

15 **Lunch adjournment from 11.42 am to 2.18 pm**

16 **CHAIR:** Kia ora ano. Thank you, Ms Janes.

17 **MS JANES:** Our witness this afternoon is Trish Grant from IHC (Society for Intellectually
18 Handicapped Children) and I will leave Madam Chair to administer the affirmation.

19 **TRISH GRANT**

20 **CHAIR:** Affirmation which I had clearly forgotten about. Hello Ms Grant. Would you mind
21 taking the affirmation please. Do you solemnly, sincerely and truly declare and affirm the
22 evidence which you will give to this Commission will be the truth the whole truth and
23 nothing but the truth?

24 A. Yes.

25 **Q.** Thank you.

26 **QUESTIONING BY MS JANES:**

27 **Q.** Could you please state your full name?

28 A. My name is Patricia Susan Grant.

29 **Q.** And you're the Director of Advocacy at IHC?

30 A. That's correct.

31 **Q.** And you've prepared and signed a statement which has been provided to the Commission?

32 A. I have.

33 **Q.** And can you confirm that you are authorised to make that statement and speak on behalf of
34 the IHC today?

1 A. I am.

2 Q. Thank you.

3 **CHAIR:** May we also ask who is in the witness box.

4 **QUESTIONING BY MS JANES CONTINUED:**

5 Q. Absolutely. Could you please introduce your companion?

6 A. My colleague is Shara Turner who works on the advocacy team at IHC.

7 **CHAIR:** Thank you for attending.

8 **QUESTIONING BY MS JANES CONTINUED:**

9 Q. Before we turn to the purpose of your evidence today, which is about civil litigation and
10 civil claims, could you give us a bit of background about IHC, who founded it, when and
11 what its purposes are?

12 A. Certainly. IHC was founded just over 70 years ago by a group of parents who rejected the
13 common view held then that disabled children should be sent to institutions. So, they
14 rallied together and formed an organisation to ensure that their children could stay at home
15 and have access to education and health and be part of the community.

16 Q. What is the vision that IHC has for people with disabilities?

17 A. IHC's vision is about seeing - -- I'll start again. It's about ensuring that all people with
18 intellectual disability live satisfying lives in the community and IHC advocacy works to
19 ensure that the voices of people with intellectual disability and their families are heard at
20 Government and community.

21 Q. And so your role as Director of Advocacy, talk to us briefly about what that entails and who
22 you advocate for and with?

23 A. My role is to ensure that the issues that impact on the lives of people with intellectual
24 disability and their families are heard by Government. So we work with individual
25 situations, provide individual advocacy but we're also focused on systems and structures
26 that do not, to the extent that they should, respond to the rights, well-being and interests of
27 people with intellectual disability.

28 Q. And you have particular concerns about access to education and access to justice. Can you
29 outline what the impacts on children who do not have access to adequate education are and
30 those are at paragraphs 4, 5 and 6 of your evidence?

31 A. It's difficult to describe the outcomes, because they're so vast. When children with
32 disabilities who require accommodations to learn are denied education, there are lifelong
33 disadvantages to that situation. Every single measure of well-being is diminished by not
34 accessing education. So that plays out in being seen by the school and community as

1 different and other, not learning to read and write and not developing social skills or
2 confidence with social relationships, not being able to work, having -- being on a benefit
3 for your entire life once you leave school, no ability then to own your own home. You
4 don't have the opportunity to make friends, socialise, have romantic relationships, form
5 your own family.

6 There are issues around confidence about realising, asking for a better job,
7 protecting your own rights, lifelong disadvantage and the children who don't get what they
8 need to learn at school suffer diverse trauma, and we're talking about being isolated, being
9 restrained, secluded, having meltdowns, stopping communicating because it's too tough,
10 being eventually stood down, secluded, expelled, suspended from school. So those traumas
11 have a lifelong impact and-- families also, their families also experience disadvantage.
12 They often cannot work, so leading down to that path of more stress, poverty and
13 disadvantage. So it's not only the children, it is their families as well.

14 **Q.** And at paragraph 7, could you read that, because that summarises.--

15 **A.** "These are the most vulnerable children in New Zealand and they consistently experience
16 the worst outcomes. The denial of their right to education starts them on the journey to
17 these poor outcomes".

18 **Q.** Then you go on to give a brief overview of your evidence, but can we quickly cut to IHC
19 filed litigation and we'll return to that in more detail, but how did that claim, what was the
20 background and in a couple of sentences can you outline what that claim is about and then
21 we'll backfill the context?

22 **A.** Sure. In 2008 IHC had been aware of the vast problems in accessing education and we'd
23 heard those stories from students, from families, we'd tried to work with Government to
24 have them respond to those problems. We'd had decades of that. IHC had been one of the
25 key lobbyists around section 8 of the Education Act which said that disabled children can
26 enrol on the same basis as their non-disabled peers. So we thought disabled children were
27 in the door; once in the door everything would be right.

28 Clearly that wasn't the case and stories that came to IHC, families spoke of the
29 terrible things that had happened to them when they tried to enrol their child. Sometimes
30 they were turned away at the door, sometimes they had conditions placed on their
31 enrolment, sometimes they had teachers who didn't know how to teach them.

32 But so just in 2008 I guess families were saying can you do something for us. And
33 we felt that it was an important time in New Zealand's history, we'd just ratified the United
34 Nations convention on the rights of persons with disabilities, New Zealand had been

1 instrumental in actually drafting the convention. And so we saw that -- we began to see
2 that this problem with denial of the right to education was actually a human rights matter.
3 It wasn't just an education issue to be solved. In fact, we were making no progress with the
4 Ministry.

5 So we thought that with the novel -- new Part 1A of the Human Rights Act that
6 this would be a way that these matters could be considered within a human rights lens. So
7 we needed to see these problems differently, we needed to situate them in a human rights
8 framework where the right to education was considered and if it was found that disabled
9 children were being discriminated against, then the Part 1A offered a process whereby
10 remedies could be sought and the Government would, over a period of time, develop a plan
11 and implement that plan to right the wrongs.

12 **Q.** Just quickly at paragraph 17 you talk about the purpose of Part 1A and it coming into effect
13 in 2001. So why was that considered to be the right mechanism to utilise at this point?

14 **A.** Part 1A offered a way to, not make, but ensure that the public service was compliant with
15 human rights imperatives. So it was a novel way to ensure that Government policy, there
16 were checks and balances to ensure that the human rights considerations were front and
17 centre. So it was about making a human rights compliant public service, it was about
18 ensuring that in the development of Government policy that human rights were considered
19 and responded to. And we were excited about that because we didn't think that -- we knew
20 that in the stories that we'd been told from families that education delivery and the policies
21 around that did not reflect the child's human right to education. It was about a rationing
22 approach, it was about a jumping hoops to get something approach. It wasn't a human
23 rights issue, it appeared, from the many conversations that we'd had with the Ministry of
24 Education and with successive Governments.

25 **Q.** And just so we get a sense of perspective, it's some time before you file the claim in 2012,
26 but when you did file that, how many children potentially are impacted by the outcome of
27 that civil litigation?

28 **A.** When we first filed, it was around 100,000 of New Zealand's children. Today I think the
29 numbers are much, much higher. The Ministry of Education is looking at a figure of 20%
30 of New Zealand's children require additional accommodations to learn.

31 **Q.** And you didn't file until 2012, but there was quite a lot happening around 2006. And that's
32 at paragraph 19 and 20 of your evidence. So from IHC's perspective, what had happened
33 between the introduction of Part 1A and 2006 that made you start thinking about doing
34 something stronger and more bold about this issue?

