically always be accepted is our experience.
12 Just another comment, I just did want to comment on — you've heard about the
13 selective, selectivity of whether we're going to accept even things that are proven. We've
14 heard about whether we're going to accept aspects of the *White* decision even if the person
15 was there at the same time making allegations against the same staff members.
16 And I think another point we just wanted to emphasise here is, you know, in terms
17 Te Tiriti. You know, I think there if there is partnership you can't have one party running
18 the process, it has to be a true partnership. And that means that you cannot have the alleged
19 abuser or the organisation responsible for abuse investigating itself, making findings and
20 also then deciding about compensation. It needs to be independent and safe.
21 And I think the other thing just to highlight again the Ombudsman's description of
22 the process is take it or leave it, there isn't a negotiation. And that applies across the State
23 processes.
24 Again, I just want one short comment about where Legal Aid sits in this. I know
25 Mr Dooley says the Commissioner is independent, and that's correct in terms of the statute,
26 but as you will have heard, that's not been our experience of Legal Aid. And even the fact
27 that it sits within the Crown Secretariat for the purpose of this Commission, is intriguing. If
28 it was truly independent, you would have thought it would have insisted that it sits outside
29 the Crown Secretariat.
30 But I think the reality is it sits within the Ministry of Justice and it is within that —
31 a Crown agency and certainly our experience of these claims really throughout has been
32 that it is — it very much identifies as an arm of the State.
33 **MS JANES:** Just before you move on, if one talks about trust and confidence of claimants and
34 processes, how would you say that could be best achieved or built on?

1 **MS COOPER:** Well, I think for this claimant group it needs to sit outside, it needs to be funded
2 outside of Legal Aid. I think if we're going to build a body that actually deals with these
3 claims, then I think the funding for that needs to sit as part of that. Was that your — what
4 you're wanting?
5 **MS JANES:** Is it just funding that the —
6 **MS COOPER:** No, no. An appointment.
7 **MS HILL:** If I can add to that. When you have — most of our clients have a deep suspicion of
8 the Government, particularly if you're a prison inmate you're currently at — you're at the
9 behest of the Government, you're in prison. And so engaging with the Government to be
10 able to take the claim, it feels like you're going back to the abuser, in all facets of this. And
11 there is deep suspicion about the motives of the Crown and particularly in their responses.
12 And so there is little trust in the integrity of the process from a claimant's perspective.
13 **MS COOPER:** And I think because we're funded by the Crown sometimes that suspicion comes
14 to us as well and we do get people, some of our clients who are suspicious of us because
15 our funding comes through Legal Aid.
16 **CHAIR:** Was that not raised — a very broad issue that we're going to have to grapple with in
17 terms of the independence of any body that has to be set up, it's got to get the money from
18 the Crown.
19 **MS COOPER:** Yes.
20 **CHAIR:** Unless there's some other unknown source. And so always there's going to be this
21 conflict, isn't there, so it's about how it's managed, how it's set up, how it's perceived by
22 survivors is going to be very important. Of course we will deal with this at a later stage,
23 but I think is there anything else you'd like to say shortly about that issue?
24 **MS COOPER:** Just that we agree, I think that's entirely right. It obviously has to be resourced
25 from State resources. But then you look at the Waitangi Tribunal, that's resourced by the
26 State but it's got that integrity and mana of being an independent Tribunal, to me it's — and
27 it also resolves historic grievances. I mean to me it's all about, as you say, the way it's set
28 up.
29 **CHAIR:** And the way it operates and the confidence it instils.
30 **MS COOPER:** Exactly.
31 **CHAIR:** Thank you.
32 **MS JANES:** Because we are at that discussion I am going to jump you forward slightly, that we
33 may do a bit of a moving feast because I think it's useful it addresses topics as they come
34 up. So in terms of the Legal Aid or the legal assistance, when you get to a blueprint that

1 you have been thinking about, where would you see those aspects sitting within your
2 independent body?
3 **MS HILL:** I think it would have to be separated out and funded as part of the independent body,
4 and actually the legal assistance programme that runs for this Royal Commission could
5 provide a model for that.
6 **MS COOPER:** Exactly. And I think it could be part of the auxiliary or the ancillary services that
7 are provided to survivors coming into the process. So it could be, for example, you know,
8 you'd like to think there would be separate therapeutic services, I mean obviously one of
9 the things that we've heard from survivors throughout this is the need to have access to
10 those therapeutic or well-being services from the point of entry to well after the point of
11 departure.
12 And also too, those wrap-around services, so to make sure that as part of that that
13 lives are more fulfilling moving forward. So, you know, those wrap-around services that
14 we've seen in that e-mail, so housing, education, linking with whānau, you know, small
15 things like removing tattoos, all of those things that can help bring up the quality of life for
16 survivors. And that fits well with our international obligations which are about
17 compensation, so that's the kind of legal side of it, and that needs, in my view, legal
18 support, but then you've got the rehabilitation. And so I think those parts can be auxiliary
19 parts that sit under whatever this body is that we create, but as part of the ancillary services
20 that it has.
21 **MS JANES:** And Amanda, you talked about the possibility of the Commission's legal assistance
22 panel being a possible model to look. Why would you advise that or recommend it, and
23 what do you see as the benefits?
24 **MS HILL:** I think the benefits are that it's attached to the body, so it's part of that view of
25 independence and so there would be — I would hope there would be an increased level of
26 trust. And you could also ensure that the people providing the services had the appropriate
27 skills. So we've talked about trauma-informed training and things like that. So you could
28 have to go through some training or do modules around trauma or something like that, so
29 that all the people who were involved in providing advice had the appropriate skills and
30 knowledge to do it.
31 **MS COOPER:** And I think too, in addition to that, you could provide on-going training, so as
32 knowledge increases, and I agree, I think it's very much like the legal assistance panel for
33 this Commission, you have to demonstrate that you have specific basic skills, it's just like
34 for those of us who are youth advocates and counsel, you know, lawyer for child, we have

1 to demonstrate that we've got experience and we understand cultural issues and, you know,
2 even some language issues. So I think that's really essential, and could be part of that
3 specialty knowledge.
4 **MS HILL:** Also, if I can be ambitious, I would love to see the sort of, in this blueprint, having a
5 separate, or having this sort of model would enable other lawyers to be developed in this
6 area.
7 **MS COOPER:** Yes.
8 **MS HILL:** I want more Māori lawyers in this area, more Pasifika lawyers in this area working in
9 the communities who have been impacted by State care, and it wouldn't just be us, it would
10 be wonderful.
11 **MS COOPER:** Exactly, and part of that I think is at the moment it's really difficult for other
12 lawyers to get into this area because there are so much that's unknown. And it's so difficult,
13 it's very complex legally, it's complex factually, you have to understand so much about the
14 history and the legislative framework and all the potential barriers. So actually if there was
15 an independent body where everything was transparent about, you know, what hurdles you
16 have to get through to establish compensation and also too there's access to a body of
17 information, that just immediately assists other lawyers and other professionals to be able to
18 work in this area, whereas right now there are so many barriers to actually getting the basic
19 knowledge and skills to be able to go down that. And of course there are also the barriers
20 with Legal Aid.
21 **COMMISSIONER ERUETI:** So the assumption is that for clients that use the system that
22 they're likely to always need legal advice?
23 **MS COOPER:** Look I think one of the things we were talking through is, you know, there may
24 be somebody who wants to do a short process because they want to have a quick
25 settlement. I think at the very least there should be somebody, even if it's just an hour or
26 two, to say look these are the pros and cons of this, because there are ramifications. I just
27 think even that ability to give some quick advice about what it might look like if you go this
28 way, or if you accept this process. I do think it's important, and again, I just emphasise that
29 at the end of this we are dealing with very difficult legal issues, all the way through this
30 process, these processes.
31 **MS JANES:** So you're overlaying very complex legal principles which are somewhat unsettled,
32 and we will come to that aspect with very vulnerable groups of people.
33 **MS COOPER:** Yes.
34 **MS JANES:** So I'm hearing you say even some access to legal advice, minimal or otherwise,

