

**ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
LAKE ALICE CHILD AND ADOLESCENT UNIT INQUIRY HEARING**

Under The Inquiries Act 2013

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

Royal Commission: Judge Coral Shaw (Chair)
Ali'imuamua Sandra Alofivae
Mr Paul Gibson

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Ms Susan Hughes QC for Mr Malcolm Burgess and Mr
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Mr Hayden Rattray for Mr Selwyn Leeks
Mr Eric Forster for Victor Soeterik
Mr Lester Cordwell for Mr Brian Stabb and Ms Gloria Barr
Mr Scott Brickell for Denis Hesseltine
Ms Anita Miller for the Medical Council

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

Date: 24 June 2021

TRANSCRIPT OF PROCEEDINGS

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1 **MS HUGHES:** Thank you ma'am, I was a bit perplexed as to the requirement in any event.

2 **CHAIR:** Yes, okay.

3 **MS HUGHES:** If the witness could be affirmed please.

4 **MALCOLM JAMES BURGESS**

5 **CHAIR:** Absolutely. Mr Burgess, welcome and thank you for coming. Do you solemnly,
6 sincerely, truly declare and affirm that the evidence you give to the Commission will be the
7 truth, the whole truth and nothing but the truth?

8 A. I do.

9 **Q.** Just talk into the microphone, please be aware of speed and noticing we've got signers.

10 **QUESTIONING BY MS HUGHES:** Do you confirm your full name is Malcolm James Burgess?

11 A. Yes.

12 **Q.** You reside in GRO-C?

13 A. Yes.

14 **Q.** You are retired?

15 A. Yes.

16 **Q.** And prior to your retirement you were a Police Officer?

17 A. Yes.

18 **Q.** You have completed a brief of evidence dated 6 April 2021?

19 A. Yes.

20 **Q.** Are there any amendments or corrections you wish to make to that brief?

21 A. There is one small amendment. At paragraph 3.8 it currently reads, "on 11 March 2002

22 Detective Superintendent Bishop, the then National Crime Manager, wrote to

23 Superintendent Graham Emery, who I believe was at the time the Chief Legal Advisor."

24 We should delete from "Superintendent Graham Emery" to "that time" and just leave "the

25 Chief Legal Advisor". It's not clear that he was writing to Mr Emery.

26 **Q.** Other than that correction, are you content with the balance of your brief?

27 A. Yes.

28 **Q.** So I want to talk to you about the circumstances in which you came to seek a legal opinion.

29 Do you agree that the Solicitor-General's guidelines require two factors to be met before a
30 prosecution can be undertaken, evidential sufficiency and public interest identified?

31 A. Yes.

32 **Q.** And both Messrs McArthur and Hall say they weren't required to consider evidential
33 sufficiency. Why was that?

- 1 A. I had considered evidential sufficiency and was satisfied, I was personally satisfied that
2 there was evidential sufficiency in seven of the cases.
- 3 Q. So why did you seek an opinion from Mr McArthur who worked for Police rather than the
4 Crown?
- 5 A. Pretty standard practice to seek a legal opinion from Police Legal, that's what they're there
6 for.
- 7 Q. And the information you provided to Mr McArthur included your preliminary report
8 regarding the various complaints, regarding the misuse of the ECT?
- 9 A. Yes.
- 10 Q. And what limitations did you put on him accessing your files?
- 11 A. None.
- 12 Q. And so assuming that Mr McArthur's opinion had supported prosecution of Dr Leeks, what
13 steps did you intend to take?
- 14 A. It would have required additional investigation, particularly interviewing the complainants
15 whom I had identified, there were sufficient evidence to proceed with. And other
16 investigative steps, it would also have required commencing a prosecution and extradition
17 proceedings.
- 18 Q. And that's obviously in relation to Dr Leeks?
- 19 A. Yes.
- 20 Q. What instructions did you give Mr McArthur regarding the need for a peer review of any
21 opinion he wrote?
- 22 A. I'd indicated to him that if he reached a view that the public interest test wasn't met, that he
23 should seek a peer review, I wanted some independence regarding the legal opinion.
- 24 Q. And what direction, if any, did you give Mr McArthur as to who the peer reviewer should
25 be?
- 26 A. None.
- 27 Q. At paragraph 6 and 7 of Mr McArthur's brief he says, and this is quoting you, "Each of the
28 complaints has been considered on its own, on its individual merits. It may be that
29 combined charges would enable other charges to be considered." He then goes on to say
30 that you didn't explain or elaborate what was meant by that statement. Can you do so now
31 please?
- 32 A. It was a rather clumsy identification of the potential for a propensity application. I could
33 have expressed it better.
- 34 **CHAIR:** Sorry, for a --

1 A. An application around propensity.

2 Q. Propensity, okay.

3 **QUESTIONING BY MS HUGHES CONTINUED:** And in paragraph 9 of his brief he records
4 that you told him that you had adopted a very conservative test when reviewing evidence.
5 What did you mean by that?

6 A. I had looked for those cases that I thought were most likely to be successful and I'd applied,
7 I think it's five criteria, to selecting those cases with a view to those being the cases that
8 would then be further investigated and prosecuted.

9 Q. Do you recollect what the five criteria were?

10 A. There needed to be a coherent account from the survivor, they needed to identify the
11 perpetrator, the presence of corroboration through medical notes or witness statements.
12 Because of the particular charge I was looking at they had to be under 16 years of age at the
13 time. And I'm sorry right at the minute the fifth one escapes me.

14 Q. If it returns to your memory you'll no doubt tell us what it is.

15 A. I will.

16 Q. So Mr McArthur, at paragraph 16, says that he cannot remember if he had access to
17 Professor Walter's report. What do you say?

