

**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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Lawrence Reid  
Mr Michael Heron QC for Dr Janice Wilson  
Ms Frances Everard for the New Zealand Human Rights  
Commission  
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:** 25 June 2021

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**TRANSCRIPT OF PROCEEDINGS**

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Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei

[10.03 am]

**CHAIR:** Tēnā koutou katoa, nau mai ki te rā mutunga o tēnei wiki. Welcome to everybody to the last day of this week of hearing. Thank you for returning, Mr Burgess, and you remain on the affirmation you took yesterday.

A. Yes.

**CHAIR:** Morning Ms Finlayson-Davis.

**QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Good morning

Commissioners, good morning Mr Burgess.

A. Morning.

**Q.** Yesterday we left with you reading out paragraph 6.37 of your statement to the Commission. If I could summarise that, it was a response to the UNCAT criticism and you note that you could accept that the administration of the shocks in certain circumstances was punishment, but for you the disputed issues was whether that was acceptable in the 1970s. And you go on to note your opinion that further inquiry was unlikely to resolve the issue given the differing medical opinions. Is that a summary of -

A. Yes.

**Q.** - your response? I want to turn now to examine in some more detail the expert evidence that you did have on the file. And once we go through that I'll have some questions for you. So the first piece of evidence you had, and you've mentioned this already, was an opinion from Professor Walters, and that was an opinion you asked for to guide you on the use of ECT, Ectonus and electric stimuli as Aversion Therapy. That was the parameters of the opinion you sought to cover those topics?

A. Yes.

**Q.** And that was a report dated 20 January 2009?

A. I'll take your word for that, I'm not sure, yes.

**Q.** I'll just get that report brought up on our screens, Mr Burgess. If we can go first to - first of all let's orientate ourselves. I think those first pages, I think we start on page 3. This is an e-mail exchange between the two of you I think following the report. So this is the report?

A. Yes.

**Q.** 20 January 2009. And if we can go - the report follows a process where you've asked a question and Professor Walters has responded to those questions. I want to go to page 7 of that report and if we can call out paragraph 2. This paragraph, Mr Burgess, gives Professor Walter's opinion that:

1 "In the 1970s in western countries it was no longer considered appropriate to  
2 administer unmodified ECT (ie ECT without anaesthetic and muscle relaxant) to patients,  
3 including children and adolescents." And he goes on, doesn't he, to refer to the data he was  
4 relying on to support that statement which we won't go through, it's quite lengthy.

5 If I can take you now to page 9 of that report and the question you have asked at  
6 10, if we can highlight that, "What was the method or equipments generally used to  
7 administer ECT or electric stimuli? Were these methods used in children and adolescents?"

8 Now the first paragraph he notes he could find no literature specifically on the use  
9 of Ectonus. But if I can take you to the next paragraph and perhaps halfway down from the  
10 word "importantly", he advises at this part of his opinion:

11 "...it has never been medically approved that these aversive treatments may be  
12 administered via an ECT device/Ectonus, as (i) the degree of discomfort and side effects  
13 would have been excessive compared to standard Aversion Therapy, and (ii) the theory  
14 underpinning Aversion Therapy requires the patient to be awake during the procedure (ECT  
15 generally renders the patient unconscious). Stated otherwise, the use of ECT by Dr Leeks  
16 would not constitute Aversion Therapy due to a combination of the following factors."

17 And he goes on to list what those factors are. And there are five factors, again  
18 noting at:

19 "1. ECT was not a recognised form of Aversion Therapy (related to this,  
20 I presume that Dr Leeks was not formally evaluating or studying ECT as a type of Aversion  
21 Therapy).

22 2. The specific behaviours that Dr Leeks was seeking to abolish were not always  
23 clear.

24 3. The level of discomfort reported by patients was presumably extreme, and thus  
25 way beyond the pain and discomfort levels described in conventional Aversion Therapy.

26 4. The patients and families presumably did not consent to ECT for this purpose  
27 (and indeed may have protested about use of the treatment).

28 5. The general atmosphere that may have pervaded the unit and ECT sessions was  
29 possibly not therapeutic."

30 I want to go now to question 11 which is on page 10. The question at 11 was,  
31 "Was the practice of applying electrodes to parts of the body associated with the offending  
32 behaviour accepted practise?" And the paragraph, his answer is a long one but perhaps  
33 I could do the first part of that:

34 "This has never been accepted practise. In ECT, it has only ever been

1 recommended that the electrodes are applied to the patient's head. I note, for example, that  
2 patient Zentveld alleged that ECT was administered to his knees and genitals. This would  
3 have been inappropriate because:" And he sets out the five criteria or five reasons, rather,  
4 for that opinion.

5 "1. There is no evidence base for this being an effective treatment method (e.g. in  
6 the case of electroconvulsive therapy, application of the electrical stimulus to the genital  
7 area would not produce a convulsion;

8 2. There may be medical risks associated with the procedure, including to the  
9 genital area;

10 3. Patients would regard this as a procedure whose primary purpose was to punish  
11 rather than to treat;

12 4. There may be longer term serious psychological complications (including  
13 flashbacks, nightmares etc) associated with such an invasive act;

14 5. For those patients with a history of sexual abuse (including childhood sexual  
15 abuse) this would bring back painful memories of that abuse."

16 And he goes on, doesn't he, to indicate again why application of ECT to a limb  
17 would be inappropriate.

18 I want to go now to question 12. The question you've asked there:

19 "Is there or was there any sound rationale for inviting children who were victims of  
20 offending by the patient to apply electric stimuli to the patient/offender as part of an  
21 Aversion Therapy?"

22 Perhaps if we can just bring up the first paragraph.

23 "It was never appropriate for a doctor to permit children and adolescents (whether  
24 or not they were victims of offending) to administer to fellow patients or offenders electric  
25 current, aversion electrical stimulus, electroconvulsive therapy, or use the Ectonus  
26 technique for several reasons." And he goes on, doesn't he, and lists out the reasons for  
27 that. In essence, his opinion is it was never appropriate.

28 And then finally on the report, if we can look at question 14, you've asked Professor  
29 Walters for a general summary of how the treatments described compare to acceptable  
30 medical practice in 1970 to 77. And his answer:

31 "In summary, Dr Leeks' treatments appeared to depart significantly from the  
32 standards of the day." And he goes on to note the reasons for that.

33 During the course - we're finished with that document thank you. During the course  
34 of your investigation, Mr Burgess, you also had CCHR bringing to you further statements,

1 information that they had collected; is that correct?

2 A. From time to time, yes.

3 Q. And one of the pieces of correspondence we've found on the file is a letter from CCHR that  
4 I'd like to bring up now, that's EXT17004. This was a letter from CCHR to you on 13  
5 November 2007. And they're bringing to your attention to some media statements or a  
6 media statement made by the Executive Director of the Royal Australian and New Zealand  
7 College of Psychiatrists. They're referencing a recent documentary in which Craig  
8 Patterson, the Executive Director of the College, had commented on the treatment that had  
9 taken place in the unit.

10 And if we could just bring up - it might be on the next page. This was the  
11 comment made by the Royal College through their Executive Director. Sorry, it might just  
12 be on the first page. The bottom two paragraphs:

13 "It is torture, it is terror. And this college and this organisation and this fellowship  
14 absolutely distances itself from that form of behaviour. Electric shocks for the purposes of  
15 getting children to modify behaviour is not medicine, it is not psychiatry, it is unacceptable.  
16 And in these circumstances it is an assault, it is grievous bodily harm.

17 If the allegations against Dr Leeks are shown to be correct, he should not be a  
18 psychiatrist. I'd probably go a step further and say he shouldn't be a doctor at all."

19 That was the official view presented in the media by the professional body  
20 governing psychiatrists and leaving no grey area in terms of how they viewed the acts  
21 carried out in the unit.

22 The third item I'd like to refer you to is the material that you obtained from former  
23 nurse of the unit, Brian Stabb. He was the only nurse you interviewed that had witnessed  
24 or administered Aversion Therapy prior to being at Lake Alice and he gave you statements  
25 he had made to Crown Law and to the Victorian Medical Board which demonstrated what  
26 Dr Leeks was doing was not Aversion Therapy. And he gave that account when he came to  
27 give evidence in this hearing on Monday of this week.

28 He told us, as he had said in his earlier statements, that he had worked in hospitals  
29 in the United Kingdom where Aversion Therapy was carried out and he compared it to  
30 what he came to understand was being carried out at Lake Alice. His statements confirm  
31 that what was being done under the guise of Aversion Therapy bore no resemblance to  
32 what he had seen before and he described it then as he did this week as a barbaric and cruel  
33 practice.