1 A. Well, --I guess we'd come to the view that we could only go so far with the Ministry of
2 Education, that they didn't understand the human rights principles that we were trying - that
3 we were putting forward. They appeared in their response,- -- yeah, sorry, I missed the
4 point there.

5 But yes, this was great -- when we thought about this as a human rights issue, and
6 we understood Part 1A of the Human Rights Act, that offered real hope for us, because for
7 too long successive Governments had batted it away. This was a big problem and even in
8 the model of education delivery that we have, which is tomorrow's schools, people --we
9 said that even though schools are self-managing, it's actually the systems and structures of
10 education that create problems for students with disabilities and I believe creates problem
11 for schools, then and to this day.

12 Q. And in terms of you had been trying to work, as I understand it, through the Ministry of
13 Education and at paragraph 18 you talk about the ORRS (Ongoing Reviewable Resourcing
14 Scheme) funding. So can you very quickly outline what the perspective you were getting
15 from the Ministry in your discussions first of this human rights approach that you were
16 trying to encourage?

17 A. During that time after 1989 and in the 90s, as I've described, a new policy Special
18 Education 2000 was developed and that eventuated in 1% of students with disability getting
19 ORRS funding and other 1% having some additional funding for communication
20 difficulties, and another 1% for students with behaviour difficulties. Those estimates
21 weren't based on any prevalence data, so it was just a guesstimate about how many disabled
22 children needed more to learn. So we thought it was a flawed policy and resourcing
23 framework.

24 So -it- wasn't just the amount of money, but it was also the other policies created
25 difficulties in their implementation. And while we had tomorrow's schools, the problem,
26 you know, this is the school's fault and we were saying no, actually Government, as system
27 stewards, this rests with you and since we have ratified the convention you, as the duty
28 bearer, the State, have responsibilities to make this work.

29 Q. And so given that there was a sense from the Crown or the Ministry that it was a school-
30 by--school issue, was there a suggestion about a different pathway that IHC should pursue
31 and if so- why was that not taken?

32 A. When we first lodged the complaint with the Human Rights Commission, we, in our
33 discussions with them, they suggested that these problems could be the subject of a section
34 5 inquiry, section 5 of their legislation. We thought that that was probably warranted, but

1 also we wanted to test this against the unlawful discrimination clause within the Human
2 Rights Act.

3 **Q.** And where did boards of trustees fit into that picture?

4 **A.** Boards of trustees, yeah, self-governing, self-managing. But they didn't have, often, the
5 resources from the State to ensure that the legislative and policy objectives would be felt on
6 the ground. They were having big problems and how those problems kind of came to light
7 was that, you know, there were high numbers of disabled children being stood down and
8 suspended, we don't know how to do this, we'll suspend them, put them out of school, not
9 enrol children, you're only allowed to be here if you've got a teacher aide, those sorts of
10 things. So school boards and school management were having huge difficulty with this
11 policy.

12 **Q.** And we'll come back to what you did, but just briefly go to the civil litigation you filed in
13 September 2012 and then there was an amended statement of claim in 2014. But so the
14 Commissioners can get a sense of what was being pleaded, can you just go to paragraph 24
15 of your evidence?

16 **A.** Right. When we filed, the Crown came back and wanted further particulars and we
17 responded by the information that we held. We'd surveyed families and schools and we
18 found plentiful evidence around significant numbers of children being discouraged
19 attendance, being excluded for school for part of the day, students excluded from
20 participating in school life, not going on school camps or being in the school play,
21 significant numbers being taught by teachers who had limited capacity around inclusive
22 practice, we had -- we knew, there was evidence that the presence, participation and
23 achievement of that group of students was not monitored, the data wasn't collected and
24 reported on to Ministry for aggregation and disaggregation. It was as if these students
25 didn't matter, that their presence and participation and achievement didn't matter.

26 There was also plentiful evidence of the long waiting lists that these students had
27 and the schools had in accessing specialist support, like speech language therapy, behaviour
28 therapy. So schools just had to get on with it and had long waiting lists to get specialist
29 help and support. So along with that-- and there was also insufficient resourcing, the
30 ORRS funding and the SEG grant, Special Education grant that assumed that these children
31 were evenly distributed across New Zealand schools was all wrong and creating problems.

32 **Q.** And so what would you say in terms of fitting within the category of abuse and neglect
33 which this inquiry is focused on?

34 **A.** Well, the evidence clearly shows that successive Governments had neglected the education

1 of students with disabilities who required accommodations to learn in public and integrated
2 primary and secondary schools and that denial and neglect has gone on for decades.

3 **Q.** And you've already told us what the impacts of those are for this cohort?

4 **A.** Yes.

5 **Q.** And what were the remedies that you were seeking, and you've outlined at paragraph 25 of
6 your evidence?

7 **A.** The remedies that we were seeking were multi-layered. We were wanting boards to collect
8 data on these students, how long they were there, how they were achieving and how they
9 were participating. We wanted that data to be sent on to the Ministry so that they could
10 monitor school performance and review and develop materials and to assist teachers to
11 teach effectively, and also that data, we wanted that data to inform a resource and
12 framework. We also wanted the other part of the education system, the Education Review
13 Office, to review schools' inclusive practice. So that on a regular basis schools would be
14 reviewed as to how they were doing around inclusion and teaching diverse students.

15 We wanted the Ministry to produce guidelines to ensure that inclusive schoolwide
16 practices were adopted and implemented. We wanted the Ministry to require the Teachers
17 Council to ensure that in their initial teaching, teacher education and professional
18 development, that teachers were knowledgeable around inclusive practice. And also
19 because of the problems with discipline processes being used inappropriately, we wanted
20 the Ministry to produce effective guidelines around dealing with disability- related
21 behaviours-.

22 **Q.** You didn't leap straight into civil litigation, so can we just talk about the process that you
23 took with the Human Rights Commission to try and resolve these matters before filing, and
24 that's starting at paragraph 26 at March 2008. You first went through the ministries and
25 you had two meetings in March 2008, can you just briefly...--

26 **A.** With the Human Rights Commission or the Ministry?

27 **Q.** No, this was the Ministry of Education, the special...--

28 **A.** Yes, no, it was no surprise to the Ministry that we were going to lodge this claim. We
29 respectfully kept them informed as to what we were thinking and what steps we were
30 wanting to take. So we spoke with the Minister, it was just between two elections, the
31 Labour Minister and then the National Minister what we intended to do. We had
32 discussions with the Ministry, they -- responded by letter to say that actually perhaps we
33 didn't understand Tomorrow's Schools and also that they thought that our actions would be
34 divisive and that, yes, they certainly didn't support us taking this approach.

1 Q. And so what did you do next?

2 A. We said thank you for that feedback but we will -- we believe that these issues are
3 important, that the human rights of disabled children to education are such that we want
4 them examined and considered within a human rights framework.

5 Q. And the next action you took, what was that?

6 A. We lodged the complaint with the Human Rights Commission in July 2008.

7 Q. And so talk us through what happened when you first went to the Human Rights
8 Commission?

9 A. Well, it was a momentous day. I remember the Human Rights Commissioners present at
10 that time and it was enthusiastically received. It was a new area for them. We felt that we
11 were going to work collaboratively with them to draw more attention to the human rights of
12 this group of students. So yes, eight months later, it took eight months then for the Human
13 Rights Commission to notify the Ministry of Education of this complaint. And during that
14 time we became concerned that they weren't necessarily on board with the complaint.
15 They, as I said previously, suggested we take another action.