1 would be an advantage.
2 **MS COOPER:** Absolutely, even, as I say, if it's just for a couple of hours, yeah.
3 **MS HILL:** It would also ensure that there's integrity in the process, because we don't want to
4 replicate this idea of a quick and dirty direct settlement with no advice, we want to be —
5 we've got to have a robust process that's got integrity and I think that's an important aspect
6 of it.
7 **MS JANES:** So an informed consent.
8 **MS HILL:** Absolutely.
9 **MS JANES:** I did jump you around, sorry for that, but you had raised that and thought we may as
10 well deal with that. And was there anything else, Sonja, you were wanting to say about
11 independence before?
12 **MS COOPER:** No, no, I think that's — I mean we've certainly talked a lot about it and I think
13 that's enough I need to say. Transparency again, we've talked a lot about transparency and I
14 think that must be very clear through the evidence that we've given about just how murky
15 all these processes are.
16 I didn't note actually when I was talking before about the Ministry of Health that
17 there's actually nothing on its website about its settlement process at all. And I know that
18 Phil Knipe's evidence is that the process is so well-known, well by who? How? I suspect
19 there is still a very, very large unmet need. This is, as I said before, this is a particularly
20 vulnerable group, there may be many, many people still in psychiatric care. I mean people
21 like Paul who've never had anybody advocate for them to bring a claim.
22 So I think this is a hugely unmet area and it's not advertised, and again it would be
23 greatly assisted by there being an independent body where, you know, just like the Royal
24 Commission itself has got good advertising, it's got good visibility, you know, then again
25 there may be more support to bring so many of these people who no doubt are still in the
26 community who have never known enough to bring a claim.
27 And I mean maybe even these hearings will bring a lot more of that group out from
28 the woodwork and hope — that's what we can hope. But I think if there was a body that
29 could make that easier and more transparent it would help.
30 **MS JANES:** One of the issues that we have been talking about now is the fact that it is, and we've
31 heard from the survivors, so hard to know where to go to complain.
32 **MS COOPER:** Yes.
33 **MS JANES:** Just talk about that, and also we've heard about the incorrect information on the
34 Ministry of Education. So accessibility issues and how they could be resolved within the

1 framework, blueprint you're thinking of.
2 **MS HILL:** I think Sonja's mentioned this idea of the sort of therapeutic or well-being function or
3 the wrap-around services. That has to include sign language interpreters, because there are
4 two closed — two deaf schools where we have claims arising from Kelston and Van Asch,
5 and those people need a lot of support. And then they need to understand that they can
6 make a claim, so again, that's not just the websites, that's proactively going and saying to
7 people, what was your experience like, because again, if we want to learn, we can't just wait
8 for people to come to us.
9 And I was thinking and talking about, when I read Patrick Stevens' evidence, it was
10 right at the end of his life and he had to go and try and resolve these things. If we know so
11 much about, say, Lake Alice, why didn't they go and look for them? Why didn't they say
12 "Here's the patient list, tell me what Lake Alice was like for you"? Rather than say to
13 people you need to find your way through this maze, isn't there a way, and if we're going to
14 learn, we go and talk to people instead of making it so hard for them to come to us.
15 So I just thought there's something to work on there around flipping over that
16 expectation that people will come to a body, then sometimes, particularly for those very
17 vulnerable people like Paul Beale, if it wasn't for Gay Rowe he wouldn't have had any
18 redress. There are so many people who will be like him.
19 **MS COOPER:** Yeah.
20 **MS HILL:** So one of those other options you could have in that suite of things, are
21 communication assistance, people who work in the disability sector, let's be proactive and
22 pull down those barriers and actually help people move forward, rather than say you've got
23 to jump all these hurdles to come to us.
24 **MS JANES:** So in terms of that proactivity, would you envisage that within an independent
25 agency there could be a section that takes, say, a *White* finding, the judge found that they
26 didn't go out, and once Mr Ansell had been convicted, they didn't go out and find out who
27 may be in that cohort?
28 **MS HILL:** Mmm.
29 **MS JANES:** So is what you're saying that this would be something that this body could do to
30 actually proactively go out and engage and find?
31 **MS HILL:** I think it would be difficult for some, depending on time passed and individual
32 experiences, the Social Welfare issues might be harder. But if you're talking about, say, the
33 Child and Adolescent Unit at Lake Alice or, say, ward 27, is it 27? Ward 12 in Auckland.
34 **MS COOPER:** Ward 12.

1 **MS HILL:** The child psychiatric ward. So I think — and I think that proactive approach, it may
2 not be for the entire cohort because that's a big group of people, but if we think about who
3 are the most vulnerable, who are the least likely to come to us, the deaf schools, Kimberley,
4 the disability institutions, the people who have had the least access, start there and see what
5 that looks like, because it's a smaller group of people but they're the most vulnerable, the
6 ones who can't speak.
7 **MS COOPER:** And we have a lot of information in New Zealand, I mean Dr Brigit
8 Mirfin-Veitch, you know that's her expertise, she's done reports for the Human Rights
9 Commission. You know, so we have a lot of expertise in New Zealand about the themes in
10 those in places and it includes Campbell Park of course. And there will be lots of
11 organisations, IHC is one, you know, that could be proactively contracted, for example, to
12 help locate those people, help them tell their stories, because a lot of them will still
13 obviously be connected to services.
14 So I agree, I think there would be some groups where we'd want to see proactively
15 supported to come forward, because they just — their ability to do so themselves is really
16 difficult and we saw that graphically with Paul.
17 **MS JANES:** And that leads us to the body of knowledge, and we've heard a lot about that as well.
18 Where and how would you envisage that playing its part?
19 **MS COOPER:** I think we're very clear that there needs to be — the body or some arm of the
20 body needs to be able to hold all of the relevant information. I mean we talked about
21 whether that could be archives, but we know that archives in its current iteration, there are
22 very, you know, difficult obstacles to actually obtaining large numbers of records, but we
23 know, you know, there are some models, for example, from Australia that we could look at,
24 and I think there is a — one of the archivists from New Zealand is doing some research on
25 that.
26 I think there needs to be a records store that is separate from the Ministries, from the
27 State. And from that then this independent body can start building up this body of
28 knowledge, because there is a huge amount, and I think while it remains within the
29 ministries, it's easy to get lost. Well, also too the ministries can still, if they've got control
30 of it, ask for it to be destroyed, and it's really important that these records are maintained.
31 That would extend then to things like NGOs [non-governmental organisation] where others
32 are cared for. Because at the moment their records, once they close up, their records are
33 destroyed. So again, really, really significant sources of information for survivors,
34 documenting punishments or incidents, all gone.

1 **COMMISSIONER ALOFIVAE:** So that would require a really clear line of accountability and
2 at what point the power transfers.
3 **MS COOPER:** Yes.
4 **COMMISSIONER ALOFIVAE:** To be able to follow that all the way through, right?
5 **MS COOPER:** Yes.
6 **COMMISSIONER ALOFIVAE:** In terms of contractual obligations, in terms of responsibilities
7 and accountabilities.
8 **CHAIR:** Also there's two factors, I think, tell me if I've got this right, that you're really thinking
9 about. One is the holding of the records.
10 **MS COOPER:** Yes.
11 **CHAIR:** So which could be a way of overcoming what is currently a chronic problem of
12 obtaining records, so it holds and safeguards in an archival way.
13 **MS COOPER:** Yep.
14 **CHAIR:** Then there's a second aspect, and that's of a research-type way.
15 **MS COOPER:** Yes.
16 **CHAIR:** So using the information from that to build the body of knowledge.
17 **MS COOPER:** Yes, that's exactly right. I mean they could be two separate entities.
18 **CHAIR:** Yes.
19 **MS COOPER:** So you may have the archivists who hold the information and then you may —
20 **CHAIR:** Hold and manage that, yes.
21 **MS COOPER:** Exactly. They manage the disclosure of that information then to survivors and
22 those who are working within the — this body. And that means it's completely
23 independent, there isn't any contrary interest dictating oh we might want to redact that. So I
24 think there'd be that, but yes you're right, then that information can be used to build up this
25 body of knowledge from which you're able to say well we now know this about Epuni for
26 this period, or Kohitere. So we can be confident that if you were there during that period
27 you're likely to have had these experiences.
28 And I just — it also means, as I say, records can't be destroyed and that's really
29 important too. I think one of the things that we know from the Australian research is, and
30 also too listening to survivors here, destruction of records is devastating, because often
31 that's the sole narrative of their lives. And so even if the records are inaccurate or partly
32 lost, at least it helps them understand who made decisions, why decisions were made, even
33 where they went, why they went, which often is unclear, and they've forgotten and they
34 don't know. And I think that's actually quite healing in and of itself to kind of understand

1 that narrative of your life.
2 **MS HILL:** If I can add and answer sort of the accountability question, the way I think about this,
3 and I sort of think of it as a records mother ship, because it gathers up everything from
4 DHBs, from Ministry of Health, from, as Sonja said, NGOs; but especially if they're
5 contracted to CYFS [Child, Youth and Family Services] or MSD at any stage, MOE, it
6 gathers in all these things so then we don't have to do requests to seven DHBs and two
7 different ministries, a claimant could come to this body and receive all information about
8 themselves, and the way I see that happening is that it's a — I'd say it's a bit like your tax
9 records, after a certain number of years you can do something with them, but it would be an
10 obligation to pass them to the Tribunal.
11 And an absolute moratorium on destruction. In our evidence we haven't talked
12 about it, but there were general destruction orders at least twice that impacted on MSD
13 records in particular. And so there must be an absolute moratorium on destruction.
14 And that accountability, obviously there are issues around the Privacy Act and
15 things like that, but none of them are insurmountable at all.
16 **CHAIR:** In the digital world it becomes, I mean the thought of dusty warehouses filled with old
17 yellowy pages —
18 **MS JANES:** In asbestos buildings.
19 **CHAIR:** In asbestos buildings.
20 **MS HILL:** Asbestos building in particular is a chronic problem. But if you think about the
21 possibility, so one thing that has always bothered me is a staff member can work at an
22 incorporated society.
23 **MS COOPER:** Yes.
24 **MS HILL:** I can think of one person in particular — but I won't go into detail because it will
25 identify them — worked there for several years and left under a cloud but without a Police
26 investigation. They went on to work at a Care and Protection residence for years, a number
27 of disciplinaries later they leave. Now if we — and there's a massive disconnect, because it
28 was never sort of —
29 **MS COOPER:** Pulled together.
30 **CHAIR:** No one joined the dots.
31 **MS HILL:** No one joined the dots and staff members who moved around institutions like
32 Moncreif-Wright, like a number of others were shifted and you would have so much
33 visibility. And some of these people, they go off, particular Libra the sexual abusers,
34 they've gone off to work in youth groups and other — if they're not allowed to be CYFS