34 Mr Burgess, would you be prepared to accept that the Police had a significant

1 amount of evidence on the file or within easy reach to establish that Dr Leeks' practises  
2 were not an accepted form of medical treatment in the 1970s and did not constitute  
3 Aversion Therapy?

4 A. We certainly had the documents that you've referred to. I think there was also some  
5 documents from an earlier Medical Council inquiry that may have been less definitive in  
6 terms of what the, you know, whether the practice was acceptable or not.

7 Q. So that was the - I think Professor Roberts had prepared an opinion for the Medical  
8 Council?

9 A. Yes, I think that's who it was.

10 Q. And he had raised concerns over Dr Leeks' practice, but as you indicate, he had probably  
11 not, or he certainly didn't go as far as the material that you had from Professor Walters,  
12 would that be fair to say?

13 A. Yes.

14 Q. And identifying that in your mind there was some difference of opinion, one way to have  
15 addressed that would have been to obtain evidence from an expert in Aversion Therapy as  
16 we have for this hearing, that could have been a possible way to clarify your understanding  
17 of the evidence you had before you?

18 A. That's possible, yes.

19 Q. I'd just like to ask you, I'm not sure if you saw Dr Parsonson give evidence in our hearing,  
20 but I'm going to ask the Registrar to play you a brief portion of his evidence. **[Video  
21 played]**. I appreciate I'm asking you to look back in hindsight, but having obtained  
22 additional expert evidence or perhaps even relying more heavily on the opinion you had  
23 from Professor Walters might have changed the course of your investigation and might  
24 have changed the thrust of the report that you gave to the opinion writers at the conclusion  
25 of your investigation, would you be prepared to accept that?

26 A. I accept that if I had additional information of any form then clearly that would have played  
27 into the report that I prepared. I think the report that I prepared accepted the findings of  
28 Professor Walters and had identified those instances where there was an allegation, there  
29 was corroboration, and it was the application of unmodified ECT or an electric shock of  
30 some form to modify behaviour as a punishment, and those were the seven instances that  
31 I thought there was sufficient evidence to proceed with a prosecution.

32 Q. And we'll come back and have a look more closely at that report in a moment. Just,  
33 I guess, tying up this section, Mr Burgess, were you aware that at the time that you were  
34 investigating this matter, lawyers for the Crown were describing the treatments or the

1 practises of Dr Leeks as indefensible?

2 A. No, I didn't know that.

3 Q. Would it have been helpful for you to have known that that was the way it was being  
4 viewed by the Government?

5 A. It's hard to say what impact that might have had. Essentially I was looking at the facts and  
6 attempting to frame criminal charges to meet the standard of beyond reasonable doubt. The  
7 opinions of other people are interesting but not necessarily definitive in terms of the action  
8 that you might take.

9 Q. Reviewing the material on the Police file throughout the history of the investigation, it  
10 would appear that the fact that there had been previous inquiries or investigations was seen  
11 as a complicating factor, would you agree with that, for the Police?

12 A. Yes.

13 Q. The file also received considerable political attention during the time that you were  
14 investigating it and you were asked to respond to at least several ministerial inquiries?

15 A. I think I responded to two.

16 Q. I'd like to bring up one of the letters that you did receive and were asked to respond to and  
17 this is NZP069. Just while that's coming up, this was a letter received from MP Tau Henare  
18 and it's page 15. This was a letter, it was actually initially addressed, well it was addressed  
19 to Annette King, then Minister of Police, 7 December 2006 and it made its way to you, I  
20 understand, to provide a response. If we could just call out paragraph 2 and 3:

21 "I understand that the individual alleged that included in the serious abuse inflicted  
22 on him and others was unmodified electroconvulsive therapy applied to the patients'  
23 genitals. I believe the alleged abuse cannot be justified by any medical standards past or  
24 present. By any measure, this type of abuse must surely constitute cruel and unusual  
25 punishment of a sadistic and sexual nature and amount to torture."

26 In your letter you state - and this is a reference to an earlier letter by the Minister of  
27 Police - "As a Government we have been determined to acknowledge what happened and to  
28 take what steps we can to put things right. Given the awful nature of the alleged abuses, I  
29 would appreciate if you could tell me what steps, if any, the Government has taken to bring  
30 Dr Selwyn Leeks (the head of the Child and Adolescent Unit at Lake Alice during the time  
31 when the alleged abuses took place) to account before the New Zealand courts."

32 We'll bring up your response to that letter, which is in the form of an e-mail to  
33 perhaps an internal recipient, a Raewyn Thomson, and this was 22 February 2007. And if  
34 we go to the prospect of criminal charges. You note there in your response:

1 "The prospect of criminal charges being successfully brought after this time is not  
2 assisted by:

3 1. A Police inquiry in the mid-70s that found no case to answer, noting the Police  
4 file is unable to be found.

5 2. An Ombudsman inquiry released in April 1977 that found unsatisfactory  
6 practises but did not establish any criminal misconduct.

7 3. A Commission of Inquiry report in 1977 which did not reach any conclusions of  
8 criminal behaviour.

9 4. Civil litigation and an agreed civil settlement process in 2001.

10 5. The death of several suspects/witnesses in the intervening years.

11 6. The loss of medical notes relevant to the alleged 'treatment'."

12 Why was the fact that there had been previous inquiries and investigations an  
13 impediment in laying criminal charges?

14 A. It was - it was not an impediment in itself, I think my e-mail said it's not - it doesn't assist  
15 the criminal inquiry. There had been a range of earlier inquiries that had not reached any  
16 conclusion around criminality. There were, as that e-mail says, witnesses and suspects who  
17 were dead, so the evidence you had available was diminished. So those were just, in my  
18 view, factors that needed to be considered when you were thinking about mounting a  
19 criminal prosecution.

20 Q. You are aware, Mr Burgess, maybe you weren't at the time, that the 1977 inquiries didn't  
21 have a mandate to make findings of criminal liability?

22 A. I have very limited knowledge of the 77 investigation.

23 Q. Not the Police investigation, I'm talking about the Ombudsman Inquiry and the  
24 Commission of Inquiry in 1977?

25 A. I'm not aware of their terms of reference or what their mandate was, or what limitations, if  
26 any, there might have been.

27 Q. I want to just go up to the paragraph above the one that we've just read out and ask you  
28 about this observation:

29 "The allegations themselves vary in the degree to which they will withstand  
30 scrutiny. There are evidential problems with the recovered memories and/or  
31 embellishments provided by some witnesses over the course of several years."

32 What did you mean by that?

33 A. There were, or - yeah, there were accounts that had emerged subsequent to the earlier  
34 statements that were not entirely consistent with the statements that had been made in the

1 civil hearings, that increased the frequency and the number of times that people said that  
2 they'd received electric shocks. There were, yeah, there were some accounts where the  
3 medical records were inconsistent with the recollection of a survivor.

4 **Q.** Dealing with the first part of that answer, you hadn't interviewed any of the complainants,  
5 so how had their accounts changed from the statements that you were provided?

6 **A.** Some of the complainants had made multiple statements, some of the complainants had  
7 participated in media programmes or reconstructions. The statements across those, you  
8 know, the two or three times or four times that they had recounted what happened were not  
9 entirely consistent.

10 **Q.** In dealing with the second part of your answer, which was that there was inconsistencies  
11 with the medical records, I think you've acknowledged earlier on there were a number of  
12 records missing or unable to be located?

13 **A.** Yes.

14 **Q.** And if there were inconsistencies in the medical records, that wouldn't necessarily mean  
15 that the complainants had embellished their accounts, would it?

16 **A.** We're talking about two different things there I think. The embellishment I was talking  
17 about was where the number and frequency of the application of shock treatments had  
18 increased over the years as each account was given. Inconsistencies in the evidence where  
19 a survivor in their statement said that a certain thing happened to them and in a certain way  
20 at a certain time and that is directly contradicted in the nursing notes or medical record,  
21 does call into doubt or certainly caused me to doubt whether that allegation could be  
22 properly advanced.

23 **Q.** I want to change course just a little, Mr Burgess. You've accepted in the statement that  
24 you've prepared for the Commission, and your colleague Mr Reid accepted in a statement  
25 he prepared for the Commission that this case was given low priority during the course of  
26 your time with the file and also his time overseeing the file.

27 **A.** It was given a lower priority or a low priority in comparison to active current investigations  
28 that both he and I were overseeing.