16 We saw it as a great issue of public interest. We expected that the Human Rights
17 Commission would, if not support us, at least, you know, sort of pave the way. We
18 understood the processes through disputes resolution on to the Office of Human Rights
19 proceedings and then to the Human Rights Review Tribunal. And we were hoping that
20 they would be allied.

21 Q. And you've indicated that Human Rights Commission notified both the Ministry of
22 Education and the Crown Law Office. Are you aware of why that happened at that point in
23 time?

24 A. No. We expected it to happen earlier, we didn't understand the time lag between us lodging
25 and it being notified. I think it took eight to nine months to notify the Ministry and Crown
26 Law. We felt it was quite straightforward that we were alleging discrimination and that
27 Part 1A offered a process whereby that could be considered. We -- yes, so I understand
28 from reading the files from the Human Rights Commission that there were -- there was
29 some consideration around jurisdiction, whether our complaint had the right legal legs, and
30 whether in fact it was the right thing to do. So as lay people, we thought that the Human
31 Rights Commission was a regulator, or a promoter of human rights. We were quite
32 surprised at the approach that was taken.

33 Q. Can you expand on that, was there -you- mentioned you had an opportunity to review the
34 file. What was your sense of reading through that file and the interdepartmental

1 discussions about your case? You partly alerted them to it, is there anything else you'd like
2 to add?

3 A. Yes, it appeared to us that in reading the file that the three arms of the State, Crown Law,
4 the Ministry of Education and the Human Rights Commission, had formed a view about the
5 complaint and there was a, about three years, quite extensive discussion between those
6 three parties and IHC had no awareness of those discussions. So the old maxim in the
7 disability sector, nothing about us without us. We felt left out, we didn't feel respected, we
8 felt that there was an attempt to misrepresent the complaint. Ours was a genuine complaint,
9 we were, you know, sort of working on the behalf of very unhappy families and children
10 who had been treated badly. We expected that the Human Rights Commission would take
11 this very seriously.

12 **CHAIR:** Can I just ask a question, sorry to interrupt but I might lose it. You said that it took eight
13 months to notify the Ministry of Education and Crown Law Office of your claim.

14 A. Mmm.

15 **Q.** And then you said as a result of reading the file you discovered that there were three years
16 of discussion between the three branches, MOE, CLO and Human Rights Commission
17 without involving IHC. My question is, did those discussions, from reading the file, did
18 they commence before the eight months were up, or did they only start once the eight
19 months had, you know, so you said they advised them of it after eight months, were there
20 discussions with the Human Rights Commission, Crown Law, Ministry of Education before
21 you were told that they had been served?

22 A. There were deeper conversations after they'd been served, but there were certainly
23 conversations.

24 **Q.** Before they were served?

25 A. Yes.

26 **Q.** Thank you.

27 **QUESTIONING BY MS JANES CONTINUED:**

28 **Q.** So returning back to your brief of evidence, you talk about at paragraph 34 that a response
29 was eventually received from Crown Law by e-mail dated 8 July 2009. What did that letter
30 say and what were your expectations of what would happen next?

31 A. I'm sorry, which paragraph?

32 **Q.** Paragraph 34?

33 A. Sure. Well, the Crown counsel advised that there'd be a further delay while she focused on
34 the complaint and she was planning a meeting with the Ministry for the week after that. So

1 that was one year later and we were waiting and the timeframes appeared to just keep
2 stretching.

3 **Q.** And any explanation of why it had taken a year later?

4 **A.** In the file there was an email prompt from the Commission mediator, the Crown counsel
5 suggested a facilitated meeting to tease out the issues and talk about the way forward. And
6 when I was alerted to that suggestion by the manager of complaints I said we would love to
7 meet, but actually we don't want to, - - we want to have a discussion on the substantive
8 issues. We felt that we were, - - might go, given what we'd experienced, we might go into a
9 further meeting where we'd be kind of intimidated really and told that we didn't understand
10 the law around the human rights of disabled children. So- we said yes, we would like to
11 meet, but we want a real conversation about our claim.

12 **Q.** And also can I get you to read at paragraph 35 there is the e-mail said in part and the Crown
13 response?

14 **A.** Yes. The Crown -- "In terms of the Government response we're not in a position at this
15 stage to give any indication about timeframes or even the nature of the response. For
16 example, if it is possible the claim will proceed to litigation, there may be some reluctance
17 to say very much before there has been an opportunity to review all of the documents that
18 potentially may be discoverable. This is likely to take many months".

19 **Q.** And then you had talked about the approach in August 2009 for a meeting, you'd be very
20 happy to do that as long as it was going to be a substantive discussion?

21 **A.** Mmm.

22 **Q.** Then at paragraph 37 there's a file note that you refer to in September 2009. Can you just
23 tell us about that?

24 **A.** Yes, well it was actually a file note by the Human Rights Commission manager recording a
25 phone conversation that she had had with Crown counsel where she records her saying that
26 she wanted to meet IHC to get clarity and for IHC to articulate the claim and plead it.
27 Further, the Ministry were prepared to ask some questions of IHC.

28 **Q.** And when did you next hear?

29 **A.** About four weeks later I received an e-mail from the Human Rights Commission manager
30 saying that a letter would be coming from Crown Law in the next three weeks. It would be
31 explaining its view that the complaint was not framed from the right legal perspective. The
32 mediator acknowledged our disappointment and frustration at that time. The lamb lapse
33 rather, yes.

34 **Q.** And then you say at paragraph 39 that it was some six weeks later, but you did then receive

1 a response. And what was the nature, summary of the Ministry's response at that time?

2 A. Well, it was from Crown Law and they said well actually they'd been dealing with a whole
3 number of other complaints which they'd prioritised, some individual complaints, and as
4 our claim appeared to be about the level of funding, it wouldn't, - it couldn't proceed. That
5 we didn't-, that-- our claim hadn't identified a specific policy or action that they could argue
6 against. And it wrongly suggested that IHC had declined to participate in the mediation.
7 So on all of those points they were incorrect. It was only a partial response to the full ambit
8 of our complaint. There was one issue around the ORRS funding but that wasn't the
9 breadth of the complaint. Ours was about the human rights to access education, not about
10 the funding.

11 So we felt that it was almost a deliberate misunderstanding of our complaint, and
12 then the final point was really difficult for us to accept, that they suggested that we engage
13 with the recently announced review of Special Education. Now in our complaint action
14 we'd explained that actually after decades of talking with successive Governments and
15 engaging with successive reviews that those discussions were limited because they were
16 completely - that- the human rights issue was not part of those discussions. So they were
17 saying, even though you want to talk about human rights, just go back to the Ministry of
18 Education and talk about education policy. So a really disappointing result from the--
19 response from Crown Law.

20 Q. And you talk at paragraph 41 of being frustrated with that response, but you also alluded to
21 the belief that you had that it was not an accurate reflection. Was that only IHC's
22 perspective on what had happened, or at paragraph 40 can you just go through that?

23 A. Yes, that was interesting because on 29 October in 2009 the Human Rights Commission
24 manager e-mailed our then lawyer to advise us that paragraph 5 of the Crown Law letter
25 was not an accurate representation of the discussion that she had had with them. So it was
26 interesting of the three arms of the State that one was now disagreeing with the other in
27 terms of the way, the reasons for the response to the complaint. So we didn't know who to
28 believe.

29 Q. And you talked just before that about the suggestion that you should be engaging in other
30 areas of lobbying or discussion. So just to accurately reflect was IHC at this point relying
31 solely on what had -- the complaint before the Human Rights Commission, or were you
32 doing other things to advance these issues elsewhere?