1 caregivers they go and be caregivers for another institution. And you need to be able to
2 track through this, and the — I'm really excited by the possibilities of this.
3 **MS COOPER:** I would add there we seriously need to think about adding in faith-based records
4 there, particularly historical faith-based records. But also too, there are other Government
5 agencies that, you know, might be affected. I mean Police, they routinely destroy records
6 after seven years, but again, there's massively useful information that the Police hold about,
7 you know, people going to complain about assaults, even if there hasn't been a prosecution,
8 it could still be helpful, if that information comes in.
9 DHBs as we know, we've talked about that. Corrections, need to think about
10 Corrections because again, that's, as we said, you know, we've not been able to help that
11 group, but it is covered by the terms of reference, I think borstals, again we know there are
12 lots of clients who complained about terrible abuse of borstals. So again Corrections
13 records, you know, again you might want to timeframe that, but again, Corrections records
14 should come in as well.
15 **CHAIR:** I think, these are — you are now mind mapping the way it goes.
16 **MS COOPER:** Yep.
17 **CHAIR:** Can I just say for your satisfaction and for our comfort, that we're going to be looking at
18 all this in terms of round tables where we can go into the granular detail.
19 **MS COOPER:** Good.
20 **CHAIR:** But I think we've got the message, you want records well-kept and accessible.
21 **MS JANES:** Centralised.
22 **COMMISSIONER ERUETI:** Not destroyed.
23 **CHAIR:** And not destroyed.
24 **MS COOPER:** Not destroyed.
25 **MS JANES:** Just going to a point that you've talked about the complexities of the legal landscape,
26 and you've talked about you have tried on occasions to do rule 1015 hearings. But to try
27 and actually —
28 **CHAIR:** Would you like to try and translate that for the lesser mortals in room?
29 **MS JANES:** Mini trials, effectively case stated.
30 **CHAIR:** In the civil proceeding?
31 **MS JANES:** In a civil proceeding, and it relates to a particular plaintiff or plaintiffs. So the
32 question really is, has there ever been consideration of trying to get certainty on legal
33 principles without involving a plaintiff individually to get, say, a declaratory judgment, and
34 if not, why not?

1 **MS HILL:** So the point of the 1015 hearings or the mini trials was to try and resolve stuck claims
2 on issues of fact. But you could take a similar approach to an issue of law. And we
3 thought about, you know, what are the outstanding issues, they're largely around the Bill of
4 Rights Act. And some issues around both quantum and what detention means in terms of
5 the current legislation.
6 And we thought about, you know, could we ask the High Court to determine these
7 things without putting a plaintiff through these gruelling processes? Our challenging — the
8 challenge with that is that there are so many different factual circumstances underlying that
9 and we think a court will be reluctant to issue a declaration or answer a question without
10 reference to some evidence.
11 So if you think about some of the things we've canvassed, that potential changes if
12 someone's under youth justice status as opposed to Care and Protection, you know, what
13 are the conditions when you're on Alcatraz, do you have a supervisor there, do you have a
14 tarp for shelter because sometimes they did and sometimes they didn't, sometimes you're on
15 Alcatraz for punishment, sometimes you're a flying squad member and you were there to
16 supervise. So these changes of the factual circumstances —
17 **CHAIR:** Even if you were to get agreed statement of facts, for example, you think it might — the
18 number of and the variety of the iterations of facts would be too great to get any real
19 certainty?
20 **MS HILL:** Yes, and also previously we've had issues with Legal Aid agreeing to fund what are
21 effectively declaratory issues and when Legal Aid is often based on monetary redress.
22 **CHAIR:** And linked to plaintiffs.
23 **MS HILL:** And linked to plaintiffs. We've certainly done generic things before, the *XY* judicial
24 review is an example. We find a volunteer plaintiff to be the named plaintiff, but it's
25 understood and agreed by Legal Aid that the work is spread over the whole group so that
26 one plaintiff doesn't carry the can, if you like. But there are so many different factual
27 circumstances that it wouldn't be workable.
28 My major concern would also be how to up bind the Crown agencies to abide those
29 decisions and not find ways around them. We've seen the treatment of the *White* decision,
30 it would be too easy for a Ministry to say oh the facts are slightly different so that doesn't
31 apply. So I think I'd like the idea, but the realities of it are fraught.
32 **MS COOPER:** We've only ever once done a case stated and that was a Legal Aid case, it was
33 whether a lawyer could get funding to formally withdraw as a lawyer once the Legal Aid
34 had been terminated. And so we did agree to do that by way of a case stated, and that's the

1 only case stated I can think. That actually worked really well, but it was a very discrete
2 legal issue. We had a nominal claimant again, and both sides presented argument and a
3 decision was made. And so it may be that in very discrete areas of law we might be able to
4 do something like a case stated, but again, as Amanda's saying, when we're dealing with the
5 factual — when you add in the factual matrices, they're so complex, each client is so
6 different.
7 **MS JANES:** So in your blueprint we've heard about the record aspect, we've heard about the
8 rehabilitation wrap-around service, we've heard about a research body of knowledge
9 potential. Let's then come to how would complaints be dealt with and what are the
10 principles that you would be advising taking into account that there will be round tables and
11 all of that granular detail can be teased out by not calling you not experts in this field but
12 who have spent more time thinking about these things.
13 **MS HILL:** It's one of those — that line from the Ombudsman case note about how a claimant
14 needs to understand what the rules and, you know, what the rules and policies are that apply
15 to them, that's probably a key thing.
16 **MS COOPER:** Yeah.
17 **MS HILL:** And having very clear what is your balance, you know, what is your onus of proof,
18 you know, what information are you relying on, those sorts of things.
19 **MS COOPER:** If there's to be any questioning at all I think it should be an inquisitorial model, so
20 led by whoever the Chair is, and I think with a body like this, ideally you would have a
21 combination of somebody with legal knowledge, but also somebody with therapeutic
22 background as well, so you'd have that joint discipline.
23 I think it would be important here always to have the ability to review any
24 compensation that's paid. So, as I say, as the body of knowledge increases you may want to
25 review and top up. Or if somebody's not been able to fully disclose and, as we know, it's
26 often incremental that there is the ability to actually provide top-ups. And I mean that's
27 already models in some of the outside of, you know, the ADR processes.
28 **MS JANES:** So Dr Winter talks about there are different ways that you can devise compensation,
29 and a starting very simple one is rules, so common experience, if you can prove that you
30 were in a particular place at a time. Would that help in terms of the disclosures, "I've been
31 in Epuni, I can only cope with talking about that, but then actually I've also been at Hokio
32 or Kohitere"; how would you envisage that incremental disclosure being dealt with?
33 **MS COOPER:** Well, if there are clear rules, I mean say, for example, I think in one of the — I
34 think it's the Irish settlement process, you know, if you've been in certain placements there's

1 an assumption about what experiences you've had and that attracts a set, you know, dollar
2 figure. So again, if those sort of very transparent rules, and that's all somebody's prepared
3 to disclose at this, you know, the point that they first come, then that's an amount they get.
4 But that's why I'm saying there should be the ability then to come back and say “Well, I'm
5 now ready to talk about what happened to me at Hokio and Kohitere” where there'll be
6 presumably similar bodies of information.
7 **MS HILL:** If I can add to that quickly, when you look at that, when you think about, you know, if
8 you're going to have effectively a default setting, it must take into account the things that
9 make up the whole of that experience. So what we know is that things like the hierarchy
10 and the kingpin hierarchy in the boys’ homes aren't necessarily accounted for in settlement
11 processes, but it was an enormously difficult factor because that was where so many of the
12 physical assaults came from. Things like the no narking culture, that sort of thing. That
13 needs to be recognised in the settlement. And things like Epuni, there's a finding in the
14 *White* decision about if you are placed in secure on your arrival there for three days as a
15 matter of course, that would be a breach of duty. So if you went into secure when you got
16 to Epuni, and there's an underlying assumption because that was done with pretty much
17 everyone, then that is taken into account in that amount.
18 **MS COOPER:** Something that we obviously need to highlight here too is the issue to take into
19 account culture, our Te Tiriti obligations and that's absolutely essential. So that's one thing
20 I actually had on my list, but didn't mention, is there needs to be cultural advisors as well,
21 and appropriate cultural support. So, for example, there shouldn't be just one access point.
22 So if a whānau wants to come or even, you know, generations, if they want to come and
23 present a whānau claim of some sort, there should be — shouldn't be just one point, it
24 shouldn't just necessarily be for individuals, it should recognise that there in different
25 cultural morays it's appropriate to accept different ways of coming to the process.
26 And I think that's got to be — if we are going to recognise partnership, then we
27 have to recognise that, and in that context as well, it's probably very important that there are
28 translators available. So we've talked about deaf, but other translators, so it's possible for
29 somebody to come and speak in Māori.
30 **MS HILL:** The idea of a whānau claim I think is it the Canadian —
31 **MS COOPER:** Yeah.
32 **MS HILL:** The Canadian process provides for a group claim or family claim, so there could be
33 something to look at there as a model.
34 **MS COOPER:** One thing I also wanted to say is with the research and policy body, one of the