18 A. I had made reference to Professor Walter's report in my report to the legal advisor. I felt
19 that I had considered Professor Walter's report in reaching my conclusions around
20 evidential sufficiency.

21 Q. Professor Walters was a medical expert who gave you advice regarding the use of ECT on
22 children and on Aversion Therapy?

23 A. Yes.

24 Q. So you took that together with your own investigation of the files to conclude that seven of
25 them merited prosecution?

26 A. Yes.

27 Q. Paragraph 67 Mr McArthur records that you did not tell him of the charges before the
28 Medical Practitioners Board of Victoria. What do you say to that?

29 A. My report did reference the fact that Dr Leeks had been facing disciplinary charges and that
30 they had essentially fallen over because he had relinquished his practising certificate.

31 Q. So what relevance did you think that matter had in relation to your inquiries?

32 A. Not a great deal really, it was -- it had never advanced, it had never progressed beyond
33 them initially bringing their disciplinary charges.

34 Q. And at paragraph 73 to 74, Mr McArthur describes it as extraordinary to have been asked

1 for an opinion on only the public interest part of the test and nothing asked regarding the
2 evidential sufficiency. If he'd expressed that view to you, what would you have done?

3 A. I would have invited him to consider evidential sufficiency.

4 Q. So at the point that you've asked for a legal -- for legal advice, you have already satisfied
5 yourself that there's evidential sufficiency in relation to seven charges?

6 A. I believed I had, yes.

7 Q. So why didn't you lay the charges in relation to those seven complaints?

8 A. Well, essentially because the second leg of the test is the public interest requirements under
9 the Solicitor-General's guidelines and the advice I got, both initially and under peer review,
10 was that the prospect of a successful prosecution was -- there couldn't be.

11 Q. And but for that legal advice, what would you have done?

12 A. If the advice had said that the public interest test was satisfied we would have continued the
13 additional inquiry with a view to prosecution and extradition.

14 Q. Finally, Mr Burgess, the question of hindsight, with the passage of time and assuming that
15 you had been properly resourced, is there anything that you would have done differently?

16 A. Look I think the resourcing issue is a very live one. I don't think it was ever intended that
17 the preliminary inquiry was going to take three years, but the reality was that with the
18 resources available, that in fact is what occurred. I think allegations like this need to have
19 an investigation team assigned that can consider the full scope of all of the allegations
20 rather than perhaps prioritise and focus on the ones that seem most likely to be successful.

21 Q. Thank you, would you remain there and answer questions.

22 **QUESTIONING BY MS FINLAYSON-DAVIS:** Good afternoon Mr Burgess. My name is
23 Emma Finlayson-Davis, I'm one of the Counsel Assisting the Inquiry. I'm going to try and
24 follow a chronological approach to my questioning so that we can understand the course of
25 the investigation between 2006 through to 2010. We can plot some of those key decisions,
26 perhaps understand some of the context around them, and then examine in a bit more detail
27 what the effects of those decisions were.

28 So I'm going to take you back to the beginning of your investigation and ask you to
29 have a look at -- we're going to bring it up on the screen, the investigation plan that you
30 prepared in June of 2006, that's NZP050. While that's being brought up, it may be
31 self-evident in the title, Mr Burgess, but an investigation plan sets the framework for an
32 investigation, it identifies in a general sense the allegations you're going to be investigating,
33 and it sets out the steps that you're going to take to investigate them. Is that a sort of a
34 rough summary of an investigation plan?

- 1 A. It is, yes, I think it also identifies some of the resources that you might require.
- 2 Q. Of course.
- 3 A. And any other significant factors that might require attention.
- 4 Q. So we've got that up now, and perhaps I should have read in the date. That's just at the top
5 right-hand corner, I'm sorry. So this was a plan initiated 20 June 2006?
- 6 A. Yes.
- 7 Q. And this is a document that you prepared; is that correct?
- 8 A. Yes.
- 9 Q. And if we can bring up those investigation objectives there again. If you can read those out
10 for us Mr Burgess?
- 11 A. Certainly. The investigation objectives:
- 12 "Number 1, to conduct a criminal investigation into the allegations by 35
13 complainants that they were subjected to unlawful electroconvulsive therapy while patients
14 at Lake Alice Child and Adolescent Unit between 1972 and 1977.
- 15 Second objective was to investigate specific allegations of sexual assaults and/or
16 violations by named suspects during the same period.
- 17 3, to establish whether there is evidence of criminal liability on the part of any
18 person that can be properly put before the courts in 2006.
- 19 To ensure that the investigation is carried out within the best practice guidelines.
20 And to ensure the investigation team meets all legal responsibilities and
21 obligations."
- 22 Q. Thank you. If we go now to page 3 of that document. If I can take you to the far left
23 column entitled "Tasks" and then a subheading of "Complainants"?
- 24 A. Yes.
- 25 Q. That lists four tasks in relation to the complainants and again, perhaps you could read those
26 out for us?
- 27 A. Yes. "Number 1, locate and confirm interest in ongoing investigation;
28 2. record evidential statement;
29 3. consider medical examination;
30 4. consider the need to provide victim counselling or support during the interview
31 process."
- 32 Q. Those steps are in line with the relevant sexual assault guidelines that were in place from
33 2003; is that correct?
- 34 A. I believe so.

1 **Q.** I guess that ties back to your objective 4 that we've just gone through that the investigation
2 was to be carried out within best practice guidelines?

3 **A.** Yes.

4 **Q.** Were any of those steps taken, Mr Burgess?

5 **A.** No, this investigation plan was accompanied by a report recommending the establishment
6 of an investigation team to carry out those requirements. There was no team established
7 and the decision was made to carry out a preliminary inquiry with a somewhat narrower
8 scope.

9 **Q.** We'll come to those documents next. I guess for our purposes at this point in time, this was
10 the intention, at least from your point of view, that these steps would be undertaken?