33 A. The legal action was only one part of our activity. We were working with families up and
34 down New Zealand to bring them together to consider the proposals within the review in

1 Special Education. IHC takes very seriously the voices of families and we organised a
2 number of forums and opportunities for families to have a say. So we were working with
3 families and across the disability and human rights sectors to get people to engage. We
4 were very sincere in our wish to engage with the Government process, while alongside of
5 this we were wanting to commit to another process that had another way to view these
6 things.

7 So yeah, we worked very hard, we commissioned research at that time about
8 inclusive practice. We invested huge amounts of time and resources in bringing families
9 together. We enthusiastically submitted, we met with ministers, we met with officials. So
10 on one hand we were trying to, with a civil action, go down that pathway, but it didn't mean
11 that we were not doing a whole range of other things as well.

12 **Q.** So returning to the civil action at paragraph 43 you mention a meeting finally took place
13 with the Ministry on 29 March 2010. Can you briefly outline what happened at that
14 meeting, what the action points were and what happened next?

15 **A.** Well, it was a relief to have the meeting finally and to be in the same room. It was agreed
16 amongst all parties that this was an open meeting, it wasn't a confidential resolution, it was
17 for the Crown to better understand our complaint. At the end of the meeting they said they
18 had a different understanding and that they would go away and think about that and come
19 back to us. We agreed to come back with some more detailed information about the issues
20 around ORRS funding and that's the way the meeting was left.

21 **Q.** And just quickly before we move on, did you go back, provide any information that you
22 had been requested?

23 **A.** Yes. Some months later we did. There was a bit of a lapse because we were waiting for
24 the response from Crown Law, because-- as they had said they better understood the
25 complaint and we were waiting to hear about that, and that could have informed the work
26 that we were doing on the ORRS policy. And also during that time there was the whole
27 review going on, so there was a lot of work being done by IHC.

28 **Q.** Just quickly, it might be useful at paragraph 45 there's just a very brief file note. You've
29 already touched on e, but can you just briefly summarise a, b, c and d?

30 **A.** At the meeting we described to the Crown that we thought- - that- our complaint was about
31 the systems and structures in which these matters sat. We asserted that the Ministry did not
32 use the levers they had available to them to alter policy, that there was no capacity within
33 schools around teacher training, professional development, teacher aide training to teach,
34 there was a lack of capacity. And that was an example of one of the systems that needed -

1 and structures that needed changing. We said there needed to be more support for boards
2 of trustees in schools and principals to learn about human rights of people with disability,
3 inclusive education, and there needed to be some real capacity building there. And we
4 stated quite clearly that funding was not the core issue of the complaint.

5 **Q.** And then in the interim while you were waiting for the civil action to progress, there was
6 the result of the Special Education review six months later which you refer to at paragraph
7 47?

8 **A.** Yes. The review promised a lot of things and in the end didn't go far enough. There was
9 some great aspirational statements and some increased levels of funding, increased numbers
10 of students who could qualify for ORRS funding. But in terms of the levers, the changes to
11 the systems and structures that we were proposing around, yeah, it just didn't recognise
12 those problems. Once again, it put it back on individual schools and said that if you've got
13 ORRS funding all your problems will be solved.

14 **Q.** At paragraph 48 you talk that-- the reason this is significant for this evidence is that in the
15 end the Ministry position was that IHC could only discuss the review insofar as the
16 outcome impacted on the complaint IHC had made. What was IHC's response to have it so
17 narrowed in terms of what could be done with that?

18 **A.** We were very happy to widen it as we felt that review had impacted on all of its claims, our
19 claims within all of the areas that we were alleging discrimination in. Because the outcome
20 of the review did not give redress to the issues that we were complaining about. So -yeah-.

21 **Q.** So didn't change the need for you to keep pursuing redress?

22 **A.** No, absolutely didn't, we needed to pursue it because the redress wasn't there.

23 **Q.** And so at paragraph 49 you talk about sending the further information and at paragraph 50
24 a date was sought to be pursued. What was Crown Law's response to the request for a
25 meeting at that stage?

26 **A.** Well, I actually gave our preferred dates for mediation, but Crown Law said that they
27 couldn't do that, in fact they refused to set any dates on the grounds it was premature to do
28 so as they had not yet responded to our complaint.

29 **Q.** And given that things were not progressing terribly rapidly for you, were there discussions
30 with anyone else to try and see what could be done, and I'm referring to paragraph 52?

31 **A.** Yes, we thought the Crown response was taking a very long time, so we approached one of
32 the members of our advocacy subcommittee, approached the then Minister of -- Associate
33 Minister of Education, Rodney Hide, about the unacceptable delay in getting a response
34 from Crown Law. It was only some ten days later that we got the final response.

1 Q. And did you approach the Director of Human Rights proceeding as well?

2 A. At that time?--

3 Q. Paragraph 52?

4 A. Yes, we had been so frustrated that we thought is there another way to make Part 1A work
5 for us, so we thought hmm, there's that Director of the Human Rights proceedings. There
6 we knew that they would take on other legal representation of cases, so we began to have
7 discussions with the Director, Robert Hesketh at that time.

8 Q. And we'll return to that, but it was important that you had started those communications at
9 this point in time. Paragraph 53, 18 August 2011 Crown Law finally forwarded a response.
10 Can you just go through what that response was?

11 A. Yes, on 18 August they finally responded. They said that in their view there wasn't any
12 unlawful discrimination revealed in IHC's claim. It said that the complaint was based on a
13 misunderstanding of the ORRS policy and its interaction with other special services. It
14 maintained the complaint, it raised issues of implementation of the policy rather than
15 pointing to any part of it which was discriminatory. It stated that the issues of
16 discrimination should be taken up with schools. Further, funding issues were not -- were a
17 political issue not amenable to challenge under Part 1A. It concluded that nevertheless if
18 IHC wished to discuss the revamped ORRS policy with it, the Ministry -- with the
19 Ministry, they would consider a request from us to do so.

20 Q. And you talk about being bitterly disappointed at paragraph 54, but can you read from
21 paragraph 55(i)?

22 A. Yes, we -- IHC responded to Crown Law, we "expressed deep disappointment at the
23 process followed by the Crown in respect of the complaint, pointing out that it was filed on
24 31 July 2008. Some of the smaller delays were caused by the Human Rights Commission
25 assessing the jurisdictional issues at the beginning but the large majority were caused by the
26 Crown".

27 Q. And j?

28 A. We advised, IHC "advised that as a result of the response received from the Crown IHC
29 would consider all options including taking proceedings before the Human Rights Review
30 Tribunal".

31 Q. And then in the period between November 2011 and September 2012, what occurred in that
32 stage, did you hear from Crown counsel again at all?

33 A. Well, yes, I received a response to my letter. The Crown apologised for overlooking the
34 need to respond to the whole complaint instead of just focusing on the ORRS issue. It

1 noted our comment that we were considering taking the proceedings further, and that they
2 understood that from --that there would be no further response needed from them.

3 **Q.** And so we jump to when you actually filed the statement of claim in the Human Rights
4 Review Tribunal?

5 **A.** Can I just say there that that response, wasn't only bitter disappointment, we felt
6 disrespected, we felt deliberately misunderstood and fobbed off and we felt that Crown
7 Law were not operating in the spirit of Part 1A. IHC had a huge responsibility given that
8 we were taking this action on behalf of disabled children and their families. To get to this
9 date and to have this result seemed very, very unfair and we were conscious of the
10 disappointment, the many families who were following this action, the disappointment for
11 them.

12 **Q.** Just touching on a point that you've raised there, was there a reason IHC became the
13 plaintiff in the proceedings rather than, say, in the *Atkinson* case where there was a
14 nominated person?