1 things I mentioned yesterday was if we've got this independent body it might be easier for
2 former staff who felt too uncomfortable to come forward because they're worrying about
3 their reputation or their jobs currently, it just may provide a way in which they can come
4 forward and talk. I mean, as I said, I've just been surprised by the number of e-mails we've
5 received over the last week by people saying "Oh look we can tell you all about", you
6 know, and I'm encouraging them to come and speak to the Commission.
7 **MS JANES:** Almost a whistleblower avenue.
8 **MS COOPER:** Exactly, and that could be current, if they've got current concerns. Because if part
9 of the purpose of this body is to inform current practice, then they can come and raise
10 current concerns. That again can be massively helpful if we are to have a body that is
11 going to inform and comment on and make current practice better.
12 **MS HILL:** Can I — the last thing that I would say is vital is to be clear about timeframes and not
13 replicate the delays and problems that we currently see. Because one of the hardest things
14 for a claimant to do is to have that uncertainty, or to be given a timeframe and it not to be
15 met. So being realistic about the resources and how long this might take, and helping a
16 claimant be sure about what is happening and when things are going to happen and meeting
17 those undertakings, because delay is such a damaging part of this process that it sucks out
18 anything good that you get — that the claimants get from going to these meetings, from
19 telling their story, from working through it all and then it drains away during the wait.
20 **MS COOPER:** Yeah, one thing we haven't really thought about and that will be for the
21 Commission to think about is apologies.
22 **CHAIR:** I was going to raise that.
23 **MS COOPER:** Yeah, because apologies are really important in this process, and I mean you've
24 heard some people say, you know, they would like their apology from the Prime Minister.
25 The Lake Alice claimants still get their apology from the Prime Minister.
26 So that's just something I think needs very careful consideration about because that
27 is such an essential part of this process. And again, just who's going to be giving that
28 apology. But the one thing I think that you would have heard very clearly from the
29 survivors is any apology needs to be meaningful. It cannot be templated, it needs to be
30 individualised and it needs to be meaningful. And if we are, in a sense, going to be saying
31 well look, at some point the agencies themselves have to show some responsibility, I mean
32 yes, they'll obviously have to contribute, one assumes, from their budget to this.
33 But there, I think, the apology process there is something that needs to build
34 potentially, you know, with the agency that is the one that's caused, or the one of several

1 that's caused the harm. Because that may be — again it needs to be survivor-focused, so
2 who does the survivor want the apology from, do they want to meet somebody
3 face-to-face?
4 **MS HILL:** There have to be options there. It's interesting because that's one thing that has been
5 developed with one of the faith-based institutions —
6 **MS COOPER:** Yeah.
7 **MS HILL:** — I've been working with, is that the offer of settlement is an apology in whatever
8 form the claimant would like, whether that's written or in person or both. And you have to
9 remember, that a written apology isn't very useful to someone who cannot read. So you
10 need to respond to the claimant in front of you and I think giving them that ownership over
11 the decision is really important.
12 **MS COOPER:** Although I note that the apologies are increasingly used now to inform
13 sentencing, Parole Board, cultural reports, they are actually very significant. One thing
14 I also wanted to say that I think should also be part of the kind of adjunct services
15 supporting survivors who want to complain to the Police. That is important for some
16 survivors, the ability to actually be supported to make a Police complaint and have their
17 perpetrator prosecuted is really important.
18 And again, I think if there is an independent body that is actually there to support
19 survivors to do that and can also then, because of its body of knowledge, potentially be able
20 to support that survivor with other willing survivors who may be able to support that
21 prosecution, which is effectively, you know, we helped with that with the *Chambers*
22 prosecution, you know, then again you've got an independent body with no self-interest and
23 that has the therapeutic support then to support survivors to also bring prosecutions. And
24 that, again, is a great benefit more generally because it protects others who may be victims,
25 but again, it contributes to that body of knowledge.
26 **MS HILL:** Also it can be forward-looking, like if you've got young people, you know, who feel
27 able to make those complaints and also feel able to alert Oranga Tamariki willingly without
28 it being done to them, and I think you will get more uptakes, you will get more people
29 willing to engage because they've got assistance to do it. That can only be a good thing and
30 contribute to keeping kids who are in care now safe.
31 **MS JANES:** And you talked also about the need for a purpose-built independent piece of
32 legislation.
33 **MS COOPER:** Yes.
34 **MS JANES:** And you wanted the model litigant, some of the good parts that we looked at about

1 the Limitation Act, settling within two years, going to your point. Is there anything that
2 you quickly want to just reinforce about the legislative framework or other things you may
3 have thought about?
4 **MS COOPER:** I think, I mean as I say we've got a very long wish list there, but it is — I mean
5 the Limitation Act is critical, but I think there are also those things that we can take from
6 the Australian approach, like reversing some of those difficult onuses, causation, proving
7 breach. Building in a statutory vicarious or non-delegable, I'll just call it strict liability, I
8 think that's really important. With the churches, some of the obstacles have been around
9 actually finding a defendant. We haven't really grappled with that here, so it's statutorily
10 imposing a defendant where bodies might have shut down, so it's making sure that there is
11 always somebody who's going to be liable.
12 That's obviously to look at civil litigation. I mean obviously if we have this really
13 well-functioning body, the need for this becomes far less, you know, prevalent really. But
14 no, I think civil litigation and everybody would say civil litigation is still really important, it
15 still has a very significant role to play. So if we can actually remove some of those barriers
16 that in the — at the moment are either stopping claims dead in the water or at least stopping
17 any remedy, then that will be hugely helpful.
18 **COMMISSIONER ERUETI:** But ideally if the Tribunal is —
19 **MS COOPER:** Does all this stuff.
20 **COMMISSIONER ERUETI:** With your vision, yeah, then that process, you wouldn't need to
21 pursue that process. Is that the aspiration?
22 **MS COOPER:** Look I think for the vast majority of people, that's the situation we are in now, the
23 vast majority of claimants would settle outside of court. But as you've seen, I mean there
24 are still — there's still so many legal issues that are not defined yet that we may still want a
25 court to clarify. And again, if we can use the Tribunal to state cases, or this new body to
26 state cases, that would be fantastic.
27 But I still think with all claimants, survivors, if we are being truly survivor-focused
28 again we have to let survivors choose their forum, and if court is their chosen forum then
29 we should limit all those additional barriers, particularly ones that are choice barriers
30 anyway, like the Limitation Act, and we should put rules around how defendants have to
31 behave and the training of everybody involved in the process.
32 **MS HILL:** Can I just add, I do think the legislative change is important regardless, because of
33 course there are victims of abuse outside of the State care context, and they should have the
34 benefit of those changes. There are people who will take civil claims against individual

1 abusers, like *J v J* and *Taylor v Roper*.
2 **MS COOPER:** Yes.
3 **MS HILL:** And I think for the general good, those changes still need to be made because there
4 will be people who will not come within the bounds of State care or faith-based care and
5 they should not suffer the consequences of that. And also I'd add to Sonja's points, reform
6 the ACC system in the ways that we've talked about. ACC is currently not fit for purpose.
7 **MS JANES:** So just on that, scattered through the Cooper Legal evidence there are a large
8 number of sections about possible solutions. We don't want to go to those specifically, but
9 we thought what might be helpful for the Commissioners is to aggregate them into one
10 document. You may have heard some changes, because when they prepared their evidence
11 the thinking may have evolved, but at least you will have one document, we can produce it
12 as an exhibit and it's then available. So we should now —
13 **CHAIR:** I think we should. Just in terms of timing, do we have an indication of how much longer
14 you will be with these witnesses?
15 **MS JANES:** I have concluded, so it would be turning it over to the Commissioners and also to —
16 **CHAIR:** I think we would value the opportunity of thinking about this over the lunch about how
17 much we would like to ask beyond what has already been asked. In terms of the Crown
18 response, do you have a sense, Ms Aldred, of how long you are likely to be with these
19 witnesses?
20 **MS ALDRED:** Yes, I do Your Honour. I'd be surprised if we — thank you ma'am, I think it's
21 probably safe to say we wouldn't be more than about 45 minutes.
22 **CHAIR:** Thank you very much for that indication. I won't hold you to it, though, but if you can
23 do it that would be appreciated. Let's take the lunch adjournment. Should we — I'm just
24 thinking whether we should come back at 2 or whether we should — no you all need your
25 time, we won't.
26 **MS JANES:** Would you be comfortable to come back at 2?
27 **MS COOPER:** Yes.
28 **MS JANES:** 2.15 I'm hearing.
29 **CHAIR:** I'm conscious a lot goes on during the lunch, and I will accept that overruling.
30 **MS JANES:** Absolutely, so will I.
31 **CHAIR:** 2.15, thank you.
32 **Lunch adjournment from 1.02 pm to 2.18 pm**
33 **CHAIR:** Thank you. We have just a very few questions before we call upon you if that's all right,
34 Ms Aldred.