29 **Q.** And we heard yesterday, Detective Superintendent Fitzgerald has apologised for the Police  
30 failing to give this investigation the sufficient priority it deserved?

31 **A.** Yes.

32 **Q.** There's reference in the file to you only being able to give this part-time commitment, given  
33 other more pressing work matters you had on your plate at that time?

34 **A.** Yes.

1 **Q.** And the fact that there had been these previous inquiries and investigations, that was also a  
2 factor affecting its priority, would that be fair?

3 **A.** I don't think they necessarily affected the priority. I think the factors that we took into  
4 account was that these were quite historic allegations, they were made about a person and -  
5 a person who was no longer practising medicine, that the institution where they happened  
6 no longer existed, and there were no - there was no immediate concern or danger to any of  
7 the victims or any other party from the people that we were concerned about.

8 **Q.** By the time you had the file, and I think you indicated yesterday fairly early on in the time  
9 that you held the file you had got up to perhaps 41 complainants?

10 **A.** I got to 41 complainants, I'm not sure exactly when that happened.

11 **Q.** And at paragraph 4.3 of the statement you prepared for the Commission, you note that the  
12 number and similar nature of the allegations suggested a systemic issue at Lake Alice, do  
13 you recall that observation?

14 **CHAIR:** Do you need a reference to that Mr Burgess?

15 **A.** I've found it thank you, Madam Chair. Yes, that's what I said.

16 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** You're also aware that there  
17 were potentially 195 complainants based on the number of people who had received  
18 compensation or ex-gratia payments from the Government in the early 2000s?

19 **A.** I knew that there were a far larger number who had been involved in the civil process. My  
20 understanding was that I had the complaints of those that wanted the Police to look at this  
21 matter.

22 **Q.** Did the Police advertise in anyway that you were looking into the Lake Alice Unit at that  
23 time?

24 **A.** No.

25 **Q.** Given the fact of the number of complainants you had, and your observation that this  
26 suggested a systemic issue, are you able to comment on how that didn't change the low  
27 priority given to this investigation?

28 **A.** It identified an historic systemic issue that was no longer at play.

29 **Q.** Are you aware of any other examples of that number of complainants coming from one  
30 institution?

31 **A.** Not off the top of my head, no sorry.

32 **Q.** Were you familiar with the investigation of the St John of God institution?

33 **A.** I was obviously aware of it because of my role, but I had no active - I played no active part  
34 in it.

- 1 **Q.** And when you say your "role", at the time we're concerned with, you were - perhaps if you  
2 can explain your role in terms of oversight of the South Island?
- 3 **A.** I was one of three Detective Superintendents in the country who had oversight for major  
4 criminal investigations across a geographic location. Mine was the South Island. We were  
5 also called on to carry out investigations or oversee investigations virtually anywhere in the  
6 country, and to, yeah, carry out special projects, I guess at the behest of the Commissioners.
- 7 **Q.** And because of that role you would have been briefed on the investigation into St John of  
8 God?
- 9 **A.** I don't recall any particularly - any detailed briefing on that at all. I was aware of what was  
10 going on, there was a perfectly competent team running it, that was really my concern to  
11 ensure that there was a competent team running it, I didn't need to get into the detail of  
12 what was going on.
- 13 **Q.** I wonder if we could just spend a bit of time on that investigation and ultimate prosecution.  
14 As I understand it, that involved historic offending of a significant number of complainants  
15 who had been in care as children or young people. They were vulnerable and they had also  
16 received or in the background civil payments as well. So in terms of a comparison, perhaps  
17 a rudimentary comparison, fairly similar situations to what you were investigating in  
18 respect of Lake Alice. Would that be fair?
- 19 **A.** I don't have enough detail around the St John of God inquiry to make - to give you a  
20 sensible answer. There may on the face of it be similar, you know, similar circumstances,  
21 but as I've said, I wasn't involved in a detailed way with St John of God, I can only really  
22 talk to you about what I know.
- 23 **Q.** Perhaps if I can just take it a little bit further and you may not be able to answer. But that  
24 was an investigation that was carried out in the early 2000s and as a result of that  
25 investigation two defendants were successfully extradited from Australia.
- 26 **A.** Yes.
- 27 **Q.** Were you aware of that -
- 28 **A.** Yes.
- 29 **Q.** - fact. And so at the time that the investigation into Lake Alice is continuing, an  
30 investigation that on its face of it has some similarities, is being investigated and ultimately  
31 prosecuted. Do you have any comment on the difference in approach, and perhaps given  
32 your last answer you may not be able to comment on that?
- 33 **A.** I think it's very difficult to compare one inquiry to another, because you have to reach  
34 conclusions based on the evidence and frame charges around what the evidence tells you

1 and then carry out whatever other investigation or prosecution activity you might want to  
2 do and no two investigations are identical or will have the same set of facts or the same  
3 evidential issues.

4 **Q.** I guess one other feature I just wanted your observation on. As I understand it, the  
5 complainants in that investigation and prosecution were all evidentially interviewed. Were  
6 you aware of that?

7 **A.** I assumed that they were, but I don't have personal knowledge.

8 **Q.** I want to change tack again and look at one particular complaint that was before the Police  
9 in the 2000s. We heard last Friday from Sharyn Collis. In 2002 she went to the police  
10 station, she believes the Palmerston North Police Station, and she went through the process  
11 of making a statement which she described as reasonably unpleasant. At around that time  
12 her lawyer at that stage, Grant Cameron, sent her statement through as one of the group of  
13 34 who wanted their complaints to be investigated. In 2004 her lawyer at that stage,  
14 Mr Steve Winter, sent on her behalf correspondence to both the Crown Law office and to  
15 the Police to follow-up on her complaint.

16 Now I appreciate these steps have all occurred before your time with the  
17 investigation file, but I'm sure you'd agree there was, on the face of it, a persistence by her  
18 to have her complaint investigated by the Police.

19 Now unfortunately it seems that her statement was one of the 14 that we've spoken  
20 about yesterday that was lost between the time it was received by the Police in 2002 and  
21 you inheriting the file in 2006. But we can see her name on a schedule of complainants that  
22 you sent in an e-mail to Gordon Vial, who was District Inspector in the 1970s and you  
23 were, I think, looking to him for any comment about the work he had done on the file. And  
24 that was in an e-mail you sent through to him on 12 April 2007. So at some point you have  
25 obtained Ms Collis' material from Grant Cameron. And I think you spoke about going back  
26 to Grant Cameron yesterday and getting some more material?

27 **A.** Yes.

28 **Q.** Now her complaint was one of sexual violation by rape against Dr Leeks and so on the face  
29 of it still part of the scope, the narrowed scope of investigation that you were conducting,  
30 because it was against Dr Leeks and not a member of staff, would you agree? Are you able  
31 to help us -

32 **CHAIR:** Do you agree with that?

33 **A.** In terms of examining the application of electric shocks, no, it wasn't. I was aware of the  
34 complaint and it did form part of the file.

1 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** But in terms of your scope, it  
2 was looking at Dr Leeks' actions in their entirety, or was it simply the misuse of the ECT  
3 machine?

4 A. It was essentially focused around the shock treatment. If there is a glaringly obvious  
5 offence of another nature then obviously that was considered.

6 Q. We heard her evidence and it's consistent with what was contained in her Grant Cameron  
7 statement. It was a clear allegation of rape by Dr Leeks, would you accept that?

8 A. It was - yes, it was an allegation, well, as I understood it and certainly from her statement,  
9 Ms Collis firmly believed that she had been raped and she believed that the offender was  
10 Dr Leeks. She was - there were some - there are and were some evidential difficulties with  
11 proving those allegations.

12 Q. What steps did you take to investigate her complaint?

13 A. I examined the statement that she gave and I didn't take any other significant steps.

14 Q. A report was commissioned by an investigative journalist from a former senior Police  
15 Officer, Detective Sergeant Pizzini, where he was asked to review the investigation of Ms  
16 Collis' complaint that's part of the material that the Police have supplied to us. I wonder if I  
17 can bring that up and ask you to have a look at that. We see there this is dated 16  
18 November 2018, the title "Report: Review of Sharyn Collis Police file." I think if we go to  
19 the end of that document we'll confirm there the writer of the opinion is Dave Pizzini, noted  
20 there as a director of Veritas Investigations, formerly a Detective Sergeant in the New  
21 Zealand Police?

22 A. Yes.

23 Q. Now he identifies at the following paragraph 211 steps, perhaps if we just bring up from  
24 "I found". "I found this statement compelling reading. It is rich in investigative  
25 opportunities to obtain independent corroborative evidence of the allegations, had those  
26 opportunities been taken in a timely manner. I will now tabulate those opportunities as they  
27 appear chronologically in the text."