11 **A.** That was my intention, yes.

12 **Q.** And if I can take you to the far right column, heading "Timings and other relevant
13 comment. When must it be done." We've got paragraph 1, "complainants not to be
14 approached until some evidential basis for their complaints is established through witness
15 interviews", and paragraph 2, "currently in receipt of statements prepared for civil hearings,
16 statements provide general information but are not specifically targeted at criminal
17 offending."

18 **A.** Given the limitation that you've identified in paragraph 1, namely that these
19 statements were prepared for a different purpose, can you help us understand what the
20 purpose, or why you took the approach that you did in paragraph 1 which was to say that
21 they weren't to be interviewed. I guess asking that again, why wasn't an interview of the
22 complainant the first step in your process of the complainants?

23 **A.** We already had the factual statements. We'd had a four or five-year delay between when
24 they were first provided to Police and when I took receipt of them. I was not sure that the
25 complainants, survivors would necessarily welcome an approach in the first instance. And
26 it seemed to me to be prudent to try and get some factual basis, some additional factual
27 basis that might provide corroboration to their statements before we went back to them to
28 have a more in-depth interview.

29 **Q.** Why did you think the complainants may not be wanting to be approached or interviewed?

30 **A.** I had a concern that some of them would have moved on, some of them perhaps with the
31 passage of time had decided that they no longer wanted to be involved in the proceedings.
32 I didn't want to be cold calling people to see where they were at, you know, several years
33 down the track from when they first provided their statements, and I wanted -- if we were
34 going to go back and talk to people, I wanted to be able to go to them with a sound factual

- 1 basis which would indeed support their allegations.
- 2 **Q.** In the ordinary course of investigation into physical and sexual harm, one of the first steps
3 would be an interview of a complainant, would it not, in an ordinary investigation?
- 4 **A.** Yes.
- 5 **Q.** And one of the purposes of that is not only to obtain their full account, but also to identify
6 lines of inquiry for the purposes of obtaining corroborative evidence?
- 7 **A.** Yes.
- 8 **Q.** Do you recall that one of the complainants, Mr Banks, asked you to be interviewed?
- 9 **A.** Yes.
- 10 **Q.** Perhaps if we can pull up that letter, that's NZP1252_0001. We'll see if we can get that a
11 bit bigger. That's a letter, the name has been redacted?
- 12 **A.** Yes.
- 13 **Q.** But Mr Banks did give evidence, or gave his statement with anonymity in this hearing.
14 This was a letter dated 21 November 2006, sent by you, and if perhaps we can just call out
15 that paragraph "I have copies".
- 16 "I have copies of your statements made in 2001 and 2005 regarding your Lake
17 Alice experience. I also have material provided by a Mr Boyd on your behalf. I do not
18 have any intention at this stage to seek further information from you by way of an
19 interview."
- 20 That was in response to a message you had received looking at the first paragraph
21 on 20 November. Is that correct?
- 22 **A.** It appears to be so, yes.
- 23 **Q.** So at this stage you have one complainant getting in touch and specifically asking for an
24 interview. We've also, or you refer to it as well in your statement, know that you had a
25 meeting with Mr Zentveld who we've just heard from in May of that year, I believe, May,
26 or perhaps April 2006?
- 27 **A.** I think it was April 2006.
- 28 **Q.** And he certainly let you know that he wanted the Police to investigate his complaint?
- 29 **A.** Yes.
- 30 **Q.** So you're aware at least of two complainants who made clear to you their desire to be
31 interviewed by the Police and for their complaints to be taken further. In relation to
32 Mr Banks, and you may know this from a review of the file. Were you aware that in fact a
33 family member had written on his behalf in 2005, written to the Police also asking what
34 was happening with his complaint? That's obviously before your time.

1 A. I'm not sure I am aware, or was aware.

2 Q. You mentioned I think before, in answer to one of my questions, that you prepared a report
3 that went to the Assistant Commissioner at that time, Peter Marshall?

4 A. Yes.

5 Q. And that was a report where you set out your initial thinking about the investigation. And I
6 think if we can bring that up, that's NZP316. And if I can take you, Mr Burgess, to page 4
7 of that document, paragraph 4. Starting with -- sorry, it's not paragraph 4, paragraph 6 my
8 apologies. And starting midway through "The circumstances." This paragraph you note:

9 "The circumstances in which the ECT was applied strongly suggest the treatment
10 is being given as a punishment to modify behaviour. Whilst no expert opinion has been
11 sought on the subject to date, the use of ECT in this matter is inconsistent with the
12 description provided to the Commission of Inquiry or the Ombudsman Inquiry in 1977."
13 You go on to note that, "ECT in either form is applied to the head. In addition to recording
14 the application of ECT, the statements record allegations of electric shocks being applied to
15 other parts of the complainants' bodies."

16 I'm interested in your comment that the description -- rather, sorry -- "the use of
17 ECT in this matter is inconsistent with the description provided to the earlier inquiries in
18 1977." Do you recall what you meant by that?

19 A. I'm not entirely sure. I think what I meant was that advice had been given to both of those
20 inquiries by Dr Leeks and that the allegations that had been made by the complainants were
21 different.

22 Q. I want to take you to another section of that report under "Credibility of complainants". I
23 believe that is page -- we've got that already. This is your initial view again of the material
24 as you read it at the time. You say:

25 "That said, there is significant corroboration of the complainants' allegations in the
26 medical notes and patient files. It is also anticipated that some of the staff from Lake Alice
27 will provide evidence that corroborates the allegations."

28 I won't take you any further through the document, but you go on to talk about the
29 various sections of the Crimes Act that might apply. You note that the application of
30 unmodified ECT as punishment, or the application of electric shocks, might justify the
31 consideration of section 195 of the Crimes Act, which is a wilful ill treatment of a child in
32 your custody or control. You also note the relevant sections of the Crimes Act that applied
33 in the 1970s in respect of sexual offending.