1 **MS ALDRED:** Yes of course.
2 **CHAIR:** So we'll start with Commissioner Erueti.
3 **COMMISSIONER ERUETI:** Thank you Madam Chair. So quick question, for the blueprint,
4 just to be clear, that includes the faith-based institutions as well? I wasn't sure about that.
5 **MS COOPER:** Yes, I think that should be as broad as possible and we also think it should, if
6 we're going to make it a proper scheme, it needs to include the District Health Boards, for
7 example, and it needs to include the NGOs, yeah.
8 **MS HILL:** I mean you have to remember that lots of State wards were placed into faith-based
9 institutions, so that if you don't have them in there you don't have a complete picture.
10 **COMMISSIONER ERUETI:** Absolutely, thank you for that. You spoke about the Treaty
11 partnership and the way in which these redress schemes currently offered by the State
12 operate, so I just had a question about your views on the process that would lead up to the
13 creation of this Tribunal that you speak of and how would the Treaty partnership be
14 reflected in that.
15 **MS HILL:** I think there would have to be a great deal of consultation prior to landing on what this
16 would look like. Because you can't just impose these things, and so I think it would be a
17 process of building. There are people far more qualified than I am to talk to you about
18 what a good Treaty process would look like.
19 I'm certainly not suggesting I've got any particular expertise, but consultation with
20 iwi, because different parts of the country are probably going to want different things and
21 different iwi, Māori are not homogenous, and I think that would be an interesting
22 conversation to have about how to reflect those differences.
23 **COMMISSIONER ERUETI:** Ka pai, thank you so much. I've got many more questions, we all
24 have, but just in the interests of time we're just staying more focused and appreciate that
25 later we will have round tables and other opportunities to get into the fine detail, so thank
26 you very much.
27 **MS COOPER:** I think too just to add to that, it's really important to add in survivors obviously is
28 a really significant voice there, so yeah.
29 **COMMISSIONER ERUETI:** Thank you, good point.
30 **COMMISSIONER ALOFIVAE:** Thank you, like Commissioner Erueti said, there's lots of stuff
31 I think we can canvass really well in terms of the granular detail. I really appreciated you
32 outlining your high-level thinking. I just had one question around timeframes and whether
33 or not you'd, just in your thinking and thought maybe that it might be a time-bound
34 institution.

1 **MS COOPER:** Well, I would like to think that it continues to be honest. I mean I think, because
2 from our perspective State claims are not going away, and if it is the body that we're
3 envisaging which actually covers Corrections claims potentially and Police claims, I mean
4 they're still continuing. But the fact that there is a complaints model at Oranga Tamariki
5 and what we already know about of children, tamariki being abused in care, to me would
6 suggest that the body needs to be a continuing one.
7 As I think I said yesterday, it could get smaller, so it could contract as it clears this
8 big backlog of historic claims. But I mean I think what we would be suggesting is there is a
9 large amount of work still to do. There are all these groups really that have not yet been
10 touched, so those particularly vulnerable people within the intellectual disability
11 community, I really think we've barely touched, the deaf community. I think there's still
12 probably a lot of people to come through who've been in care generally. So I think there's
13 still a lot of work, but from my perspective if we're going to set up this Tribunal it should
14 be enduring, it should continue, even, as I say, if we contract it at some point.
15 **MS HILL:** Can I add to that to say if there's going to be a function where it learns from
16 information and continues to gather information, then there might just be a change in the
17 proportion of work that it does over time, that historic claims could contract, but that
18 research and recommendatory function, which I think would be really important, could
19 endure and, as I say, a change in proportion of what it was doing.
20 **COMMISSIONER ALOFIVAE:** Which is the influential component of what would come out of
21 the research in terms of projecting forward.
22 **MS HILL:** Yes.
23 **MS COOPER:** I think just the other thing, just bearing in mind about that, is that 22-year lag. So
24 when we take that into account it is a body that, you know, probably will need to be in
25 perpetuity just because there is that very big lag between abuse occurring and the average
26 survivor of that to be able to report it.
27 So I mean one of the things I've really seen now is I think there is very little
28 visibility, for example, over what's happening now, because most people won't have
29 reported it, which is why we're now seeing lots of claims coming through for people who
30 are in their late 20s to early 30s, and a lot of those claims are very serious indeed. And, you
31 know, as a youth advocate now I always pause and think well, what are the experiences of
32 my clients going into these justice or Care and Protection residences, particularly in a
33 culture that we know still prevailing of snitches get stitches. And I think, you know, those
34 of us who have been youth advocates know our clients didn't tell us about these terrible

1 things they endured at the Whakapakari programme and Moerangi Treks, and it's like, you
2 know, so they've held that really tight. So I just think that's something that is why this body
3 will need to be enduring, because of that very long lag.
4 **COMMISSIONER ALOFIVAE:** Thank you. No further questions, thanks very much.
5 **CHAIR:** I just have two areas I'd like to cover again at a highish level. The first is, and this will
6 take a lot of teasing out eventually, but could you envisage this, we'll call it institution,
7 operating in a way, you've already mentioned the word inquisitorial which has the idea of
8 somebody sitting up the front and asking questions. But could you see it acting, having
9 alternative ways of dealing with various claims, for example, restorative justice processes.
10 **MS COOPER:** Yes.
11 **CHAIR:** Mediation processes, whānau-based, hui, that sort of thing, is that something that was in
12 your contemplation?
13 **MS HILL:** Yes, and as we have these conversations we sort of go that's a really good idea, so that
14 shows how much this has travelled since we wrote our brief I think. But when you think
15 sometimes even when people were in care abuse happened within a whānau, so even with
16 State oversight people were placed with whānau and abuse happened in those contexts. So
17 and a whānau may elect to deal with it in a different way and a healthier or a restorative
18 way, and as long as everyone understands what that means and there's no sort of
19 compulsion to do it. And the thing I keep coming back to, people should leave this process
20 better than when they arrived to it. And if there is a restorative element that helps with that,
21 then we should embrace that.
22 **MS COOPER:** Again, I think it's something we couldn't have contemplated probably even five
23 years ago, because we just, you know, yes, there's been that culture within the Youth Court
24 and the Family Court for a long time, but actually extending it to adults is still something
25 that's very much being developed. But I think we know a lot more now, we have more
26 practice with that, more skill with that. And I mean I guess we see that healing that can
27 happen, I mean I'm thinking of our faith-based people, where, you know, it's been for some
28 of them, and again very survivor-focused, it's been really important to have like the Bishop
29 or the Cardinal or, you know, to actually say sorry. So yeah.
30 **CHAIR:** It fits in, doesn't it, with this notion of tino rangatiratanga, of the survivor having a range
31 of options from which they can choose their direction of travel, so yes.
32 **MS COOPER:** And also took I guess when the body of knowledge is, you know, at a particular
33 level it may be that actually lots of claims can be dealt with without ever really needing to
34 speak to the survivor at all. There'll be a sufficient body of knowledge that you can see

1 their claim and you can assess it on the basis of the papers and their account, written
2 account of what's happened. And I mean that's in essence how the claims are dealt with
3 now. But I think it would be, you know, where there are any questions, where there are
4 question marks or areas that there may be a contest about, I think they should always have
5 the option of being able to come and present their case in person to someone. But, as I say,
6 most of it could probably just be done on papers.
7 **CHAIR:** And the second area which I ask, because you two are the people with probably the most
8 experience, if we imagine a new institution that started tomorrow, and that it dealt with
9 claims that came in from tomorrow, tell me about all of those people for whom you've
10 previously acted who have settled already. Do you have any idea about how you — do you
11 think there's a place for those people to come, and if so how would that work? And again,
12 at a high level.
13 **MS HILL:** At a high level, I think, as we talk about this institution, I know that its different parts
14 are growing quite rapidly, but part of that I think, they can come with their experiences and
15 that may be their documentation, and have someone review it and look at what the current
16 standards are, whatever standards the institution has developed, and review it. And there
17 perhaps is a recommendation, it's reopened, or that elements are looked at again, or that the
18 knowledge that was applied to that person, that's now been updated. So we need to bring
19 that into line. So rather than trying to be consistent with past processes, you're trying to
20 bring people in line with what your guidelines and standards are at that point. So I think
21 there is a reviewing function in there.
22 **MS COOPER:** I think the other really important aspect, and that's one that's certainly been
23 reflected in other processes, is that ability to provide a top-up. So typically, of course, these
24 processes will have compensation levels, and there has been a general acknowledgment that
25 past settlements may be very much out of kilter, so it shouldn't be that people coming, you
26 know, at the point of go, start go from the institution are able to benefit from increased
27 compensation levels, I think other processes would recognise that they should — that those
28 who've already settled and had to for whatever reason should be able to come back and say
29 well look, this was my settlement when you now look at the bands, whatever they might be,
30 clearly mine's out of kilter.
31 **CHAIR:** The bands that existed at that time.
32 **MS COOPER:** Quite.
33 **CHAIR:** Yes, so you're talking about these ones where you pointed out anomalies or apparent
34 anomalies.