15 **A.** Yes, the families who had come to IHC were already exhausted and worn out by the
16 struggles that they were having as families to access education for their children. And we
17 had taken a device from the Director of Human Rights proceedings, the Office of Human
18 Rights proceedings, who made some comments in watching the *Atkinson* case, Part 1A
19 case. He said:

20 "My experience of dealing with a number of individual plaintiffs in proceedings
21 against the Ministry of Health has taught me that wherever possible in Part 1A proceedings
22 an institutional rather than an individual or number of individuals plaintiff is preferable.
23 Quite apart from anything else, the litigation process is harrowing and very public. Words
24 such as 'brutalising' have been used by individuals to describe this type of litigation, matters
25 easily become sidetracked as personal issues are delved into. Institutional plaintiffs do not
26 suffer this fate to anywhere near the same extent".

27 So that was good advice, because our families, you know, IHC was happy to
28 represent families and take that on the cheek on their behalf, because it would have just
29 been a woeful situation. They were exhausted already, we thought that we could advocate
30 on their behalf, that's what they wanted and that's what IHC does. It was the right thing to
31 do and we couldn't turn away from it.

32 **Q.** Thank you. And going to the Director of Proceedings, initially, Mr Hesketh took your case,
33 can you just talk about him taking over your case but then what happened next, were you
34 continued to be represented by the Director of Proceedings?

1 A. Well, yes, we had been talking with Robert Hesketh. He decided that within his
2 responsibilities in that role that our case was one that he would provide legal representation
3 for. That was at the end of December 2011, during 2012 we worked together on that and in
4 September we filed that claim, well, he did on our behalf.

5 Unfortunately, in the following year he retired and a new director was appointed,
6 Robert Kee, and we worked with him to understand the action, and were hoping that he
7 would continue to provide representation. Sadly, that wasn't the case. On 17 May, -just
8 finding the date,- -2013,- he withdrew his representation on the basis that he felt the
9 resources of -- that it was a big claim, we knew that. We also knew that other big claims
10 around the world had had a good hearing, human rights challenges, but he felt the resources
11 of his office couldn't meet that challenge, the size of the claim. And also he expressed a
12 real preference to sue individual schools, and we knew that many schools were trying their
13 very best with an imperfect policy framework and that that wasn't the answer to get the
14 systemic change that we were wanting.

15 Q. And so what did that mean for IHC and your civil claim?

16 A. Well, we had to look around, fortunately we had some good advisors at that time and we
17 came to be in contact with Francis Joychild who agreed to provide legal representation to
18 IHC. She was very busy with other priorities until the end of that year and it wasn't until
19 the beginning of the following year that our relationship with her was formalised.

20 Q. And it came to be that she filed an amended statement of claim in 2014 for you?

21 A. That's right.

22 Q. What happened after that amended statement of claim was filed, and that's at paragraph 63?

23 A. Can I just say that the IHC board were fantastic. I mean obviously we had to think about
24 how much this claim, what these proceedings were going to cost. And IHC stood, you
25 know, we believed in this and the IHC board approved resourcing this action, it was a very
26 important thing historically and then. So, sorry, your question was?

27 Q. After you filed the amended statement of claim, what was the next action by the Crown,
28 and that's 63?

29 A. Right, well, the Crown then decided to -- well, essentially made a strike-out application to
30 our claim, and these were on the issues of jurisdiction, justiciability and joinder, we'd also
31 joined the Teachers Council and the Education Review Office in the claim. And
32 interestingly enough, these were the issues that had been canvassed during those earlier
33 discussions as evidenced in the HRC claim, Human Rights Commission file, that all of
34 these issues were discussed between those three arms of the state then and now we saw

1 them in the strike-out claim. In the preliminary hearing that we had these were the issues
2 that were going to be traversed. But eventually the hearing did take place in February 2015
3 and our last day was on 31 March, that's just a little correction there to the evidence.

4 **Q.** Thank you.

5 **A.** And about a month after that the Tribunal issued a minute seeking further submissions on
6 the duty to provide an effective remedy. These were duly provided and that's where it lay.

7 **Q.** So just to clarify, you talk about the hearing taking place in February and resuming on 31
8 March did you say?

9 **A.** Mmm.

10 **Q.** How many days did the hearing go over?

11 **A.** It was four days, two days in February and two days in March.

12 **Q.** And what happened next? Did you receive a response?

13 **A.** From the Tribunal?

14 **Q.** Tribunal.

15 **A.** No, we still haven't had -- there has been no decision handed down from the Tribunal from
16 that preliminary hearing, and that was in 2015, it's now 2020.

17 **Q.** So as you say at paragraph 10 of your evidence, it's five years to get a decision on just a
18 preliminary interlocutory application?

19 **A.** Yes, we haven't even had the substantive issues around discrimination, unlawful
20 discrimination, considered, we haven't had that conversation yet. We're hoping we will.

21 **Q.** And at this point I understand that you wrote to the Minister and if we can have Exhibit 33,
22 which is your letter to the Minister of Justice. And if we can call out paragraphs 2 and 3 to
23 start with. Can I just have you read the called out portion?

24 **A.** "At the beginning of August IHC, -this was August 2015,- -- wrote to the Tribunals Unit to
25 inquire as to when we could expect a decision. The Tribunals Unit reply indicated that they
26 were unable to provide any indications of an expected timeframe. IHC's case was first
27 lodged in 2008. We have experienced long delays in the processes leading up to the current
28 proceedings and are therefore disappointed and frustrated at this further delay".

29 **Q.** If we can then call up paragraph 5 and I'll have you read that as well?

30 **A.** "IHC is concerned that the current resourcing of the Human Rights Review Tribunal is
31 linked to long delays in cases getting heard by the Tribunal and delays in decisions being
32 made".

33 **Q.** Thank you, and then you received a reply from the Minister of Justice, Exhibit 34. And if
34 we can call out paragraphs 2, 3 and 4, if we get all those on screen.

1 A. Minister Adams replied; "While as Minister I cannot intervene in the progress of your case,
2 I can make some general comments. I understand there have been a few factors that have
3 contributed to the time it has taken for IHC's case to progress. I am advised that the
4 Tribunal received IHC's claim in September 2012 and during 2013 a number of
5 adjournments and pauses in proceedings were requested by and granted to IHC's counsel. I
6 am further advised that counsel filed an amended statement of claim for IHC in August
7 2014, setting out IHC's case. Following this the Tribunal was able to hold a hearing in
8 February and March 2015.

9 With regard to the time it has taken for the Tribunal to issue a decision following
10 the hearing, this responsibility rests with the Chair of the Tribunal. I am aware that matters
11 heard by the Tribunal can be complex and the Tribunal's decisions can have wide-ranging
12 implications for industry and Government agencies. I understand that the Chair can take
13 time to consider all the issues and implications before issuing a decision. I am advised that
14 the Ministry of Justice does set time aside for the Chair to dedicate to decision--writing in
15 order to facilitate this process.

16 The Government has no plans to increase the resourcing of the Tribunal and I am
17 satisfied that the Tribunal's current resourcing levels are adequate to manage its caseload
18 effectively. As outlined above, there can be a number of factors that contribute to the
19 progress of a case and additional resourcing would not have made an impact on these
20 factors".

21 **Q.** Thank you. Sometime later, if we jump to paragraph 68, in August 2019, which is
22 effectively four years after this correspondence, you talk about a public announcement
23 relating to resources in the Human Rights Tribunal, can you quickly summarise that?