28 I won't read them all out, Mr Burgess, but in essence, they are following up lines  
29 of inquiry that emerged from her statement. People she had spoken to at the time, nurses  
30 who may have been present, records that may exist, and what I've referred to as recent  
31 complaint witnesses.

32 Would you agree, Mr Burgess, that those are steps that could have been taken to  
33 investigate Ms Collis' complaint?

34 A. They are steps that could have been taken closer to the time of these events, they could

1 have been taken, I guess, at the time I received the complaint, but given the passage of  
2 time, many of those potential lines of inquiry were significantly limited.

3 **Q.** How would you know that not having embarked on them?

4 **A.** Well, I knew that we had little or no evidence in terms of a medical file. The prospect,  
5 given the state of the Lake Alice records that we had obtained, the prospect of identifying  
6 the nursing staff seemed to me to be extraordinarily remote. A number of those steps, had  
7 they been implemented close to the offending, or the alleged offending, would have been  
8 quite valuable, but 30 odd years down the track I had little confidence that they would be  
9 successful.

10 **Q.** I think we'll just go to the conclusion of that report if we can. If I can just call out the  
11 second paragraph. This is personal opinion, Mr Burgess, perhaps if I can read that out and  
12 ask you to comment on that:

13 "Any investigator with an objective mindset (ie wanting to place the best evidence  
14 before a jury) would have pursued the inquiries tabulated above, at the very least. No  
15 decision on a prosecution is contemplated until the investigation is complete, so that that  
16 decision can be fully informed by the available evidence and the public interest factor) ie  
17 reference against the prosecution guidelines)."

18 Do you have any comment to make in respect of that opinion?

19 **A.** Not really, no.

20 **Q.** All right, we can bring that down. I want to turn now to a particular incident you  
21 mentioned at paragraph 6.12 of your statement. You have spoken or drawn out a particular  
22 incident and provided a reason for your assessment that no charges should follow. And the  
23 paragraph, if you could perhaps read that out for us?

24 **A.** Certainly.

25 **CHAIR:** What's the paragraph number again?

26 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED: 6.12.**

27 **A.** "I decided not to consider charges in relation to the incident in which a group of boys had  
28 been permitted to administer electric shocks to a boy that had allegedly abused them (refer  
29 paragraph 5.3). My rationale was that the incident had already been the subject of the  
30 contemporaneous 1977 inquiry by Police (as well as the Medical Council inquiry) and it  
31 had been concluded then that there was no basis for laying criminal charges. I did not come  
32 across any fresh evidence that suggested it was appropriate to reopen the investigate."

33 **Q.** Are you aware, Mr Burgess, that in the 1977 inquiries you refer to in that paragraph, that  
34 the fact that the electric shocks were delivered to the patient's genitals during this incident

1 was not considered by either the Police investigation or the Medical Council inquiry?

2 A. I'm not familiar with the scope of the 77 inquiry.

3 Q. Before I move on, just to orientate the Commissioners, this is the incident we've heard  
4 something about during the course of the hearing involving the boys applying electric  
5 shocks.

6 I'm going to suggest that in fact during the course of your investigation you did  
7 obtain two items of fresh evidence. I'm going to outline what they are and invite your  
8 comment at the end. In August 2006 you obtained an account from former staff nurse  
9 Terry Conlan who told you he witnessed shocks to the patients' thighs and genitals by  
10 Dr Leeks. And this was the first time that it had been mentioned that the shocks had been  
11 to the genitals as well. Do you recall speaking to former staff nurse Terry Conlan?

12 A. I do recall speaking to him, yes.

13 Q. If you would like I can bring up the job sheet?

14 A. That might be helpful.

15 Q. Certainly. So again, to orientate ourselves, this is a job sheet 17 August 2006, a reference  
16 to you travelling to Auckland to interview Terry Conlan, and the part I am asking you about  
17 I think is on the second page, paragraph 3, thank you:

18 "On another occasion Dr Leeks applied the electrodes from the ECT machine to the  
19 genitals and thighs of a boy in the Child and Adolescent Unit. This boy - redacted - had  
20 apparently sodomised another boy who was in the unit. The Aversion Therapy was applied  
21 as a punishment. The boy who had been offended against was invited to operate the  
22 apparatus. Other boys were also involved." And you note, "It is noted that there is no  
23 complaint from - redacted - on the Lake Alice file."

24 That was you recording what Terry Conlan told you on that occasion?

25 A. Yes.

26 Q. You also had Professor Walter's opinion, and we won't go through that again, but I took  
27 you to a part earlier where Professor Walters confirmed that application of ECT electrodes  
28 to any part of the body other than the head would be inappropriate, and involving children  
29 to apply electric stimuli to a fellow patient would never be appropriate either.

30 Both of these pieces of evidence were obtained during the course of your  
31 investigation; is that correct?

32 A. Yes.

33 Q. Now in relation to the same incident and in response to a media inquiry, you sent an e-mail  
34 to then Assistant Commissioner Richard Chambers, in fact I think he still is Assistant

1 Commissioner, setting out the position in respect of this incident. If we can just bring that  
2 up on screen. So just to again orientate ourselves, this is an e-mail from you to Richard  
3 Chambers on 27 September 2019. And at paragraph 3 beginning with "The main thrust":

4 "The main thrust of his inquiry appears to be why no prosecution was brought  
5 against Dr Leeks for the actions he took against a child named - redacted - is one of 41  
6 complainants identified during the course of the inquiry. He was allegedly subjected to  
7 electric shocks on his testicles and legs after he sodomised some other children in the unit.  
8 It seems very clear on the evidence that electric shocks were administered. There was an  
9 inquiry completed at the time and Leeks claimed then the shocks were given as a form of  
10 Aversion Therapy and not as a punishment or an assault. His explanation appears to have  
11 been accepted by medical authorities and Police at the time."

12 If we can just go to the next paragraph please:

13 "The reason no prosecution subsequently took place in 2010 was because having  
14 examined the history of the complaint, the law and the evidence (including corroborating  
15 evidence from a nurse of the alleged assault) both Police legal section and Pip Hall QC  
16 (who independently reviewed the legal section advice) gave advice, which I followed, that  
17 there was insufficient evidence to proceed with a prosecution. In fact, my recollection is  
18 that Pip Hall said there was no legal basis on which to bring the charges under the sections  
19 we were considering."

20 I want to now bring up the synopsis of evidence you provided to the legal opinion  
21 writers when you sought their opinion and in particular the synopsis in relation to this  
22 survivor and to this incident. It is the last two paragraphs of this page. I won't read out that  
23 in its entirety, but perhaps if you could read those two paragraphs, Mr Burgess. There is no  
24 mention in those paragraphs to the evidence you had from Terry Conlan.

25 **CHAIR:** Sorry, I'm just going to check with Commissioner Gibson if he would like to have it -

26 **COMMISSIONER GIBSON:** I would be interested in it.

27 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Certainly. "Redacted - was  
28 admitted to Lake Alice Hospital in 1973 from Kohitere training school. He was admitted as  
29 an informal patient aged 14 years. He was diagnosed with an antisocial character disorder.  
30 He was discharged to Waikeria borstal in 1974 after being charged with indecencies on  
31 fellow patients.

32 Redacted - states that he was given ECT as a punishment on numerous occasions.  
33 He describes three separate occasions where he received this treatment. On the first  
34 occasion he does not identify the reasons for receiving the treatment. He describes a form

1 of unmodified ECT. On the second occasion he said that he received ECT for running  
2 away. He also claims to have received shocks to other parts of his body as a form of  
3 therapy administered by Dr Leeks.

4 The third occasion he describes relates to the time after he had been identified as the  
5 offender for indecencies on fellow patients. He describes getting ECT administered by  
6 Dr Leeks and also by other boys. He does not describe where the electrodes were placed  
7 but - redacted - describes them being placed on his thighs. He claims, and is supported in  
8 this assertion by another survivor, who is redacted, that after the boys had applied the  
9 current, Dr Leeks took over and administered a final application of the electric current  
10 which knocked him out."

11 We can see there that there is no reference to the corroborative evidence you had  
12 obtained from Terry Conlan.

13 A. No, there's not.

14 Q. And there's no reference to what Professor Walters said about those two aspects of that  
15 incident, and when I say two aspects, I mean electrodes to a different part of the body and  
16 administered by another patient.