34 So if I could summarise the position in relation to your thinking at this point in

1 time, and that is 22 June 2006, you've drafted an investigation plan to consider misuse of
2 ECT, allegations of sexual offending against any member of staff, you've noted that you've
3 got significant corroboration on the file already and you've turned your mind to what the
4 charges might be in respect of the allegations, both in terms of the misuse of ECT and also
5 in terms of sexual offending. Is that a fair summary of where we've got to at this point in
6 your investigation?

7 A. Yes.

8 Q. You've also identified in that document, and I think you identified it earlier in your
9 investigation plan, the resources that you'd need for such an investigation, and you touched
10 on this I think earlier in respect of questions you were asked by your counsel. You assessed
11 the resources that you would need as a detective sergeant or --

12 A. Yes.

13 Q. Yes, a detective sergeant, four investigators and one analyst. Now we know, and you've
14 mentioned it already, that a decision was made not to commit a full inquiry team to this
15 investigation. Who made that decision?

16 A. It was a decision reached following conversations between myself and Superintendent
17 Perry and endorsed by the Assistant Commissioner investigations.

18 Q. And the Assistant Commissioner at that stage was Commissioner Marshall; is that correct?

19 A. Assistant Commissioner.

20 Q. Assistant Commissioner Marshall?

21 A. Yes.

22 Q. You've mentioned Detective Superintendent Perry. Why was that decided, what did you
23 understand the basis for that decision to be?

24 A. The level of resource that would be required given the other investigative pressures that
25 were currently confronting Police, and the need to have a focused inquiry perhaps that
26 addressed the concerns about Dr Leeks specifically, as the first step in determining whether
27 a more significant inquiry might be useful.

28 Q. What was your response to that decision?

29 A. I was part of that decision.

30 Q. So help us understand how we get from your initial assessment of the file and your
31 investigation plan to a decision to not carry out the investigation plan you've only prepared
32 a matter of weeks earlier?

33 A. I think most of the elements of the investigation plan found their way into the preliminary
34 inquiry. Unfortunately the resources didn't and therefore the inquiry was not done as

1 expeditiously as it should have been.

2 **Q.** Let's have a look at the next document, we're moving forward three weeks or so to 12 July
3 2006. This is a memorandum prepared by Detective Superintendent Perry. I think at that
4 stage his title was National Manager Crime; is that correct?

5 **A.** Yes.

6 **Q.** And we've already mentioned Assistant Commissioner and that's Assistant Commissioner
7 Marshall. And that was prepared, as I said, on 12 July 2006. At the stage that this decision,
8 or the scope decision is being made, we've heard in terms of the material read out by
9 Detective Superintendent Fitzgerald that the Police had initially received 34 statements
10 from Grant Cameron?

11 **A.** Yes.

12 **Q.** In the period between 2002 through to 2006 it would appear 14 of those statements and
13 corresponding files have been lost?

14 **A.** Yes.

15 **Q.** And so when you inherit the file, you receive 20 statements and corresponding supporting
16 evidence; is that correct?

17 **A.** I believe so. I went back to Grant Cameron to gather the additional statements and I'm not
18 sure entirely when in the timeframe that that was.

19 **Q.** And those were to get the additional 14 that had been lost?

20 **A.** It was to get the statements of any of the survivors who had previously indicated an interest
21 in a criminal inquiry.

22 **Q.** I think you note in your report later on in the investigation that you were aware there was
23 initially 34 statements?

24 **A.** There were several numbers floating around in terms of how many statements there were.
25 I only know that I received a tranche of statements. I didn't consider they were complete
26 and it seemed to me wise to go back to Grant Cameron and see what additional information
27 he could give me.

28 **Q.** But you must have had some idea of the numbers to know that it wasn't complete, what you
29 received in 2006?

30 **A.** Yes, there were various documents on the file that suggested at different times there were
31 different numbers of statements, that didn't tally with the number I received, so therefore
32 I set about trying to find the additional ones.

33 **Q.** We're just going to bring up paragraphs 2 to 4 of this document if they can be called out.
34 It's quite lengthy but I will read it out, Mr Burgess, and then I have some questions for you.

1 "It is clear that a comprehensive investigation into all matters arising from these
2 allegations will face a number of significant problems. It is apparent that there are
3 allegations of multiple offending by both staff and patients over the period that the Child
4 and Adolescent Unit was in operation. Difficulties arising from the historical nature of the
5 complaints are compounded by the fact that a significant number of the potential
6 complainants/offenders are either dead, suffering from psychiatric illnesses, or fall into
7 both victim/offender categories. It would also appear that while some staff working at the
8 unit could be potential witnesses, it is also probable that those same staff are parties to
9 offences against section 195 of the Crimes Act (wilful ill treatment of a child).

10 I have spoken with Detective Superintendent Burgess on this matter and he has
11 confirmed that the overriding consideration of the individuals he has spoken to concerning
12 activities within the unit have been the actions of Dr Selwyn Leeks and a desire to bring
13 him before a court.

14 With those considerations in mind, I would propose that any investigation should
15 focus solely on the activities of Dr Leeks. This would be on the basis of a top-down driven
16 approach as opposed to a bottom-up approach. In essence, this approach would focus on
17 assembling a case against Dr Leeks based on a small number of cases which would reach
18 the prima facie standard. It is clear that the establishment of viable cases against the doctor
19 will depend to a significant degree on the integrity of the complainant and the amount of
20 corroborative evidence which any investigation would uncover."

21 And we perhaps don't need to keep reading, but that refers to a logical starting
22 point and lines of inquiry. We've established that you had a small amount of statements at
23 this time, perhaps 20. Where did the evidence of psychiatric illnesses come from?