24 **A.** Yes, there have been some reporting in the media about the situation in the Human Rights
25 Review Tribunal. It wasn't just IHC that was waiting in a queue. So during that time I'd
26 made many phone calls to the Registry to inquire about when we could expect a response.
27 I wrote on 6 August and I wrote again asking why,-- when we could expect a decision. By
28 then I'd seen a public announcement that five new deputy chairpersons had been appointed.
29 A minute was issued from the Tribunal on 21 August, again providing no answer and
30 explaining in detail the resourcing issues.

31 **Q.** If we can bring up Exhibit 36 which is the minute that you had seen. Paragraph 2 talks
32 about the long delay in the delivery of a decision is acknowledged. If we can then look at,
33 very briefly, paragraph 3, it talks about two reasons for the delay, first an unprecedented
34 increase in the Tribunal's workload and second, that until recently the Human Rights Act

1 did not allow the appointment of deputy chairs. And then if we go over to page 2 it
2 talked,-- if we can call out paragraph 7 and I'll have you read that. 7 and 8.

3 A. "It was not until 14 November 2018 that the Human Rights Act was amended to permit the
4 appointment of deputy chairpersons. Such deputies were not appointed until 8 May 2019
5 and it will not be until October 2019 that all will have taken up their positions. In view of
6 the need for induction and training, the present best estimate is that it will not be until the
7 first half of 2020 that any appreciable progress will be made in accelerating the rate at
8 which cases are set down for hearing and decisions published".

9 Q. And we're now a year past this minute. Have you received any other communication or
10 have any other steps been taken with the Human Rights Review Tribunal?

11 A. No, I haven't received any communication but I did communicate with the Tribunal just
12 two weeks ago and the response was that the situation hasn't changed from the August
13 minute of 2019, so we're in exactly the same position.

14 Q. So given that 12 years effectively have passed since you first made the complaint to the
15 Human Rights Commission, what would you say about the cohort of disabled and
16 vulnerable children who started on the journey of this claim and where are we now, what is
17 the current status?

18 A. Of the claim or the students?

19 Q. The students. We know the claim is stuck.

20 A. Those students, that whole cohort of students whose families swore affidavits about what
21 was happening for them in school, they've all left school, and unfortunately many of them
22 are not having a very good time. This year's June household labour survey reports that
23 48.2% of disabled students are not in training, not in education, are not in employment. So
24 essentially that group of students experience disadvantage then and are still, --and the
25 lifelong disadvantage of a system that neglects their right to education is clearly evident in
26 the numbers of those young people who are sitting on couches all over New Zealand not
27 doing a lot that's good for them and for their communities.

28 Q. And have there been any changes at all that you could point to in that elapse of period, is it
29 better, worse, same?

30 A. There's no doubt that there has been progress, whether IHC's claim and legal action is
31 linked to that progress. But clearly there has been some progress. And IHC is very pleased
32 about that. However, there isn't the kind of progress that will mean that a disabled student's
33 right to education will be recognised by the local school or by the system. So we've still
34 got some distance to go.

1 **Q.** So from the perspective of IHC, does it continue with the claim despite 12 years and only a
2 preliminary hearing, or could you discontinue at this stage?

3 **A.** We're committed to a process, the process that Part 1A offers.

4 **Q.** And as we round out this particular part before turning both to afternoon tea and our claim,
5 can you go back to paragraph 11 of your evidence, which describes your summary of the
6 civil claim?

7 **A.** IHC says that the Part 1A remedy has failed children with disabilities needing
8 accommodations to learn. Reasons in its opinion for this failure include the "technical,
9 adversarial and oppositional approach adopted by the Ministry and its legal advisors,
10 Crown Law, from the beginning. The gross and chronic under-resourcing of the Tribunal
11 until last year to hear and deliver decisions in a timely way".

12 **Q.** And given you wrote this evidence early this year, --would you add anything to that gross
13 delay in resourcing because there are now more resources but you still haven't received a
14 response?

15 **A.** No, and I think those of us in civil society as NGOs we look to human rights bodies to be
16 accessible and to be responsive in a timely way. I mean clearly IHC's case, whether it
17 succeeds and wins, fails whatever, the issue remains do NGOs who represent disabled
18 people, can they access justice and can they have redress to right the wrongs that have
19 happened to them. And I would suggest that IHC's case clearly illustrates that that's not,
20 you know, like we've got some real problems.

21 **Q.** And we'll talk about what redress should look like, but in terms of redress through the civil
22 claims system, what would be your final word on how successful or adequate that has been
23 for you?

24 **A.** I'm sorry, can you repeat that?

25 **Q.** In terms of civil claims, this has taken 12 years. In terms of redress or seeking redress, how
26 acceptable or adequate have you found that process?

27 **A.** Well, IHC hasn't been successful in terms of - we had a genuine belief that these human
28 rights bodies would provide a pathway for this terribly serious issue to be considered, and
29 that's about the human rights of disabled students access to education. They still, and 12
30 years previously, still experience denial of their right and neglect of education. And we had
31 expected that the two human rights bodies in New Zealand would take note of that and
32 provide kind of safe passage in a timely way to have these children's issues examined. We
33 haven't achieved that. I don't think that's-, --and yes, there may have been some time delays
34 on the part of IHC, but actually we haven't been able to control our --timely response to

1 these important issues. And that's been a hard thing to report to the families, to the
2 students, and the wide range of allies to this action. IHC's had enormous support, people
3 think that this is the right thing to do because it is about human rights, and these things need
4 to be considered by the Ministry of Education. We need to have a better conversation
5 about human rights and education.

6 **Q.** Thank you. We'll take the afternoon adjournment.

7 **CHAIR:** We will, thank you.

8 **Adjournment from 3.35 pm to 3.53 pm**

9 **CHAIR:** Thank you Ms Janes.

10 **QUESTIONING BY MS JANES CONTINUED:**

11 **Q.** Trish, the next part of your evidence talks about a particular case study. Can you just
12 describe how IHC became involved in that case study and what it illustrates and why it's in
13 your evidence?

14 **A.** IHC became involved in the case of Mr M because he asked us to and we were very happy
15 to support him in his civil claim to get redress for what had happened to him in his
16 childhood and early adulthood.

17 **Q.** So just briefly describe his early childhood which is at paragraph 81 of your evidence?

18 **A.** Right, well, it goes back a long time in 1928 when Mr M was two months old. He was
19 placed into the care of the Home of Compassion in Island Bay Wellington to be adopted.
20 At six years old he hadn't been adopted and so there was a process initiated for him to go to
21 Templeton in the South Island and to --come under the Mental Defectives Act. So he was
22 assessed as being disabled and the recorded evidence of that diagnosis of low intelligence
23 was that at six years old he didn't know his surname, he couldn't add 2 and 2 and he could
24 not spell the word cat. So on that very slim diagnosis he was sent off to the South Island to
25 Templeton.

26 **Q.** And just briefly describe what Templeton, - you've- talked about the Mental Defective Act,
27 but what was Templeton?

28 **A.** Templeton was a psychiatric institution, it was a place, --a psychopaedic institution, it was
29 a place where children who were of low intelligence were sent. It was kind of around that
30 time, remembering that that was in the early 1900s where the eugenics theory was very
31 popular, it was felt that if these young children were sent away that would prevent them
32 having children and it would control their behaviour. So the approach was to segregate
33 them in places where they could be contained and looked after. It was a very custodial way
34 of looking after children. Templeton -had a lot of rules and there were kind of three

1 activities, a place loosely called school which was about kind of rote learning of usually
2 domestic tasks, work on the farm, or in the workshop. So there were lots of young people
3 there, it wasn't closed down until 1996, so it was a Government- -funded institution for
4 children with disabilities.