17 A. No, there's not.

18 Q. Looking back on this incident perhaps while we're focused on it, and with hindsight, do you  
19 accept that you had a corroborated and clear account of electric shocks being applied to a  
20 child's genitals?

21 A. Yes, there is evidence that this child received electric shocks and on the face of it, certainly  
22 from the document you've referred me to, it appears that Mr Conlan corroborated that. I am  
23 obviously assuming that the two patients are the same person.

24 Q. Yes, you do need to take that from me.

25 A. I do indeed, yes.

26 Q. And we know, of course, that no charge was recommended in respect of this incident.

27 A. No, there wasn't.

28 Q. I want to turn to the report that you prepared, Mr Burgess, and this was for the purposes of  
29 seeking legal opinions. This was prepared on 14 September 2009. And it's addressed to  
30 the Senior Legal Advisor in Canterbury, we know that to be Mr Ian McArthur; is that  
31 correct?

32 A. Yes.

33 Q. Now you were asked questions about this yesterday by your counsel and you said in  
34 response to a question by her that you referred to the expert evidence that you had from

1 Professor Walters, and I think you said you also considered it in reaching conclusions  
2 around evidential sufficiency; is that correct?

3 A. Yes.

4 Q. Now this is a nine-page report, and the reference to Professor Walters can be found on page  
5 4, if that could be brought up. And if we can bring up - it's in the last paragraph, it's four  
6 lines down. There is a line there, "An expert opinion regarding the use of ECT to children  
7 has been obtained and is attached to the file." That is the reference to Professor Walter's  
8 opinion?

9 A. Yes.

10 Q. And that is the only reference in the report to his opinion; is that correct?

11 A. I believe so.

12 Q. You again spoke or answered questions from your lawyer yesterday as to the purpose of the  
13 legal opinions that you sought and confirmed they were limited to the public interest  
14 component of the test to prosecute. So just so we're clear, you were not instructing them to  
15 independently review your assessment of the evidence, or the sufficiency of the evidence?

16 A. I was not, but I think at least one of them made some comment about the sufficiency of  
17 evidence and I think disagreed with my opinion.

18 Q. Can we confirm the material that was provided to those opinion writers. Mr McArthur in  
19 his statement, and you were taken through some of this yesterday, confirms he had your  
20 report, and that's the report that we've just been referring to; is that correct?

21 A. Yes.

22 Q. And he notes that he had some staff statements?

23 A. Yes, I think he asked for and was provided a folder of additional material.

24 **CHAIR:** That was Lake Alice staff?

25 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Lake Alice staff, sorry, yes.

26 A. That included Lake Alice staff statements.

27 Q. There was no reference in his report that he provided back to you to staff accounts provided  
28 by either Brian Stabb or Terry Conlan. Were you aware of that?

29 A. I'm not sure whether he specifically identified staff members or not. I can't recall. But he  
30 certainly had that material.

31 Q. Well, he had access to that material if he wanted it, was that the effect of your evidence  
32 yesterday?

33 A. Well, he had access to the entire file if he wanted it. My recollection is that he asked for  
34 and was provided with the statements of the staff, and that logically would include

- 1 Mr Stabb and Mr Conlan.
- 2 **Q.** In his report provided back to you, he sets out the staff members' statements that he had  
3 before him and would you accept from me that Mr Stabb and Mr Conlan were not referred  
4 to in that material?
- 5 **A.** If that's what his report says, of course.
- 6 **Q.** I want to come back to the expert evidence point, Mr Burgess. It would appear from the  
7 statements that both Mr McArthur and Mr Hall have provided to this Commission that they  
8 did not have Professor Walter's expert opinion. Are you able to comment on that?
- 9 **A.** I don't think they did have the statements - Professor Walter's statement. As I said  
10 yesterday, it was referenced in the report, I guess as an indication to them that it was there  
11 if they required it, but I had used Professor Walter's report to reach conclusions around  
12 evidential sufficiency based on what the allegations said and what the supporting evidence  
13 appeared to be.
- 14 **Q.** Would you agree that for both of the report writers the key issue as they saw it, would be  
15 that it was too difficult to establish that the use of ECT, the use of the machine rather, was  
16 for punishment and that such a use was outside the standards acceptable of the day, that  
17 seemed to be their main concern?
- 18 **A.** Sorry, can you run that one by me again?
- 19 **Q.** Certainly. It seemed, or from a review of their opinions, it seemed that they - the key  
20 concern for them was that it was too difficult to establish that the use of the ECT was  
21 outside of the standards of the day?
- 22 **A.** That was certainly one of the aspects they commented on, yes.
- 23 **Q.** And in reaching that view, they were relying entirely on your report?
- 24 **A.** I provided the report, I don't know whether they went beyond that or not, that's, I guess,  
25 questions that you'd need to ask them.
- 26 **Q.** Well, we've confirmed that the reference to Professor Walters was that one line in the  
27 report?
- 28 **A.** Yes.
- 29 **Q.** So you didn't set out in your report the material that I took you through this morning in  
30 relation to his expert opinion?
- 31 **A.** No. I -
- 32 **Q.** So they were not provided with any expert opinion to guide their assessment?
- 33 **A.** There was an expert opinion available should they have wished to examine it. I had used  
34 the expert opinion to form a view on evidential sufficiency. I can't really take it beyond

1 that I'm sorry.

2 **Q.** Sure. Perhaps if we just bring up page 2 of your report, paragraphs 5 and 6. We can see  
3 there the heading "Treatments Applied".

4 **A.** Yes.

5 **Q.** If we can take it from paragraph, "The third treatment". I'll read this into the record:

6 "The third treatment which appears in the notes is what has since been characterised  
7 as Aversion Therapy. It appears this is referred to in the nursing notes as ECT, Ectonus or  
8 Ectonus Therapy. This apparently entailed the ECT machine being used on a different  
9 setting to the setting that would be used to deliver ECT. It involved the patient receiving an  
10 electric shock at a lower level of electric current as a means of modifying behaviour.

11 The location in which the electric shock was delivered during these treatments was  
12 apparently determined by the sort of behaviour that led to the application of the electrodes  
13 in the first instance. For example, boys who ran away might expect to have the electrodes  
14 applied to their legs, boys who were caught masturbating or offended in a sexual fashion  
15 could expect to have the electrodes attached to their penis or their testicles, and boys who  
16 were fighting might expect to have the electrodes attached to their shoulders. These  
17 applications of electric shocks are not recorded in the ECT notes but are often referred to in  
18 the nursing notes."

19 That statement of perhaps the evidence or what you had gleaned from the material  
20 you read was directly addressed by Professor Walters in his opinion. The appropriateness  
21 of what's been set out there.

22 **A.** Yes, I'd agree with that.

23 **Q.** So do you agree it would have been necessary to set out the expert opinion to confirm that  
24 what was being described was inappropriate and not consistent with the standards of the  
25 day?

26 **A.** I guess I can only say it might have been helpful. I was providing a report which  
27 summarised my inquiries. There may have been some merit in providing additional  
28 information from Professor Walter's report, but I didn't and I can't take it any further than  
29 that.

30 **Q.** The consequence of that is that they are left with the impression, are they not, that this is  
31 the opinion of the day that this is to be expected or appropriate treatment?

32 **A.** Well, no, I don't think they were, because I was recommending that there was sufficient  
33 evidence to charge Dr Leeks for applying EC, well, Ectonus or unmodified ECT in those  
34 sorts of circumstances.

1 **Q.** In your statement to the Inquiry -

2 **[Fire alarm]**

3 **CHAIR:** We will adjourn.

4 **Adjournment from 11.22 am to 11.52 am**

5 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** One factor that appears to have  
6 assumed great significance in the Police assessment of the evidence is the credibility of the  
7 complainants. Would you agree, looking back over the documents that you have in  
8 preparation for the hearing?

9 **A.** I certainly highlighted credibility as an issue.

10 **Q.** There's a number of documents that speak to this, but perhaps if I can take you back to an  
11 earlier document and that is NZP316, page 8 paragraph 3. Entitled "Credibility of  
12 Complainants". This is the report I took you to yesterday, I believe, this is a report you  
13 made to Assistant Commissioner Marshall in June 2006 and under the heading "Credibility  
14 of Complainants":

15 "The complainants in these matters generally come from disadvantaged or  
16 dysfunctional backgrounds. Many of them have found their way into various institutions,  
17 including prison, since leaving Lake Alice. Several of the complainants could be rightly  
18 described as recidivist offenders who have horrific criminal histories. There are therefore  
19 bound to be issues of credibility that will emerge from any inquiry." And the remainder of  
20 that passage I read out to you yesterday and speaks to the significant corroboration of their  
21 allegations in the files.