24 A. I don't know.

25 **Q.** One of the things that we've heard a great deal of in this hearing is that in fact very few of
26 the survivors or complainants did in fact at any stage have psychiatric illnesses.

27 A. I don't know the answer, I didn't write the report. I can only assume that an assumption was
28 made that because people had been in the Lake Alice Unit there might be some background
29 of psychiatric illness.

30 **Q.** Why would that be a relevant factor for the Police?

31 A. I guess it goes to the certainty that you have around the statement of a complaint. This is
32 getting into the realms of speculation, but if somebody has a diagnosis and they are -- that
33 suggests they are delusional, you would need to think about how you might progress an
34 allegation with that diagnosis in the background. I'm no psychiatric expert, but there are

1 going to be some illnesses that are going to have an impact on how certain an investigator
2 can be about the allegation that they're inquiring into.

3 **Q.** Is that something that you are trained in as police officers, the impact of psychiatric
4 illnesses?

5 **A.** No, I think it's just one of the many things you take into account when you're assessing a
6 complainant, what makes up the whole of this person and their story and what issues,
7 strengths, weaknesses there might be that you need to either probe or be aware of as you
8 progress your inquiry.

9 **Q.** It's noted there, and I appreciate this isn't your document, but it's clearly been prepared
10 following discussions with you, that you had spoken to survivors and they had advised you
11 that investigating Leeks was the overriding priority. What survivors or complainants had
12 you spoken to to form that view?

13 **A.** I had spoken to Mr Zentveld and two representatives from CCHR. I'm not -- I don't now
14 recall any other folk that I might have spoken to before this report was created. It was
15 certainly very clear from my conversations with Mr Zentveld and the CCHR
16 representatives that their primary concern was Dr Leeks and the application of electric
17 shocks by way of punishment.

18 **Q.** We have learned from that memorandum that the investigation plan or the investigation
19 scope, as you had identified right at the beginning, which was the misuse of ECT, sexual
20 offending, all staff members being considered, shrunk down to focus on Dr Leeks and a
21 focus presumably on the misuse of ECT.

22 I want to suggest that this change or narrowing in scope had four key effects and if
23 I go through them and then invite your comment at the end, Mr Burgess. The focus
24 became, number one, the focus became the misuse of the ECT machine, number two, only
25 Dr Leeks was to be investigated, so no consideration to other staff members' involvement in
26 the misuse of an ECT machine. 3, as I've just mentioned, there wasn't going to be any
27 investigation into allegations of sexual or physical offending by other staff members. And
28 4, the use of Paraldehyde injections as punishment was not going to be investigated.
29 Would you accept that those were the flow-on effects of the decision made to narrow the
30 scope of the investigation?

31 **A.** Yes, with, I guess, a proviso, that some -- certainly in regard to Paraldehyde I absolutely
32 accept your proposition, and yes, the scope did narrow to focus primarily on Dr Leeks and
33 the application of either ECT or some other shock treatment. The sexual offending was
34 considered and on my assessment of the material that I had available, I considered there

1 were evidential issues that precluded a successful prosecution on the allegations contained
2 in the files that I had.

3 **Q.** We'll come to that in a moment, but I've just noticed the time, Madam Chair, is it
4 appropriate to take an afternoon adjournment? I'm conscious of the signers at least and the
5 stenographer?

6 **CHAIR:** Yes, I think we should take a break but we'll make it 10 minutes and we'll proceed after
7 that. Thank you.

8 **Adjournment from 4.01 pm to 4.17 pm**

9 **CHAIR:** Yes, Ms Finlayson-Davis.

10 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Thank you Madam Chair. Just
11 before the afternoon tea adjournment we were touching on the aspect of sexual allegations
12 and I think you had said, and perhaps correct me if I got this wrong, that they weren't
13 necessarily excluded from your investigation. Was that the effect of your evidence?

14 **A.** I think my evidence was that I considered the sexual allegations and formed a view about
15 the prospect of successful prosecution.

16 **Q.** We've heard during the course of this hearing, Mr Burgess, about serious sexual offending
17 perpetrated against children repetitively in the child and adolescent unit. Now of course it's
18 very important that we focus on what you had before you when you were investigating this
19 matter. But if we focus once again, we go back to the 20 statements that you had at the
20 beginning of your investigation. Were you aware that contained within those 20 statements
21 was two allegations of sexual violation by rape, six allegations of sexual violation by
22 unlawful sexual connection, and that was in different forms, including by anal connection,
23 or sodomy as it was known in those times, five allegations of indecent assault, and five
24 children who received electric shocks to their genitalia and in one respect, in respect of one
25 survivor to her breasts and that these allegations were made in respect of children aged
26 between 10 and 16 at the time.

27 **A.** I can't say with certainty what allegations I knew about at that early stage. What I can say
28 is that over the course of the time that I was inquiring into this I became aware of multiple
29 allegations, some of them as you've described, of sexual, pretty -- some pretty horrific
30 sexual matters and they formed part of the consideration in terms of where to from here.

31 **Q.** And I think you've stated it in your statement and you've repeated it again in evidence today
32 I think in your statement both at paragraph 3.23 and paragraph 6.16. You state,
33 "I considered the sexual offending allegations but was unable to progress any of them.
34 Some were so vague that the details of the offending and the alleged offender could not be

1 established. In two cases the identified staff member was dead, in one case the complainant
2 was dead. Some allegations were not sufficiently credible to pursue, given conflicting
3 evidence from the medical notes and no other corroborating evidence."

4 That's just reading out your paragraph 6.16, and I think you've given evidence to
5 that effect just prior. I'm not going to put the examples up given the sensitivity of the
6 material, but I think you've acknowledged that whilst some of the allegations in the
7 statements you received from Grant Cameron were vague, there were equally statements
8 where explicit details were given of children being raped or sodomised, with surrounding
9 details which could have been followed up by the Police. Would you accept there was
10 some examples of that within the material you received?