1 **MS COOPER:** Even if the new bands, you know, say if this sets up, like the Australian model, so
2 it sets a top of, say, $150 and then whatever the bands are. And I think then if you look at a
3 past settlement and say okay, well, assessed under the new criteria this is where you would
4 fall, there's clearly a $60,000 disparity, I think the ability to top up to that $60,000 disparity
5 to put them in line with where they would fall under the new criteria.
6 And I mean it's really interesting, the St John of God settlements that we're entering
7 into now, they specifically contract for the ability to have that top-up if as a result of this
8 Commission new tariffs or new compensation levels are fixed. So that's already being
9 recognised in some faith-based, and I think another one, yeah.
10 **MS HILL:** The recent — so Sonja talked earlier about a part of the Anglican Church which had
11 changed its ways and their settlement documents say that, you know, if as a result of the
12 Royal Commission recommendations are made, we'll review this, it will not go down, but it
13 may go up.
14 **CHAIR:** That's very interesting.
15 **MS COOPER:** Yeah.
16 **CHAIR:** Thank you very much indeed. I'll now invite Ms Aldred to ask her questions, at last.
17 **QUESTIONING BY MS ALDRED:** Thank you. Just before I begin, I just have a brief few
18 words. I just wanted to proffer a few further words in explanation, I suppose, of our
19 approach which is, as I sort of touched on I think in my brief opening at the beginning of
20 this hearing, the Crown's approach to this hearing generally, of course, has been to provide
21 information to the Royal Commission primarily through the evidence of its own witnesses,
22 and the documents that they refer to and have provided.
23 Given the nature and the context of the Inquiry, we've taken the approach that it's
24 not — sorry, slow down. Given the nature and context of the Inquiry, we have taken the
25 approach that it's not necessary nor desirable to be putting the substance of any particular
26 differences to the Cooper Legal witnesses. And obviously we have — we probably don't
27 have time to traverse everything either.
28 We do acknowledge that some of these differences will come down to differences in
29 perspective and, of course, some of the evidence you've heard is really in the nature of
30 submission, which we will, in due course, respond to in kind.
31 That approach, of course, means that there are only a few matters that I'm left with
32 that I need to deal with today, and as I previously said, these really will just relate to
33 matters of context or provision of further context or a couple of issues in relation to
34 fairness.

1 So just with those comments behind me, I've got a few matters that I'd like to
2 address to Ms Cooper around Ms Hill. So thank you for your very arduous evidence before
3 the Commission and I've just got a few areas I'd like to explore. So first of all, turning to
4 the Ministry of Education.
5 In your evidence, I think both in your brief, your written briefs of evidence or brief
6 of evidence and in your evidence for the Commissioners, you have referred to the Ministry
7 requiring, before it will accept an allegation, something like proof beyond a reasonable
8 doubt or higher, or I think you said certainly higher than the civil standard and possibly
9 higher than the criminal standard.
10 The Ministry's evidence will be that this isn't a correct classification and that it
11 applies a lower threshold to accepting allegations and being made out. And really in this
12 regard I just wanted to refer you to a document that's been — that's in the Inquiry's bundle
13 that you may or may not specifically have read, but this is a document that Counsel
14 Assisting have placed before the Commission and which I'd like to now take you to. It's a
15 document witness — no, sorry, what is the — we don't have a witness number, we just
16 have MOE 269.
17 And this is a — you'll see the first document is an e-mail and it is from a policy
18 advisor to the two assessors that the Ministry uses copied to one of the senior solicitors in
19 the Ministry's legal team. And it starts with saying that it attaches a sample report to help
20 us all with assessment reports, it will need amendment as required by particular cases, but
21 reports should generally cover similar ground and follow the format. And it also attaches a
22 copy of a sample legal advice memo which Jyotika uses for her memorandum on the legal
23 aspects of each case, and that's said to give the assessors a steer on the things that the legal
24 team will then take into account when recommending settlements or decisions.
25 So if we could turn over to the next page please and you'll see that this is the
26 memorandum. Now you may not have had a chance to read this and I don't —
27 **MS HILL:** I have not seen this document before.
28 **MS ALDRED:** It is in the Inquiry's bundle rather than the Crown's and I don't — I'm conscious of
29 issues of asking you to address the whole of the document, so I won't do that. But what I
30 will do is just take you to briefly show you what's in it. And the first page is, this page is
31 the first page of the template assessment report and the Ministry will say that this template
32 was taken from an assessment actually conducted, but with all identifying features
33 removed. So you'll see that it's been redacted so that it doesn't show the name of the person
34 or the institution.

1 And then, so if you turn over to — I'll just find the right page — so that document
2 which then follows, and there's about another six pages long, is the assessment report itself.
3 And I'm not going to take you through that, but what I'd like to take you to is page 8 of that
4 document, which is the template legal advice memo relating to settlements. And the —
5 **CHAIR:** I don't think we have page 8 yet do we?
6 **MS ALDRED:** Sorry, that's page 8.
7 **CHAIR:** Thank you, it looks similar to the second one. No, I'm with you.
8 **MS ALDRED:** Yes, it just looks a bit like the assessor's report, they're both in the form of a
9 memorandum and they're all written in template so they're largely the same format. So the
10 subject is "Legal advice on historic abuse claim and possible payment" and this is the
11 recommendation that the Legal Services team have made to the Chief Legal Advisor about
12 payment in this case and which is said to be a template for consideration of further claims.
13 Now just briefly if you could turn over the page to page 9, you will see — I don't
14 want to go into the details of the claim, but at paragraph 8, as an example claim, this is a
15 complaint that an assistant housemaster had attempted to sexually abuse the claimant on
16 two separate instances.
17 And then — and so the memorandum goes on to consider the case, but then if you
18 go over to paragraph 14, which is on page 10, just by way of summary, there's an
19 explanation that in this case the Ministry has undertaken a full assessment of the claim, it
20 says the Ministry did not find any direct evidence to support the allegations and goes on to
21 say more specifically at 14.1, that the Ministry hadn't been able to find records of the
22 teacher's name employed at the school during the relevant time.
23 It also goes on to say that there weren't any other records of an incident or claims by
24 any other children of the school at the time and there were no records of the person making
25 a complaint at the time.
26 And so if you could then just pick out paragraph 15 please, the writer goes on to say
27 the assessment findings indicate there was some staffing difficulties at the time in that the
28 staff to child ratios were considered by some to be insufficient, it goes on to say there were
29 general concerns about the suitability of staff, and later down that paragraph the assessment
30 report also finds that the claimant was a credible witness.
31 So it goes on to say, "therefore notwithstanding the evidential difficulties, after a
32 careful balancing exercise, the assessment finds that it is more likely than not that these
33 events occurred and that it is reasonable to accept there had been suitable and adequate
34 staff, the incidents complained of would not have occurred".

1 So and then just to conclude or wrap up this report, if I could go to please page 12,
2 and you'll see at the bottom of that page a section called "Payment Advice". If I could just
3 pick out — yeah, that's fine, paragraph 27 records that the Crown will resolve claims based
4 on the facts and won't use the Limitation Act to avoid making a fair offer. It goes on to
5 repeat what was said at earlier paragraph 15, that in spite of evidential difficulties the
6 investigator's report supports the claimant in terms of the allegations because of the general
7 indications as well.
8 And then if you could turn over the page please, and, sorry, at paragraph 29 makes a
9 recommendation that a settlement be offered in those terms. And further down, and I don't
10 need to take you to this, there's also the offer to effectively write off the Legal Aid debt in
11 addition to those terms.
12 So putting aside questions of quantum or degree, just, I need, I suppose, to put it to
13 you that this does at least reveal that it's a little inaccurate to suggest that allegations won't
14 be accepted unless they meet a criminal standard of proof.
15 **MS HILL:** You need to remember that that's probably the most information I've ever seen about
16 how the Ministry of Education conducts its assessments. And so all we have to go on is the
17 outcomes that we see at the end of that process, because we don't see the assessment reports
18 either. So the only thing we can give evidence about is what we see and what — without
19 any internal working.
20 There are times when ones like this occur, and actually we dealt with this when we
21 looked at the MOE settlement amounts, this client is in that table in the appendix B.
22 On this specific incident, credibility was the factor. So he met with the MOE
23 assessor, a lot of our clients don't have that opportunity. So I wonder what would have
24 happened with him if they hadn't met the assessor.
25 But if I was, in fairness, to say, can I be sure that a blanket approach of a very high
26 burden is taken, then in fairness to the Crown I'd probably have to say I couldn't say that.
27 But on what we see it's certainly higher than the civil burden of proof. And I don't think it's
28 consistent in the way that allegations are treated either.
29 So while this might be an example of a lower standard, I'm not convinced that it's
30 always this approach. But I'm happy to concede that there might be some fluctuations in
31 there, but should there be fluctuations? I'd probably say not.
32 **MS ALDRED:** Thank you, I appreciate that. The other — the Ministry's evidence, of course, will
33 be that this was circulated as a template and as the proper method of assessing claims, and
34 that that is the method that is applied. But I understand your evidence, so thank you for