22 Is this reflective of your personal view, Mr Burgess, or was that a view held by the  
23 Police during the 2000s in respect of complainants like those that you were considering in  
24 respect of Lake Alice?

25 **A.** I'm not sure that - I guess I'm not sure what you mean by "a view". That to me is a  
26 statement of fact that says a number of the complainants have criminal histories. My  
27 experience, and I'm sure the experience of most other police officers and no doubt lawyers,  
28 is that people who have significant criminal histories are likely to have their credibility  
29 called into issue if we were to proceed down the path of a prosecution, for instance. So  
30 that's just a factor, it's just a thing there that we'd have to be aware of. That's not saying that  
31 I don't believe what I'm being told or what I've read, that is just saying that that is a factor  
32 that we need to think about.

33 **Q.** Was any consideration given by you or the Police at that time to the fact that the existence  
34 of the difficulties that you've noted in that paragraph were inherently related to the abuse of

1 which they complained?

2 A. I'm not sure I quite understand what you're trying to ask me.

3 Q. Perhaps I'll give you an example. We've heard from several survivors during the course of  
4 this hearing that their time in State care, and particularly Lake Alice, has set them up for a  
5 life in and out of prison. One survivor described it, this is Charlie Symes, he said, "I got so  
6 used to being inside, Lake Alice made sure of that, it was like being in a prison. I guess it  
7 got me ready for the time that I would go to prison as an adult."

8 So my question is, was any consideration given to the experiences that they had  
9 had as children in considering the impact of any criminal offending they may have  
10 committed as adults?

11 A. Not by me because that wasn't relevant to my inquiry. It would only - that would only be  
12 relevant if you were considering, you know, whether you were likely to be charging them  
13 rather than them being complainants, surely, unless I'm misunderstanding your question.

14 Q. Perhaps I'll ask it in another way.

15 A. If you could.

16 Q. The references throughout the material suggest that the experiences that the complainants  
17 have had as adults somehow impact on their credibility. Was any consideration given to  
18 the reasons or the background experiences they had had that may have caused those later  
19 difficulties?

20 A. I think the short answer is no, if I understand what you're asking me. I mean essentially  
21 it's - what I am noting there is the fact that these issues might arise. I haven't gone beyond  
22 that to determine why they had had criminal convictions, that's not relevant frankly.

23 Q. Did the Police in the 2000s in the time you were investigating this matter, did they provide  
24 training in identifying and understanding those links between childhood experiences and  
25 adult involvement in the criminal justice system?

26 A. I don't know, I can't recall.

27 Q. I want to -

28 **CHAIR:** Are you leaving that topic?

29 **MS FINLAYSON-DAVIS:** I am, yes.

30 **CHAIR:** Could I just ask one question, because you raised it in that heading under credibility was  
31 an issue. The first thing you say is that many of them came from disadvantaged or  
32 dysfunctional backgrounds and then you go on to talk about the criminal. Just taking the  
33 criminal histories out of it, would the fact that they came from disadvantaged or  
34 dysfunctional backgrounds have an impact on your assessment of credibility?

1 A. Absolutely not.

2 Q. I just wonder why you put it in there then under the credibility issues?

3 A. Might not have been the right place to put it, but again, it was an acknowledgment of the  
4 fact that many of them did come from very difficult backgrounds. Perhaps it should have  
5 been referred to somewhere else.

6 Q. Thank you.

7 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Have you had the opportunity,  
8 Mr Burgess, to read a report that was prepared by Professor Mike Rowe and provided to the  
9 Commission by the Police entitled "Policing abuse in State care: Lessons from  
10 international experiences"?

11 A. I've read his report, yes.

12 Q. I wonder if I could just bring up a paragraph of that report and it is at paragraph 26. Just  
13 the first sentence there. Professor Rowe observes:

14 "Furthermore, discrediting victim testimony was relatively easy in an environment  
15 where those in institutional care are already identified as troubled, unreliable or malicious  
16 complainants."

17 Do you have any comment on that observation, Mr Burgess?

18 A. Not really, it's his observation.

19 Q. Do you think that had any application in the policing period that we're talking about in the  
20 2000s?

21 A. I can only speak for myself, I guess. I don't agree that I was attempting to discredit victim  
22 testimony. I was taking it at face value. This is - doesn't have context around it so I'm not  
23 sure whether this statement is talking about police officers or those who had care of  
24 children who were able to discredit victim testimony. All I can say is, I took their  
25 statements at face value.

26 Q. Thank you. I've just got perhaps one more topic for you, Mr Burgess. I want to turn to  
27 some observations made by Sir Gallen and Justice Collins QC, former High Court Judge  
28 Sir Gallen prepared the report and you refer to his findings both in your statement in  
29 September of 2009 and also in your statement for the Commission, and Justice Collins QC  
30 we've heard some evidence about was involved in the second round of civil claims in this  
31 matter.

32 Sir Gallen and Justice Collins were perhaps in a distinct position to the Police in  
33 respect of their work on this matter, they had gone around and they'd interviewed  
34 approximately 40 of the survivors and they had formed fairly clear views on what they'd

1 heard and read and you recite Sir Gallen's findings in your report, and if I can summarise  
2 those, Sir Gallen noted that ECT was constantly in use as punishment and in the  
3 circumstances as they were described to him could not possibly be referred to as therapy  
4 and when administered to defenseless children can only be described as outrageous in the  
5 extreme. Justice Collins has prepared a statement for the Commission and I'd just like to  
6 take you to a paragraph of that statement and that is paragraph 44:

7 "I have seen an affidavit from Mr Boyd, a researcher at the Citizens Commission on  
8 Human Rights, who says that in 2006 I told him Dr Leeks had engaged in criminal  
9 offending (or words to that effect). I do not now recall making that statement, but I am sure  
10 I would have done so. Both Sir Rodney and I discussed Dr Leeks' role in the unit, and we  
11 were both certain that if the Police had seen the records that had been made available to us  
12 in confidence then the prosecuting authorities would have agreed with our conclusion. It is,  
13 for example, impossible to justify the application of ECT to children on the basis that such  
14 extreme measures could cure bed wetting. I have never been made privy to the decision not  
15 to prosecute Dr Leeks, nor have I been told the basis of the decision."

16 Mr Burgess, would you be prepared to accept that if the Police had similarly  
17 interviewed the complainants you may have taken a different assessment as to the strength  
18 of the case?

19 A. I would accept that thorough investigative interviews might have clarified some of the  
20 evidence, yes.

21 **Q.** A final question for you, Mr Burgess. Having gone through the process of preparing to  
22 give evidence and giving evidence yesterday and today, in reflection, on reflection, is there  
23 anything you would do differently were you to investigate this matter again?

24 A. Well, again, as I think I said yesterday, this should have been resourced appropriately from  
25 the outset to give it the attention that it required. Beyond that, I'm not sure that there is - I  
26 think essentially I gathered the evidence that was available given the approach that was  
27 agreed and reached certain conclusions, and at the end of it I guess I was left with advice  
28 that said a prosecution was not going to succeed and therefore it didn't go any further.  
29 There are bound to have been things in how I recorded my reports or provided advice that  
30 with 20/20 hindsight I might do slightly differently, but other than that probably not.

31 **Q.** Thank you for your time, Mr Burgess. Madam Chair, I understand my friend will have  
32 some questions. CCHR have also sought and been given leave to question. Again, their  
33 counsel is unable to be here today, so while Ms Joychild is asking any questions she may  
34 have, if I may just consult with them to confirm there's nothing further they wish -

1 **CHAIR:** I have another suggestion that I've consulted with at least one of my colleagues. What  
2 we would like to do now is to take a very short break to confer with counsel about any  
3 other questions that we might wish to have, so while that's happening, during that break  
4 then you can consult with CCHR as well.

5 **MS FINLAYSON-DAVIS:** Certainly.

6 **CHAIR:** And then we'll come back and resume with questioning after that. So if you don't mind  
7 just waiting, Mr Burgess, we'll be back shortly thank you.

8 A. Not at all.

9 **Adjournment from 12.09 pm to 12.21 pm**

10 **CHAIR:** Yes Ms Finlayson-Davis.

11 **QUESTIONING BY MS FINLAYSON-DAVIS CONTINUED:** Mr Burgess, you'll have to  
12 endure me for a few more questions I'm afraid. We've heard during this hearing from some  
13 of the survivors that there were deaths at the unit in the Child and Adolescent Unit, perhaps  
14 following or during treatment and I just wondered if that was something you were aware of  
15 or looked into during your time investigating this matter?