11 A. There were certainly allegations and some pretty severe allegations of sexual assault of
12 varying kinds. The degree to which they could be followed up depended on a range of
13 factors. As I've said in my earlier -- in my statement, whether the offender could be
14 identified, whether the offender was still alive, and in at least one case the complainant was
15 no longer alive. So there were a range of factors that had to be taken into account. As an
16 investigator, it's necessary to look at the information you have and determine whether you
17 believe that is capable of sustaining a charge or a prosecution. And this applies to, I guess,
18 any offence, it's the what, what happened, who did it, and, you know, is that in fact
19 unlawful. So those are the sorts of things that you have to satisfy.

20 Q. Surely one remedy, if the statements had been too vague, would have been to conduct an
21 evidential interview with a survivor, or survivors?

22 A. That may have provided additional information in some cases, yes, I accept that.

23 Q. Because as we've gone through and you've acknowledged, these statements were prepared
24 for a different purpose, weren't they, they weren't, as you've acknowledged, at a level of
25 detail that you would require for a criminal investigation?

26 A. I think that's fair, I think you would inevitably re-interview complaints, complainants if you
27 believed you could sustain a charge, yes.

28 Q. It's somewhat circular, isn't it Mr Burgess, because how could you form the view as to
29 whether a charge could be sustained if you haven't interviewed the complainant in the first
30 place?

31 A. I accept your point. This Inquiry was conducted on the basis of what we had from the civil
32 hearings. We took those statements at face value, we looked at opportunities to corroborate
33 them, and yes, if we had reached a view that they warranted further investigations and/or
34 prosecution, we would clearly have had to go back and speak to the complainants.

1 **Q.** I think I covered this earlier, but one of the problems for the Police with not having
2 interviewed the complainants is that you didn't identify lines of inquiry that you could have
3 followed up?

4 **A.** That's possible, yes.

5 **Q.** And another opportunity to have gained corroborative evidence might have been if you
6 interviewed the staff members as suspects and put to them some of the allegations?

7 **A.** If there were cases involving an identified staff member where we could have put that
8 allegation to them, and it was appropriate to interview them as a suspect, then I have no
9 doubt we would have.

10 **Q.** I want to bring up a letter you wrote, I think it's to a Detective Drew who was assisting you
11 with your investigation. This is NZP321_0004. Just while that's being brought up,
12 Mr Burgess, this letter was setting out for Detective Drew some background to the
13 investigation, and I think you were tasking him with interviewing some of the staff
14 members.

15 **A.** Yes, Detective Superintendent Drew and I was asking him to task some staff --

16 **Q.** Right.

17 **A.** -- to carry out the investigation.

18 **Q.** Sorry, I've given the wrong reference, it's 061. So we just see there and orientate ourselves
19 to the document. This was a letter written 22 March 2007 to Detective Superintendent
20 Drew. If we go to the end of the letter, confirm this is a letter you prepared, albeit it doesn't
21 appear signed, and if we can go back to the section entitled "Interview Format", and that
22 will be on page 3. And if we could call out those two perhaps under the heading "Interview
23 Format". I'll just read this out for the record:

24 "It is envisaged that this interview will record the witness' general knowledge of
25 events at the Lake Alice Child and Adolescent Unit. Their recollection of any
26 investigations conducted around 1974 to 77 by the Police or other investigators would be
27 helpful. The witnesses should be referred to the list of patients and invited to comment in a
28 general way regarding their knowledge of the individual patient and any psychotic
29 condition that the patients might have displayed during their stay at Lake Alice. A
30 spreadsheet recording the individual complainants and the general nature of their
31 allegations is attached and should assist in this regard.

32 It is not intended at this stage to complete a detailed interview of each individual
33 regarding any specific allegations made against them by the complainants. Should that be
34 necessary at a later stage, it will be completed with reference to specific nursing records

1 and statements of complaint."

2 So the approach taken by the Police was to speak to the staff members and talk to
3 them generally about the unit and not the allegations that might be held by the Police
4 against them?

5 A. At the time that was -- that report was done, it was intended that we had information in a
6 more general way. I don't believe that we had specific allegations to put to those staff
7 members at that time. I guess I was also conscious that if we got to the point of putting
8 specific allegations to those staff members, we would be looking to caution them and they
9 might very well invoke their right not to talk to us.

10 Q. In relation to the specific allegations point, the only material you had through the course of
11 your investigation was the Grant Cameron statements, if we can refer to them in that way?

12 A. Sorry, can you repeat that?

13 Q. So in terms of any allegations against the staff, the only material you were working with
14 through the period of your investigation was the statements they had provided to Grant
15 Cameron for the purposes of the civil proceedings; is that correct?

16 A. Those were the only statements I had. Obviously I took account of the medical records and
17 nursing notes that were available.

18 Q. And I've gone through with you some of the sexual allegations that were contained within
19 those statements. But that is what you were working from in terms of your investigation,
20 you were working from those statements?

21 A. Yes.

22 Q. Now again, we have heard during the course of this hearing about a nurse called Howard
23 Lawrence. I want to again take you back to the material that the Police had in relation to
24 Howard Lawrence at the time of your investigation. And if you'd take it from me these are
25 the allegations in those Grant Cameron statements as they relate to Howard Lawrence and
26 if I can just set those out for you.

27 One survivor described being sodomised by Howard Lawrence, although it's noted
28 that that survivor was deceased by the time you inherited the file. Several described
29 physical assaults by him, one spoke of having his head grabbed and bashed into walls, one
30 survivor, and this is Mr Banks, described him as the worst staff member of all and that he
31 would press his knuckles into his forehead and rubbing them hard to signify the ECT
32 treatment we would get if we stepped out of line. He also described Howard Lawrence as
33 being one of the staff members to give him electric shocks to his thighs and genitals.
34 Another survivor described getting a shot of Paraldehyde from him for scratching his car.