1 that.
2 The next point, I wanted to ask a few questions about the Ministry of Social
3 Development next. And the first point I just wanted to very briefly touch on was just really
4 a point of, I suppose, correction, which is at — in relation to your brief of evidence. And at
5 paragraph 323 of your primary brief of evidence.
6 **MS HILL:** Just give us a minute to find that. Yes, thank you.
7 **MS ALDRED:** So you are talking about the CCRT [Care Claims and Resolution Team] system
8 and you say — you refer to a five-step process in the previous paragraph and you say that
9 not long after the process was introduced, meetings were phased out altogether. By 2013
10 virtually all claims were being dealt with by exchange of documents with no face-to-face
11 contact between our clients and MSD and then go on to say in the next paragraph; "Of
12 course MSD continued to meet with unrepresented clients".
13 **CHAIR:** Slow down Ms Aldred.
14 **MS ALDRED:** Sorry. "So MSD continued to meet with unrepresented clients". Really just a
15 brief point in relation to that. MSD's perspective, which is reflected in its evidence, is that
16 it had reached an agreement with Cooper Legal that it wouldn't offer to meet with your
17 clients unless that was expressly requested. And that that was an agreed position between
18 yourself and the Ministry.
19 **MS HILL:** I'll have to let Sonja answer that as I had left by that point.
20 **MS COOPER:** Well, I distinctly remember reading a document authored by Garth Young only a
21 few days ago in which he said that the Ministry had decided that they were no longer going
22 to meet with Cooper Legal clients and that had been communicated to us. I think — so
23 whether that's an agreement, I guess that was what was the position we reached. I would
24 acknowledge it was very difficult to arrange the meetings, because it had to suit not only
25 the client but the Cooper Legal team and the Ministry of Social Development team, which
26 meant it was — the logistics were always extremely difficult.
27 But I'm not sure that I would agree entirely about it being a mutual agreement. I
28 think it certainly got to the point where that's what happened, but as I say, I read a
29 document only last week in which Garth Young communicated that we — our clients were
30 not going to be offered meetings and we would instead be invited to provide letters, which
31 is what happened.
32 **MS HILL:** It was an internal communication with MSD, not a communication to Cooper Legal,
33 just to clarify.
34 **MS ALDRED:** Can I just take you please to just a document that was filed in relation to the *XY*

1 proceedings, which is an affidavit of Carolyn Risk? That is Crown bundle tab 74. So that
2 was sworn in 2015. And if I could just please have paragraph 39 of that brought up, which
3 is at — good, thank you.
4 So that records Ms Risk's evidence before the High Court that "In August 2012 the
5 Ministry agreed with Cooper Legal that the Ministry would not meet with Cooper Legal
6 clients unless expressly requested to do so. This was to reduce duplication for claimants
7 telling their story and also resulted in speeding up the process". And went on to say that the
8 Ministry based its assessment on written material.
9 I really just point that out because, and I accept that this is all a while back,
10 Ms Cooper, as well, but the Ministry's perspective is that there was never any intention to
11 refuse Cooper Legal clients an interview, and that this was really a matter that was
12 effectively by arrangement.
13 **MS COOPER:** I'm not disagreeing that we would have reached an agreement about that, but what
14 I'm saying is that this had already been an internal decision made by the Ministry in any
15 event. And so I'm not disagreeing that we would have acknowledged, given those practical
16 difficulties that I was talking about, that we couldn't continue with them. I'm just saying
17 that the Ministry had already reached that view anyway.
18 **MS ALDRED:** Perhaps we'll be able to see that document and talk about it at a later stage. So the
19 next thing I just wanted to talk to you about is the introduction of the two path approach.
20 And in your brief of evidence, and I think again in your evidence before the
21 Commissioners, you have said that ultimately it was announced without notice to you and
22 you heard it being publicly announced on the radio. But you have accepted that there had
23 been, up to a point, quite significant consultation with Cooper Legal?
24 **MS COOPER:** Absolutely. I mean we were wanting to reach an agreement, I mean that was the
25 whole purpose and I think that was why we were so stunned that after months of
26 consultation and work to try and reach an agreement about a process, when it was
27 ultimately announced we heard it on the radio, and then after the broadcast by Anne Tolley
28 we then got a letter from the Ministry of Social Development.
29 So that was the point we were making, that, you know, we had in good faith
30 embarked on this long process to try and create a good settlement process which, as we've
31 explained, that fell down, and then at the end of the day we don't even get any advance
32 warning it's being announced, we hear it on the radio.
33 **MS HILL:** I do think that letter arrived very shortly after the radio show.
34 **MS COOPER:** After the radio, yeah.

1 **MS HILL:** Perhaps there was an intention we receive it beforehand, I couldn't tell, but I think the
2 letter arrived in our inboxes after the publicity.
3 **MS ALDRED:** The morning report.
4 **MS COOPER:** Yes.
5 **MS HILL:** So there might have been good intention to let us know beforehand, but the — as it
6 turned out, it didn't work that way.
7 **MS ALDRED:** But in fact too, it was ultimately your decision, was it not, to finish talking to the
8 Ministry about the two path approach?
9 **MS COOPER:** Well, I think, I certainly acknowledge that and that's because the fiscal envelope
10 was not sufficient to achieve what the Ministry said it wanted to achieve through the
11 accelerated process. So we withdrew at that point, because we didn't think it was a process
12 with integrity.
13 **MS ALDRED:** And that was reflected in Gendall J's decision in the *XY* case, wasn't it?
14 **MS COOPER:** Yeah.
15 **MS ALDRED:** That he refers to a letter you wrote to MSD saying that you were effectively
16 withdrawing from any further consultation?
17 **MS COOPER:** Absolutely.
18 **MS ALDRED:** Yes, and he also refers, doesn't he, to the Ministry having given you notice that it
19 wouldn't necessarily expect to agree every aspect of the settlement.
20 **MS COOPER:** That's — I mean that was something that we were discussing all the way through,
21 and I mean in any process we're not going to expect to agree everything. But when the
22 fundamental premise of the process is broken from the start, and that is there wasn't
23 sufficient money to achieve what the Fast Track process was intended to achieve, and so it
24 had this inbuilt lowering of every offer to fit within a bell curve, that was not something we
25 were prepared to sign up to.
26 **MS ALDRED:** But ultimately it was your decision to withdraw from the negotiation about it.
27 **MS COOPER:** Oh, yes, yes.
28 **MS ALDRED:** Just again, on the two path approach, once it was implemented, you've expressed
29 some concern, I think, in your evidence relating to those groups of claimants who were
30 excluded from it. You refer specifically to initially the exclusion of siblings of people with
31 assessed claims.
32 **MS COOPER:** Yes, I think that was something we learned once we got served with the court
33 documents.
34 **MS ALDRED:** Also, the high tariff offenders you spoke about yesterday I think saying that they

1 were, until the change of Government and your letter, shut out of that process, or their
2 claims were put on hold?
3 **MS HILL:** Yes, so when we got the letter advising about who would be made a Fast Track offer,
4 there was schedule 1 with who was going to get an offer, and schedule 2 the people who
5 were not — that included high tariff offenders, people who had litigation against an NGO at
6 that time, and —
7 **MS COOPER:** The stuck claims.
8 **MS HILL:** Yeah, although they weren't on the list of —
9 **MS COOPER:** No, that's right, they just didn't get an offer.
10 **MS HILL:** Has that changed? Sorry, I think I see what your point is, that the exclusion of people
11 who had siblings who had received an offer, that was a proposed exclusion, but I think in
12 the end it may not have been implemented.
13 **MS ALDRED:** No, yeah, that was my point thank you.
14 **MS HILL:** Sorry to jump ahead.
15 **MS ALDRED:** No that's helpful, I just wanted to clarify, I think that you in fact — I think you in
16 fact do touch on this in your evidence at paragraph — I've noted paragraph 408 but I don't
17 think we need to go there.
18 **MS COOPER:** No.
19 **MS ALDRED:** But you accept that ultimately the sibling claims were brought in into —
20 **MS HILL:** The particular one didn't survive into the final process, that's right.
21 **MS ALDRED:** Yeah. So — and the reason I raise that is just because the sibling exclusion, I
22 think, was touched on in your evidence, but I just wanted to clarify that in fact those people
23 weren't ultimately excluded from the final version of the process. And similarly with high
24 tariff offenders, whilst they were another excluded group, that was actually against the
25 Ministry's recommendation, and I think that you acknowledge that in your evidence
26 yesterday, Ms Hill.
27 **MS HILL:** Yes, and we didn't know this at the time, of course. Only subsequent OIAs, when we
28 could see the advice from MSD saying that it was unworkable. There was clearly
29 reluctance on MSD's part to implement it and I do acknowledge that, although in the end a
30 policy was formulated, it was only the change of Government that brought it to a halt.
31 **MS ALDRED:** Thank you, so just one other matter in relation to MSD, that is in relation to
32 Mr Young. Yesterday in your evidence you made some remarks to the effect that Garth
33 Young, who was the former manager of MSD's historic claims team, was, in your words,
34 inherently conflicted. And you referred specifically to his formal work as a social worker.