16 A. There was no evidence in the material I saw of any deaths at the unit.

17 **Q.** Did you consider during your time investigating whether you should, or the Police should  
18 be, rather, refer the matter to the Nursing or Medical Council for consideration?

19 A. I didn't, I don't know whether anybody else thought of that.

20 **Q.** Would that have happened during that time period, is that something that would have been  
21 considered on other files?

22 A. I guess it would depend on the circumstances. All I can say is it's not something  
23 I considered in relation to this file.

24 **Q.** Finally, Mr Burgess, we spent some time going through the report that you wrote in  
25 September 2009 that invited opinions by Mr McArthur and Mr Pip Hall. Now you note, I  
26 think, in your statement to the Commission that you found their opinions determinative of  
27 the matter?

28 A. Yes, essentially. There's two parts, as I understand it, there's two parts to having a  
29 prosecution that's going to be advanced successfully. One is evidential sufficiency and the  
30 other leg is the public interest. I had sought advice on that and they essentially told me that  
31 it didn't meet those criteria and on that basis I was convinced that prosecution wouldn't  
32 succeed.

33 **Q.** It was still open to you as an investigator, however, to continue with the investigation  
34 should you have felt differently?

1 A. I suppose I could have, but given that I'd received legal advice that suggested it was  
2 essentially dead in the water, that would be a very rare thing to do.

3 **Q.** Those were my final questions, thank you Mr Burgess. I believe my friend Ms Joychild  
4 may have some questions for you.

5 A. Thank you.

6 **CHAIR:** Yes Ms Joychild.

7 **QUESTIONING BY MS JOYCHILD:** Mr Burgess, I'm counsel acting for the survivors. So I  
8 am not going to trawl through the embers of the failed Police investigation because my  
9 friend has done that and picked it apart with you this morning, apart from asking you to  
10 confirm that it really was a failed Police investigation.

11 A. No, I think I've said it was an under-resourced investigation. It reached certain views  
12 about - I reached certain views about evidential sufficiency and was quite willing to  
13 proceed to prosecution, but in the face of legal advice, terminated the inquiry.

14 **Q.** Well, the legal advice itself, Mr - just looking at that legal advice, Mr Philip Humphrey  
15 Brett Hall, he was one of the people who gave the independent advice. In his own evidence  
16 he says that he had just completed acting - this is at paragraph 14 - for a former brother of  
17 St John of God who had been charged with historical abuse of former pupils of the school  
18 operated by the order. So you went to get an independent advice, or independent advice  
19 was obtained from someone who had acted for a sexual offender, a prolific sexual offender.  
20 I mean why would you go there? Obviously this person is going to be very focused on  
21 weaknesses in the complainants rather than strengths, because that's their specialty.

22 A. As I think I said yesterday, I didn't determine where we went for the independent legal  
23 advice. That's not a question I can answer, you need to ask the person that sought that  
24 advice.

25 **Q.** You relied on it, though, didn't you?

26 A. I did rely on the legal advice that I received. In my experience it's normally provided  
27 dispassionately. And with regard to the law, I had no question to think otherwise in this  
28 case.

29 **Q.** Well, it shows someone who is full of the prejudices and stereotypes around a complainant  
30 who's in a psychiatric institution and who later become criminal offenders. I'll read on  
31 what Mr Hall says is that -

32 **MS HUGHES:** With respect, ma'am, is there a question in that?

33 **MS JOYCHILD:** Yes, I'm asking for the question. The question will come.

34 **CHAIR:** We'll let you read - what you're reading from is the statement from Mr Hall, is that

1 correct?

2 **QUESTIONING BY MS JOYCHILD CONTINUED:** Yes. And he says, "I was aware of the  
3 difficulties these cases presented, especially where the complainants were mentally or  
4 intellectually disabled to a degree or otherwise vulnerable and also the fact that  
5 compensation payments had been paid or were being paid. Similarly there had been  
6 considerable media reports concerning the alleged ECT treatment. All of these factors are  
7 likely to have had some influence or impact on the memories of patients and the reliability  
8 of their statements.

9 I put it to you, Mr Burgess, having read that sentence out, that the legal opinion  
10 upon which you rely to not do any investigation at all, was obtained from someone who had  
11 very negative attitudes towards complainants in cases such as this.

12 A. All I can say is that in my experience when I seek legal advice, lawyers act in an ethical and  
13 proper way, and that's what I expected on this occasion. I understood from the passage you  
14 recounted, that the lawyer was drawing on experience he'd previously had to examine some  
15 of the issues that might impact on the public interest question, which I'd asked him to  
16 consider.

17 Q. Well, looking at the public interest now, with hindsight, it's very clear that that was  
18 weighed woefully inadequately, wasn't it?

19 A. Well, that's clearly your view. I asked for advice, I received the advice, and I acted on it.

20 Q. So even with everything that you've heard or that you know about the terrible damage that's  
21 been done to the survivors on an ongoing basis, the fact that we've had case of(sic) child  
22 torture on a systemic nature in this country, to consider that the public interest was not in  
23 prosecuting, that must - you must agree that that was a very wrong decision to come to?

24 A. I can only repeat what I've already said. I sought advice, I got advice, I acted on the advice.  
25 Whether, with the passage of time, that advice can now be viewed in a different way, is  
26 open to debate, I suppose. But at the time, that was the legal advice.

27 Q. So you're not prepared or willing to give a hindsight view?

28 A. Well, my view, as I think I said in my report, was that there was sufficient evidence for this  
29 man to be prosecuted, and that's what I had intended to do. But it would be foolish, in my  
30 view, if you were taking a prosecution when you had legal advice that said you've got no  
31 prospect of this being successful, and that's essentially what my legal advice told me.

32 Q. Well, Mr Burgess, you can get legal advice from any source you like generally on many  
33 things, because there is so much discretion and judgment involved in giving legal advice.  
34 So moving on to the point I want to make about that, is the sense that one gets from your

- 1 evidence, and from looking at how the decision-making went, was that there was a real  
2 sense of lethargy and disinterest and lack of appetite to prosecute Dr Leeks, and that was  
3 coming from the Police. Would you agree?
- 4 A. No.
- 5 **Q.** Resources weren't given to it?
- 6 A. And we've acknowledged, and I've acknowledged, that there should have been more  
7 resource applied to the Inquiry. But that doesn't mean that we weren't interested in the  
8 inquiry and indeed, as I've said several times, it was my intention that we should prosecute  
9 Dr Leeks.
- 10 **Q.** I'm going beyond you and talking about the general Police attitude to this claim, because  
11 not only that, but 14 whole files were lost. How could that be if there was a real interest or  
12 focus on the investigation?
- 13 A. I have no idea.
- 14 **Q.** And important documents were lost as well.
- 15 A. These are all things that I've got no personal knowledge of, I'm sorry. I don't believe it  
16 showed - well again, I can speak for myself, I did not have a lack of interest in the case.  
17 I did have competing priorities.
- 18 **Q.** You mentioned this morning about the fact, one of the important factors was in prioritising  
19 this case was that there was - there was no longer issues at play, it was a historic case. Is  
20 that right?
- 21 A. Words to that effect, yes.
- 22 **Q.** But of course, Mr Burgess, it was still at play in a big way, at least in the 300 or so  
23 children's minds who went through Lake Alice. Would you accept that?
- 24 A. Absolutely accept that, the survivors were still, you know, concerned and aware of what  
25 had taken place, what had happened to them. But in terms of the threat posed to others and  
26 for a continuing course of behaviour, by Dr Leeks, that threat had been eliminated.
- 27 **Q.** Well, that particular threat had been eliminated, but for these survivors, and everyone has  
28 said it today, and even ones who haven't appeared before this Inquiry, they had no closure  
29 from the steps that had been taken to that time, the apology meant nothing, the  
30 compensation was not the complete answer, they had to have accountability. They had to  
31 know that this terrible criminal action, which happened to them, was serious enough for the  
32 Police to prosecute the wrongdoer. Because that's giving a message to society that what  
33 they suffered was wrong. Was that view anything that engaged the police's interest or  
34 thoughts at the time?