1 Still more described him as nasty and sadistic.

2 That material is all contained in the Grant Cameron statements. When he is
3 interviewed during the course of your investigation, none of that is put to him for comment.

4 I want to bring up a document and I wonder if you can help us with whether this is
5 a document from your investigation or from perhaps the time before you inherited the file.
6 We can see there it's entitled "Allegations against Howard Lawrence." And I'm having
7 trouble reading that. They are -- some of the allegations I've read out are contained within
8 this document, and there are ones that I've read out that are not contained, but starting first
9 of all with, do you recognise this document?

10 A. Yes.

11 Q. Was that a document you prepared?

12 A. I believe so.

13 Q. So again, we see there eight allegations, one assisted in the administration of unmodified
14 ECT and it gives between date range, sodomised in the strong room after administering
15 Paraldehyde, number three, sodomised and performed oral sex on him in the upstairs staff
16 toilets eight or nine times, 4, assisted in the administration of unmodified ECT, 5, assisted
17 in the administration of unmodified ECT, 6, gave ECT on arms and legs, 7, gave ECT on
18 testicles, and 8, threw syringe into buttocks. Why weren't these allegations put to
19 Mr Lawrence during your time investigating this matter?

20 A. The first three allegations I think relate to the man that was dead --

21 Q. Deceased?

22 A. -- before we took receipt of the file. The analysis of the medical notes and other
23 information to corroborate the allegations of ECT treatment did not provide, they were
24 pretty much non-existent, they didn't provide any corroboration of the accounts, and as I
25 think I said earlier, by this stage the inquiry was very much focused on the actions of
26 Dr Leeks and his application of ECT. Had we advanced to a more fulsome investigation,
27 after seeking legal advice and there were obvious charges that could be put to the likes of
28 Mr Lawrence, then that would have taken place. In the first instance, I guess I wanted him
29 on record to tell us what he was prepared to tell us without allegations being put to him.

30 Q. Is that standard Police procedure to speak to someone, knowing you had these serious
31 allegations against them, and invite them to comment on that time period without letting
32 them know that this was in existence?

33 A. It was probably being a little bit -- I wanted an account from this person about Lake Alice
34 prior to putting any specific allegations to him or anyone else. It's hard to say that you will

1 do things in a particular way. Ordinarily if I was at a position where I thought there was
2 sufficient evidence for Mr Lawrence to be cautioned and have the allegations put to him,
3 then that's what we would have done. I didn't believe we were at that stage and I wanted a
4 general account on the record.

5 **Q.** I'm not sure if you're aware, but Mr Lawrence was obviously alive during the course of
6 your investigation?

7 **A.** He was, yes, I believe he's now dead.

8 **Q.** But he passed away shortly after?

9 **A.** Yes.

10 **Q.** So an opportunity to go back to him ceased?

11 **A.** Yes.

12 **Q.** The next --

13 **CHAIR:** Sorry, can I just ask a brief question, you said the nursing notes, I wasn't quite sure what
14 you meant, that the nursing notes either didn't exist or they didn't have sufficient in them.
15 Did you mean either or both of those?

16 **A.** Both Madam Chair. Depending on who the patient was, some had almost no medical notes,
17 as I'm sure you've been made aware, some had some medical notes. The medical notes
18 seemed to be a useful way in which we could attempt to corroborate allegations and
19 therefore where they were available we placed some reliance on them.

20 **Q.** Thank you.

21 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** The next effect of the decision
22 to narrow the scope that I want to examine in a bit more detail is the decision to focus
23 solely on Dr Leeks and this is in relation to the misuse of an ECT machine. Because it's
24 clear, isn't it, that staff weren't investigated for their misuse in relation to allegations of
25 misuse of the ECT machine.

26 **A.** I'd have to go back to the file really to know. My recollection is that the staff member that
27 was principally identified as using the ECT machine was dead, otherwise it was pretty
28 much Dr Leeks.

29 **Q.** And we know too from the memorandum that was drafted by Detective Superintendent
30 Perry that I took you to some time ago, that the Police had already turned their minds to
31 what we call in the criminal law "party liability", but it had decided not to investigate that
32 because you preferred to have the staff members as witnesses. Do you recall that part of
33 the memorandum?

34 **A.** We were very much focused on what we saw as the main event.

1 **Q.** This decision was something that the United Nations Committee Against Torture were
2 critical of and I want to bring up the paragraph that covers that and ask you your comment.
3 So this is paragraph 9.6 of the UNCAT decision. Paragraph 9.6:

4 "The 2010 Police report -- and that is the report that you prepared, Detective
5 Burgess, and we'll get to that a bit later on -- further mentions that the charges were only
6 considered in relation to the guilt of the main suspect, Dr Leeks, concluding that there was
7 unlikely to be sufficient evidence to successfully prosecute a charge of wilful cruelty to a
8 child. The Committee expresses concern that the authorities have not tried to find out if
9 anybody else could be held responsible for the alleged violations, which raises doubts as to
10 the effectiveness of the Police investigation, which should be capable of identifying those
11 responsible for the violations."

12 Do you have any comment to that observation or criticism by the United Nations
13 Committee?

14 **A.** I guess I can only repeat what I've already told you, which is we focused the inquiry very
15 much on the activities of Dr Leeks rather than a broader examination.

16 **Q.** We come to the last effect of the decision to narrow the scope of the investigation and that
17 is the decision not to investigate the use of Paraldehyde as punishment. Now we've heard
18 this afternoon Detective Superintendent Fitzgerald's acknowledgment that with the benefit
19 of hindsight the scope of the investigations by the Police should have included the use of
20 Paraldehyde as punishment. And I should clarify, that is the investigations between 1977
21 and 2010. So we've got that acknowledgment from the Police today.