5 **Q.** And you talk about Mr M's expectations of what his life would be like when he went to
6 Templeton at paragraph 82. Can you just describe your understanding of what he thought
7 life would be like?

8 **A.** Well, he thought that when he went to Templeton he was told that he'd be able to attend
9 school, he was very keen to go to school, like other children, but when he got there that
10 didn't happen. He worked on the farm and in the workshop at that time too, there was very
11 gender defined activities, so the girls went off to this school-like place and the boys went
12 off to work on the farm or be in the workshop. So he was very, very disappointed with that
13 and at page 14 when he could be employed- he --was promised wages for the work that he
14 was doing on the farm. Sadly he never received those wages, so when he left Templeton at
15 19 years when he asked for all the wages that he'd asked the institution to put in one place
16 and save up for him, he, yeah, there were -- he didn't get them.

17 **Q.** And are you aware of practices of the day whether being paid wages was a reasonable
18 expectation that he had?

19 **A.** Yes, it was, although whether those wages were comparable to wages outside an institution
20 is another thing, but yes, and the institutions had various ways to manage those things that
21 often have ledgers where wages, you know, the figures around what was earned was put
22 alongside what would be spent at the institution shop, you know, so there was this ledger
23 around what you've earned and what you've spent and your balance.

24 **Q.** And so what happened to him at the age of 19?

25 **A.** In those days as young people were entering into, coming out of childhood, I suppose,
26 under the Mental Defectives Act, there were ways that employers could approach
27 Templeton to say "Look we need some labour, have you got anyone that could help us",
28 and that's what happened to Mr M. He was sent to a farm on the West Coast allegedly
29 under probation, he was still under the Act, but on probation with the hope that one day he
30 would be free from being under that Act.

31 **Q.** And he was -- you talk about him being moved to an isolated West Coast farm, but what
32 was his life skills, his life circumstances at that point would you describe it at paragraph 82,
33 the final sentence?

34 **A.** Well, he was discharged from Templeton although still under the Mental Defectives Act.

1 He had no money, he had no literacy skills and not a day of schooling. He'd also been the
2 victim of terrible physical and sexual assault during that time at Templeton.

3 **Q.** And yet he went on, if I can digress slightly from your evidence, you were talking to me
4 about what he actually went on to do with his life, which I think is quite a testimony to
5 what happened for him?

6 **A.** Yes, when he left the farm and ended up in Seaview Psychiatric Hospital on the West
7 Coast, they then assessed him, they were thinking who is this person and how can we
8 support him, and so he went through an assessment process and surprise, surprise he was
9 found not to have an intellectual disability and so they then arranged for him to get
10 employment at the hospital next door. So he began his, what would be his lifelong career
11 as a porter within hospitals. And of course those settings were very familiar to him, he
12 liked the way those places ran, there was predictability, it was certain and he went on to
13 have a very good career working hard, and he was well -respected in those workplaces.

14 **Q.** And you talk about him in 1991 leaving Hutt Hospital after a workplace injury and starting
15 a search for information. Can you describe what began for him that journey of looking for
16 his records and what happened next?

17 **A.** Well, I think with a lot of people who go into retirement, Mr M suddenly had a lot of time
18 on his hands and he began to try and make sense of his life and what had happened. He had
19 work, but interestingly enough Mr M lived a very isolated, lonely life, he didn't have many
20 friends, he never had an important relationship, he didn't have children, he didn't have
21 relations, so he had a lot of time on his hands and he started to think about the terrible
22 things that had happened to him. And he especially thought about the money that he had
23 been promised and never received. So he started to ask some questions of the Ministry of
24 Health, he started to talk with politicians of the day --to get their advice on how to get
25 redress around the things that happened to him. So that was in 1991. It wasn't until 1995
26 that those inquiries became more formal and then around '96, 1996 through Legal Aid he
27 instructed his own solicitor.

28 **Q.** And what was the solicitor able to achieve for him if anything?

29 **A.** He had one, he actually had two solicitors, so at the end of that whole legal process Mr M
30 received an apology from the State and financial compensation.

31 **Q.** But there was quite a way to go before --

32 **A.** Yes.

33 **Q.** - The start of the journey in '91 to 2003 when he got that compensation?

34 **A.** Mmm.

1 **Q.** So how did he find the ability to access records, was that a barrier to him seeking redress?

2 **A.** It was absolutely a barrier. I think in those days institutions had a more, I guess, casual
3 approach to recordkeeping than we do now, that no- -one ever thought that someone would
4 apply to see their own records. So there was a lot of information missing and a lot of
5 uncertainty about who had responsibility for his duty of care. So he approached the
6 Ministry of Health, he approached the Catholic average diocese who told him no, it's not
7 us, it's the Ladies of -- the Home of Compassion.

8 And then there was some confusion around Templeton because, of course,
9 Sunnyside Hospital was the psychiatric institution for adults, but it also administered the
10 psychopaedic setting that was Templeton. So he went off on a number of pathways and
11 was redirected to others. It was a long process to even get what records existed. He
12 developed his own file, he was very tenacious and we have his own personal file at IHC.
13 Yes, it really illustrates, you know, the false turns-- that people sent him on and his
14 tenacity, really, to get the right answers and seek redress.

15 So the second lawyer who, what- happened was that there was one claim served
16 on the Ministry of Health and then the Home of Compassion. And that was around the
17 denial of, or the neglect of Mr- M's education. At that time his legal counsel had looked
18 out and seen that many of the cases at that time based on abuse hadn't been successful, so
19 they framed up his claim around the denial and neglect of his education.

20 **Q.** And so you've talked about the difficulty of accessing records from not only the Home of
21 Compassion, which I understand from your evidence that he was sent to the diocese, there
22 was an issue about who he should complain to?

23 **A.** Yes.

24 **Q.** So my question really is, as well as the difficulty to access to records, is your perception
25 that there are barriers of knowing who to complain to, to actually start that process of
26 redress as well?

27 **A.** Absolutely. And remembering that, you know, he had some legal advice, but this was a
28 very confusing progress at that time. He was quite unwell, he was, -- he had some health
29 issues. It was a minefield for him to try and access the right information and the right
30 agency to complain to and seek redress from.

31 **Q.** And you mentioned that one of the organisations didn't even have records of him because
32 there was a different name or a different birth date or...--

33 **A.** That's right, that's right. So, he felt like a non-person who, you know, the system hadn't
34 taken notice of, yeah, so that was very hard for him.

1 **Q.** Because you talk in one of your paragraphs about a sense of feeling unworthy?

2 **A.** Yes, yes, and I think --

3 **Q.** Paragraph 84?

4 **A.** I mean as with, -- I mean when he was working he didn't disclose to anyone that his early
5 life had been in an institution. He was very embarrassed about that, felt that it would be
6 held against him. And he was very ashamed about the abuse that had been perpetrated
7 upon him and the culture of abuse that was evident in all of those settings, the Home of
8 Compassion, Templeton, the farm on the West Coast and Seaview. So he felt unworthy of
9 being treated well, and whether that was the reason he didn't enter into any intimate
10 relationships or whatever, he led a very lonely, isolated life and that was the impact on him
11 of that early childhood and the levels of abuse that he'd suffered and the way he'd been
12 treated.

13 **Q.** And when he came to seek redress and he had the assistance of the solicitors, did he also
14 seek other avenues to try and raise awareness? And I'm at paragraph 90 of your evidence,
15 paragraph 87 and then jumping to 90.