- 1 A. I was obviously aware from discussions with some of the complainants about how strongly  
2 they felt that Dr Leeks should be prosecuted. However, the prosecution had to be based on  
3 sufficient evidence and had to pass the test of public interest, and it did not do that.
- 4 Q. One of the - Mr AA who gave evidence today said that he went to a meeting with Justice  
5 Gallen where Justice Gallen reassured the survivors that Dr Leeks would be prosecuted.  
6 Were you aware of that?
- 7 A. No.
- 8 Q. You talked about the difficulties with - on the one hand we have what the complainants say  
9 and all the possible risks of exaggeration and changing memories, but you would have been  
10 aware that one complainant, Kevin Banks, had made a complaint almost  
11 contemporaneously, I think it was either 76 or 77, where he gave quite detailed information  
12 about what happened. Were you aware of that?
- 13 A. Yes.
- 14 Q. Others gave statements from 1994, Leoni McInroe, and the others were in the late 20s.  
15 Generally that was only 20 to 25 years since what had happened to them happened. Do you  
16 accept that?
- 17 A. Yes, the maths would tell you that, yes.
- 18 Q. Now the staff witnesses who did not corroborate the complaints of the complainants, of  
19 course they have their own interest in what they say, haven't they?
- 20 A. I don't know what you - sorry, what are you asking me?
- 21 Q. Well, what I'm saying is, the staff who were so strongly against what the complainants were  
22 saying, were the very staff who were also engaging in the torture and probably sexual  
23 abuse. So it wouldn't be in their interests to tell the truth, would it?
- 24 A. There's a couple of bits of speculation there, I guess. If you are asking were the staff telling  
25 the truth -
- 26 Q. I'm not asking that, I'm asking when you considered on the one hand we've got these  
27 witnesses, and they're only seven that you considered would be able to be prosecuted, on  
28 the other we have the staff saying very different things. Did you weigh into the mix of why  
29 you only prosecuted - thought seven should be prosecuted, that the staff evidence could be  
30 very unreliable and self-serving?
- 31 A. I made an observation in my report that the passage of time might have led to staff having  
32 faulty recollections as well. Beyond that, I guess I took their statements on the same basis  
33 as I took the complainants' statements. They had told me what they had to tell me.
- 34 Q. Yes, the concerns about the credibility of the complainants are set out in various places, and

- 1 the issues that the complainants will face, having been from dysfunctional homes and then  
2 ending up in various institutions, including prison. But there does not seem to have been a  
3 recognition of the credibility of the staff in any of the documentation that I could see.
- 4 A. I guess you - as an investigator you always weigh the credibility of any witness. There  
5 was, other than some health issues, there was nothing that alerted me to issues of credibility  
6 in the staff statements that I saw.
- 7 Q. Apart from the fact that they've been accused of criminal offending, serious systemic  
8 criminal offending, and though you're investigating Dr Leeks, they may well be in the  
9 firing line themselves?
- 10 A. Well, the staff members that were clearly identified as potential suspects were in the main  
11 part dead.
- 12 Q. Not all of them.
- 13 A. I was not aware of, or did not identify evidence that the staff members that we were talking  
14 to were involved in serious systemic abuse as offenders.
- 15 Q. Moving on to another topic. There is a clear correlation between abuse as children and  
16 criminal offending as adults. Is that a matter that you accept?
- 17 A. That's been my experience.
- 18 Q. And there's plenty of research to back that up?
- 19 A. [Nods].
- 20 Q. So that would have been a factor actually, I think my friend was trying to explain that this  
21 morning, but that would have been a factor actually strengthening their credibility, could  
22 have been seen that way, couldn't it?
- 23 A. I'm not sure I follow your logic.
- 24 Q. Many of them have said that they were taught to be criminals by the way other people  
25 treated them. Raping them, beating them up, being extremely cruel to them, torturing them.  
26 They learned to be criminals at Lake Alice. Was that something that you took into account  
27 when you looked at their worrying criminal histories?
- 28 A. No, as I think I said just a little while ago, I noted the criminal histories because they were  
29 facts. I was not questioning or trying to analyse how they came to have those criminal  
30 histories. That was not part of my inquiry and I was merely recording it as an issue because  
31 in my experience a witness who has significant criminal histories, particularly of  
32 dishonesty, are likely to have those addressed in any hearing.
- 33 Q. Yes, I was talking about people who were abused as children.
- 34 A. I'm sorry, I might have missed the point.

- 1 **Q.** That's all right, I think that I've got no further questions, thank you.
- 2 **CHAIR:** Thank you. Ms Hughes, did you wish to ask anything in re-examination?
- 3 **MS HUGHES:** Just a couple of matters if I might ma'am.
- 4 **CHAIR:** Yes certainly.
- 5 **QUESTIONING BY MS HUGHES CONTINUED:** Now it's been suggested, Mr Burgess, that
- 6 you displayed a lethargy and disinterest in the investigation of these matters and you've also
- 7 spoken about how it took three years to complete an initial report.
- 8 **A.** Yes.
- 9 **Q.** Can you just explain to the Commission what it was that was occupying your time during
- 10 those three years?
- 11 **A.** There were multiple serious inquiries, two Police shootings, the culmination of the
- 12 Commission of inquiry into Police conduct, some significant criminal investigations and
- 13 prosecutions. There was some work done with the IPCA around managing the Police
- 14 response to investigative workload, there was a fairly significant workload of pressing and
- 15 current inquiries.
- 16 **Q.** And you of course were a resource of one, is that right?
- 17 **A.** Yes.
- 18 **Q.** So the end point for you was a view that there was evidential sufficiency to prosecute
- 19 Dr Leeks in relation to seven complaints; correct?
- 20 **A.** Yes.
- 21 **Q.** And that took into account Professor Walter's opinion?
- 22 **A.** Yes, that helped form the decision, inform the decision.
- 23 **Q.** And the sole purpose you, therefore, sought legal advice on was the public interest aspect
- 24 of the prosecution?
- 25 **A.** Yes.
- 26 **Q.** Because you'd already satisfied yourself regarding the first limb?
- 27 **A.** Yes.
- 28 **Q.** So the reason you didn't proceed with the prosecutions you wanted to take was?
- 29 **A.** The advice I received that it would not meet the public interest test and that it would be
- 30 unlikely to lead to a successful prosecution.
- 31 **Q.** Thank you Mr Burgess, thank you ma'am.
- 32 **CHAIR:** Mr Burgess, I wish to thank you on behalf of the Commission for coming. Appreciate
- 33 that you are quite long retired from the Police and that in preparing your statement of
- 34 evidence and the relevant documents you've had to trawl through historic matters and that

1 can't have been easy and - but it is appreciated because it's very important that people  
2 involved in that inquiry are prepared to come forward and assist this Commission with  
3 assessing the whole picture, and the Police role in this is a very important part of that and  
4 it's our - sorry, I just wish to say that it is important that we've had the Police perspective  
5 from somebody actively involved and for that we thank you.

6 A. Thank you, ma'am.

7 Q. You may stand down of course.

8 **CHAIR:** We have 10 minutes, are we going to use that or shall we take an early lunch and resume  
9 a little earlier.

10 **MS FINLAYSON-DAVIS:** In your hands, Madam Chair, I don't know whether my friend has  
11 any view on starting the next witness?

12 **MS FEINT:** Entirely in your hands, Detective Superintendent Fitzgerald is in the building  
13 somewhere.

14 **CHAIR:** I think what we'll do, it's only 10 minutes, it seems unfair to start and stop. Let's take an  
15 early adjournment. Shall we resume again at a time please - I always get the time wrong so  
16 I need some help on that.

17 **MS FINLAYSON-DAVIS:** Perhaps so that we can complete Detective Superintendent  
18 Fitzgerald's evidence today, perhaps an hour lunch would be -

19 **CHAIR:** Yes, all right, we'll come back at quarter to 2 then, thank you.

20 **Lunch adjournment from 12.49 pm to 1.54 pm**

21 **CHAIR:** Good afternoon Ms Feint.

22 **MS FEINT:** Tena ra tatou. We're now going to hear the evidence of Detective Superintendent  
23 Fitzgerald. You affirmed him yesterday, Madam Chair, so do you want to do it again?

24 **THOMAS JOHN FITZGERALD**

25 **CHAIR:** No, you remain on the affirmation you took yesterday, Detective Superintendent.

26 **QUESTIONING BY MS FEINT:** Good afternoon superintendent. Can we confirm for the  
27 record please that your name is Thomas Fitzgerald, you're a Detective Superintendent and  
28 you're the Director of the Criminal Investigation Branch of the New Zealand Police?

29 A. That's correct.

30 Q. And you've been in the Criminal Investigation Branch for 28 years?

31 A. That's correct.

32 Q. Thank you. Now we've heard in this Inquiry that there is a current Police investigation and  
33 you've got oversight supervision of that investigation; is that correct?

34 A. That's correct.