1 **MS HILL:** Yes.
2 **MS ALDRED:** I need to raise this with you because that, in my view, is quite a serious allegation
3 to make about Mr Young, and you gave as an example that he was conflicted on the claim
4 by the Sammons sisters.
5 **MS HILL:** Just to clarify my comment, that Mr Young had been open about that conflict in
6 relation to Georgina Sammons and had — there was a line somewhere where he had
7 acknowledged that conflict in correspondence and said he had not been involved. I don't
8 know the position in relation to Tanya and Alva. I know that he had less involvement with
9 them as a social worker. I'm not sure of his involvement with the settlement — the lack of
10 settlement of their claims.
11 **MS ALDRED:** Thank you, so Mr Young's evidence for the Commissioners will be that his
12 involvement with Georgina Sammons was not as her social worker but as a team leader or
13 supervisor in that — in relation to the care provided to her. And that, in his words, once the
14 claim reached MSD he immediately removed himself from it and had nothing further to do
15 with it.
16 **MS HILL:** I'm certainly not suggesting he had any improper involvement in the claim, it was
17 demonstrative of the fact that anybody in Mr Young's position who used to be a social
18 worker who is now involved in historic claims, there has to be a conflict there. So when
19 I talk about inherent conflict, the situation rather than any specific allegation of anything in
20 relation to Ms Sammons.
21 **MS ALDRED:** Mr Young will give some further evidence, though, to the effect that actually this
22 hasn't been a problem for him in his work and what he will be able to tell the
23 Commissioners is that the Sammons' claim was the exception, and that aside from that
24 claim he has never seen a claim that has included allegations against an ex-colleague of his.
25 And he will also be giving evidence that he's rarely been in a position of conflict. I
26 think a couple of occasions he will tell the Commissioners he's — allegations have been
27 made by someone who may have been in his care — not about him I hasten to add — and
28 that similarly with the Sammons case he's immediately removed himself.
29 But his evidence will be that in spite of the high volume of matters that have come
30 across his desk, in this capacity, conflict has not been an issue. So I just needed to raise
31 that really, I think out of fairness to Mr Young.
32 **MS HILL:** We have no visibility over those matters, so his involvement with Gina Sammons was
33 really demonstrative of a problem that can arise. As I say, I don't make any particular
34 comment, I don't want to cast aspersions on Mr Young, that wasn't the intention.

1 **MS ALDRED:** Thank you, that's appreciated. And finally, just turning to Legal Aid briefly, so I
2 think there's — it's fair to say there's been a suggestion in your evidence that Legal Aid has
3 met with other agencies and the words you use in your brief of evidence, which I won't take
4 you to because I don't think there'll be a problem with this, is to negotiate a financial
5 strategy for dealing with the historic abuse claims.
6 And the reason I raise this is simply because in effect this allegation challenges the
7 independence of the Legal Services Agency and latterly Legal Aid as it sits within the
8 Ministry of Justice. And from the Agency's and Legal Aid's point of view quite a
9 significant allegation. And I simply want to put it to you that witnesses for Legal Aid will
10 give evidence that any meetings that they've had with other Crown agencies have only ever
11 been for proper purposes.
12 **MS COOPER:** Look, I accept that that's what Legal Aid will say and all we can say is our
13 experience, so that's very much the evidence from our experience of that. And I think,
14 look, we have a very, very good working relationship with Legal Aid and I want to say that,
15 that since we went into mediation with them in 2012 and we had an independent consultant
16 who was appointed to work with us and other — Treaty firms, that relationship has been
17 really good. We have been able to work with Legal Aid constructively to resolve funding
18 issues.
19 And it's been really good because we have been able to communicate where our
20 practice has had to change to respond to changing ADR processes, so they've been part of
21 that discussion. And it's been such a different dynamic to work with where they meet with
22 us, like we still meet once a month as much as we can. We tell them about the files that
23 we're working on, generally what's happening, we copy them in on important, you know,
24 correspondence that we receive from the various agencies that we are working with. It is a
25 very constructive relationship and I think that's important to highlight, we said that in the
26 contextual hearing and I say that again now.
27 But I do think that there was a period in the withdrawal of aid process where that
28 independence was compromised and I don't resile from that. I think that independence was
29 compromised. I think that there were communications occurring that should not have
30 occurred, and when I refer to the Solicitor-General's evidence about the *Martin* case, which
31 was in 2007, saying that Crown Law should not be communicating directly with Legal Aid
32 and yet there is clear evidence of those kind of direct communications, even in the
33 Solicitor-General's own evidence from 2009, so that's after that decision. And we know
34 from our own — the Official Information Act material we collected in that Legal Aid was

1 part of joint meetings with Crown Law, and the agencies that we were engaged in litigation
2 with. And it just raises questions, particularly given that we were in the middle of this
3 withdrawal of aid process. So that's, you know, I think that's the inference that we've
4 drawn.
5 **MS ALDRED:** You will have seen that in the brief of evidence filed on behalf of the Ministry of
6 Justice it acknowledges the positive relationship with Cooper Legal now and also
7 acknowledges that that has perhaps not been so positive in the past. And I think it's
8 appreciated, your acknowledgment of the current positive working relationship is
9 appreciated.
10 The issue of independence is a matter that the witnesses for Legal Aid will be
11 giving quite significant and detailed evidence on, including evidence in relation to the
12 meetings that you have spoken about and we'll be able to refer to documents, all
13 documented minutes of those meetings.
14 **MS COOPER:** And again, they may be documents we've not seen, because there may have been
15 legal professional privilege claimed for them. I don't know. I mean we did our Official
16 Information Act requests and we got whatever was deemed to be released to us under the
17 Official Information Act. So again, there may be material that we haven't seen.
18 **MS ALDRED:** I think the main thing I was thinking of is a reference to minutes of a meeting sent
19 to you as well, so — which I can take you to if I need to.
20 **MS COOPER:** No, I think I know which one, one of a number you're talking about.
21 **MS ALDRED:** Yeah, so I really just put that because I need to really conclude this, I suppose, by
22 saying that the Ministry's evidence will be that it's maintained its independence and that it's
23 only consulted with the Government agencies where it's been appropriate. So that really
24 was all I needed to put to you on that, Ms Cooper.
25 **MS COOPER:** Thank you, just perhaps if I can just also say that when the relationship was
26 working, Legal Aid actually came along with meetings to us(sic) with the Ministry of
27 Social Development. So it was all completely transparent, we were all at the same
28 meetings, we all were aware of what was being discussed. And, you know, that was again
29 a really good working relationship. And so I think the issue here is transparency, and
30 where there isn't transparency I think that just raises issues, particularly within the context
31 of a very aggressive withdrawal of aid process. So that's just my response there, and I
32 emphasise again the landscape is very, very different now and we have a very solid, good
33 working relationship.
34 **MS ALDRED:** Thank you Ms Cooper. I don't have any more questions for you both, thank you

1 very much.
2 **CHAIR:** Thank you Ms Aldred. Is there anything arising?
3 **MS JANES:** No thank you, Madam Chair, no issues arising.
4 **CHAIR:** With great happiness I can say that we have not only concluded for the day but we have
5 concluded early and I'm sure that's a great relief to both of you. On behalf of the
6 Commissioners, can I please thank you both, we acknowledge the vast amount of work that
7 you've done over decades for survivors and we have heard, I think it's fair to say, both in
8 this hearing and in private sessions with survivors, the extraordinary debt that they owe to
9 you for your work.
10 The Commission also owes a debt to you for sharing so generously both your oral
11 evidence today and I know vast documentation that you have provided to us behind the
12 scenes without which we would be put to enormous amount of trouble. So please accept
13 our thanks, our appreciation for the work that you've done and we hope the continuing
14 work that you will do with the Royal Commission so that we can advance this very
15 important cause. So thank you both very much indeed.
16 **MS COOPER:** Thank you.
17 **MS JANES:** Madam Chair, before you conclude, prior to the break I had mentioned we would
18 have one more exhibit which was going to be a collation of all the — and we now produce
19 that exhibit.
20 **CHAIR:** That was very fast work, thank you. This is the — these are the proposed solutions
21 which are now taken out of your brief of evidence and compiled into one document?
22 **MS HILL:** I think, as we said in our conversations over the last few days and since that was
23 written, because that was written in November or December last year, so I think we've
24 developed quite a lot on some of those concepts.
25 **CHAIR:** But this is at least a basic thing, we will read this in light of the evidence that you've
26 given today, so thank you. Is that Exhibit 3?
27 **MS JANES:** That's Exhibit 3.
28 **CHAIR:** Thank you. Is there anything else arising from anybody else in the courtroom apart from
29 mana whenua? No more, then we conclude the session today.
30 **Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei**
31 **Hearing concludes at 3.14 pm**
32