22 But again, just to put some context to the decision not to investigate those
23 allegations, and again, going back to those 20 statements that you had from Grant Cameron,
24 would you accept from me that we've reviewed those 20 statements and 15 of the 20
25 survivors allege that they were given Paraldehyde as punishment?

26 **A.** I'll accept that, yes.

27 **Q.** Five of those survivors were able to name the staff who administered the injections, six
28 survivors were not able to name the staff but had corroborating nursing notes. So again,
29 that was material that wasn't investigated as we know.

30 **A.** No, I think I've acknowledged from the outset that Paraldehyde investigation -- allegations,
31 sorry, were not investigated. I was a resource of one with some assistance from the folk
32 who were speaking to the staff. I made a decision to go for what I saw was essentially the
33 main event and focus the inquiry on that. Had we progressed to a fuller inquiry it's possible
34 that some of the Paraldehyde matters might have been considered. That was not my

1 intention though.

2 **Q.** So through this part of the questioning I've been referring back to the 20 statements that
3 you had at 2006. Of course by 2009 you mention in your statement provided to the
4 Commission you'd got up to 41 complainants, or 41 statements?

5 **A.** Yes, I think that happened relative -- well, progressively, but the bulk of the statements
6 were obtained relatively early in the inquiry.

7 **Q.** And as those statements came in, presumably the number of allegations of sexual
8 offending, Paraldehyde use, misuse of the ECT machine by staff must have increased as
9 you got more and more material coming in, would you accept that?

10 **A.** Certainly some of the number of allegations would have increased. Some of the statements
11 did not disclose any form of criminal offending, so yeah, I can't -- there's not a linear sort of
12 progression to this that I can say we went from this number to this number. I guess
13 logically it suggests there were more, but I can't tell you how many.

14 **Q.** At any point in your investigation, did you review the evidence and think perhaps we
15 should reconsider the decision made to narrow the scope to Dr Leeks and the misuse of an
16 ECT machine?

17 **A.** I honestly can't recall. I don't think I did.

18 **Q.** And presumably if you didn't consider it, you didn't raise it with, for example, the Assistant
19 Commissioner or Detective Superintendent Perry and say "Hey, we need to reconsider our
20 approach, it's much bigger than I initially thought"?

21 **A.** No, I don't -- as I said earlier, I don't think any of us contemplated that a preliminary
22 inquiry was going to take as long as it did and potentially encompass as many people as it
23 did. Did I go back to them? No, I didn't, in fact they probably weren't the people in those
24 roles anyway.

25 **Q.** Right, well, whoever was in --

26 **A.** Whoever was in them, I didn't go back to them.

27 **Q.** -- equivalent roles. I want to turn to the next criticism that UNCAT have made of the
28 Police investigation and that is at paragraph 9.4 of their decision, if I can bring that up.
29 And I think this is one of the criticisms you address in your statement to the Commission,
30 so we'll go to what you say about that after. I think if we can highlight -- let's see if I can
31 find it. I can't just see it in the paragraph now, sorry Mr Burgess, let me -- if we come
32 down to the Committee, it's five lines up from the bottom. I think it might continue over
33 the page, but let's start with that part.

34 "The Committee therefore expresses concern that despite repeated investigations

1 into the same matter, Police acknowledgment of evidence of the application and the State
2 parties' acknowledgment before the Committee of the seriousness of a historic complaints
3 of torture, while admitting the continuing public interest in the matter, they made no
4 consistent efforts to establish the facts of such -- I think it goes over the page -- sensitive
5 historical issue involving the abuse of children in State care. They have also failed to
6 expressly acknowledge and qualify the alleged treatment inflicted on the complainant."

7 And at 9.5 the following paragraph, gosh perhaps I won't read the whole
8 paragraph, but three lines down, and this is really the essence of it, "However, the State
9 party has not demonstrated that it made sufficient efforts to clarify the facts."

10 Now you address this criticism at paragraph 6.37 of your statement.

11 A. I don't think I do.

12 Q. I've brought up the wrong -- you have noted paragraph 9.4. Perhaps if we address the item
13 that you have -- the sentence that I have not brought up, but is clearly in that paragraph,
14 perhaps a bit earlier on. So perhaps if you could read out your response to the criticism?

15 A. Certainly. "The UNCAT Committee notes that my 2010 report, quote, 'did not clarify
16 whether the alleged treatment was indeed applied as a punishment' (paragraph 9.4)." I do
17 not think that statement is accurate. To my mind it was reasonable to infer that electric
18 shocks were administered as punishment in certain circumstances, by which I mean when
19 administered in response to the victim's misbehaviour in order to modify that behaviour.
20 However, the disputed issue was whether that could be said to be an accepted form of
21 medical treatment in the early 1970s, ie Aversion Therapy as Dr Leeks and other Lake
22 Alice staff alleged. I am not at all sure that further investigation would have resolved that
23 issue since there were differing medical opinions on the topic at least in relation to the early
24 1970s time period under investigation."

25 Q. Thank you Mr Burgess. Now I note, Madam Chair, I'm about to embark on a reasonably
26 lengthy new topic in relation to that statement, I wonder if that's an appropriate point to
27 adjourn?

28 **CHAIR:** I think it probably is, and you are prepared to stay over night, aren't you, not in this
29 room. Really I'm asking, you are prepared to come back in the morning?

30 A. Yes, of course.

31 Q. I think in light of that it's unwise to embark on anything new and we will take the
32 adjournment following our karakia me te waiata.

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

34 **Hearing adjourned at 4.55 pm to Friday, 25 June 2021 at 10 am**