16 **A.** He, for a very reticent, shy man, he actually spoke with a lot of people and a lot of
17 politicians. He wrote to Cabinet Ministers, he wrote to anyone who listened really. He was
18 really motivated around righting the wrongs, and he wanted the State to acknowledge that,
19 so -- and hence his motivation to accessing files that governed those institutions. And he
20 came across a lot of barriers to that. So the politicians, although they appeared interested,
21 were not that helpful in helping him find a way. In 1997 he engaged a solicitor and the
22 solicitor organised a psychologist's report that confirmed the trauma that Mr M had
23 experienced as a result of the abuse, and his life at institutions.

24 **Q.** And you've already outlined the loss of opportunity and the abuse, and so with this report
25 that now sets out that abuse and the impact on Mr M through his life, he filed a statement of
26 claim with the parties being the Ministry of Health and the Home of Compassion in 1999.
27 What was the Crown's response as you've recorded it at paragraph 93?

28 **A.** Well, the Crown, they received the claim and then indicated that Mr M's allegations would
29 need to be corroborated before they could consider settling the claim. So he didn't know
30 how to do that, so at that time he started talking to J B Munro who was a former Chief
31 Executive of IHC and IHC helped him to find that evidence. And the advocacy team went
32 and spoke with people who had been in those places with him so that to confirm that what
33 he'd said was true. And of course, you know, some were reluctant, it was bringing back
34 terrible stuff, it was retriggering people into trauma, so but the IHC advocacy team did a lot

1 to satisfy the Crown and corroborate the evidence.

2 **Q.** And in terms of what IHC was able to do in terms of assisting interviewing witnesses who
3 had disabilities themselves, what barriers were you able to overcome that perhaps would be
4 harder for other people trying to seek corroborative evidence in those communities?

5 **A.** The IHC advocates at that time were very familiar with how people with intellectual
6 disability process information and the kind of supports that they needed to engage with the
7 process, presenting information in accessible formats, slowing down the process, all of
8 those things. So they were able to put the time in at great personal cost, our files reveal.
9 People volunteered to do this to gather this, to really connect with people about what had
10 happened. And they weren't easy conversations, of course, it was a piece of skilled work,
11 but they were successful and got the information from those people that was needed for
12 Mr M.

13 **Q.** And just you've mentioned legal aid. Can you just talk about your understanding that Mr M
14 initially had legal aid and then no longer had it. Can you just outline what that was about?

15 **A.** Yes, he'd just about exhausted what was available through legal aid at the time when his
16 first lawyer said that they had to move on to something else, they had other priorities.
17 Fortunately through IHC at that time we were able to connect him with a lawyer and a QC
18 who was able to file a claim, a new claim.

19 **Q.** What would the barrier have been for him if there was not that connection through the
20 IHC?

21 **A.** I hate to think, I'm not sure he would have ever been successful. And that's, you know, I
22 think it was lucky, but knowing his tenacity and- I suspect he might have found someone
23 else, but we got there quickly for him. So it worked well for him to have IHC as his friend,
24 and of course we wanted to do the very best by Mr- M knowing his background and his
25 history, and his age, you know, he was an old man at this stage.

26 **Q.** And you mentioned that he had already had a psychiatric report at the request of his own
27 lawyers, but at paragraph 96 you talk about the Crown requiring him to undergo another
28 psychiatric assessment. Can you just go through why that was necessary and if there was
29 any impact on his claim as a result of that? You're at paragraph 96.

30 **A.** I mean as his case was gathering momentum it felt a bit like the Crown was resisting
31 because in the request for yet another specialist report, which was not a psychologist but a
32 psychiatrist, that was expensive, I think \$2,000 back in the day, back in 2002. So Legal
33 Aid funding -- no, I think that -- sorry, I've just jumped a paragraph.

34 **Q.** 96?

1 A. Yes, legal aid funding was obtained to pay for that report, but it felt like yet another step in
2 this process. But the report theorised that the abuse which Mr M had claimed to have
3 suffered seemed very real and had caused him to be significantly psychologically disabled.
4 The psychiatrist said that M found it extremely distressing to describe the trauma he had
5 suffered, in particular the sexual abuse.

6 Q. And it also talked about why he hadn't come forward earlier, which is important in terms of
7 civil claims. Can you just read paragraph 98?

8 A. Yes. Also the report kind of flagged that M hadn't come forward until he had ceased
9 working as he'd invested a large part of his personal esteem in his career, and that he was
10 worried that if his colleagues knew he'd been institutionalised and abused they would lose
11 respect for him, or he would lose his job.

12 Q. And then you talk about him actually receiving redress in 2003. Can you just again read
13 that paragraph?

14 A. "In June 2003, eight years after he first requested the Crown investigate and resolve his
15 claim, after two lawyers and thousands of legal aid dollars and significant advocacy work
16 by IHC, the Crown made a financial settlement with the 74 year old M and provided him an
17 apology. M passed away three years later in 2006".

18 Q. And you've given some reflection and thought about what can be learned from Mr M's case
19 and you've set those down and the Commissioners are able to read through those. But is
20 anything that you would want to highlight of particular importance, because I'm then going
21 to ask you about what recommendations or suggestions you may have for what could be
22 done better?

23 A. Accessing justice or seeking redress for people with disabilities is complex and it's difficult.
24 Firstly, the systems themselves may be inaccessible, they may be unaffordable and actually
25 you need a lot of support to go through those processes. So the fact that, you know, we
26 have no funded advocacy for disabled people, the fact that there are very few counsellors
27 who have the expertise to work with disabled people who have been abused or suffered
28 trauma, and the fact that, you know, we - there's no- one- actually to report vulnerability to.
29 We don't have anyone, any organisation in New Zealand that has the statutory authority to
30 investigate the vulnerability of adults with disability. And I think that's a huge gap in terms
31 of safeguarding the future, we need better safeguarding mechanisms and better support for
32 people to try and get help and to resolve and seek -- problems and seek redress.

33 Q. In terms of timeliness, this took eight years; are there any suggestions you would make
34 about how that could be overcome, and particularly if there were accommodations needed

1 for people who were vulnerable and disabled?

2 A. Yes, I mean both M's case and actually IHC's case with a civil claim, it's absolutely clear
3 that there needs to be a timely response, you know, any system of redress needs to
4 guarantee a timely response to people's approaches. And I think IHC's evidence clearly
5 illustrates that taking time is another form of abuse and neglect and it's unacceptable.

6 Q. Thank you, is there anything else that you would like to say before I check if the
7 Commissioners have any questions for you in terms of what the future could or should look
8 like?

9 A. In other countries there are organisations that, like the Office of the Public Advocate that
10 has, that -can investigate vulnerability. But I think we do -- whatever system we decide
11 on for safeguarding the future we need a system that's fair and impartial, that isn't
12 expensive, and that accommodates and recognises that people need, -- that disabled people
13 have a human right to access justice and to seek redress and that a new understanding, we
14 certainly need a new understanding that denial or neglect of education and access to justice
15 rights is a further form of abuse.

16 Q. Thank you, Trish. Do the Commissioners have any questions for --

17 **CHAIR:** I think we do, I'll just ask. Commissioner Alofivae will ask you some questions.

18 **COMMISSIONER ALOFIVAE:** Thank you very much, Trish, for your fulsome evidence. I just
19 want to take you back to the claim, so 2008, 2015 you still don't have a response to the
20 preliminary hearing. So the substantive issues are still yet to be dealt with. So there was a
21 cost involved in the first getting you to the preliminary stage. Is there going to be even
22 more work involved to deal with the substantive hearing?

23 A. Undoubtedly, undoubtedly there'll be more work for a substantive hearing. Yes, so IHC
24 has, you know, instructed, you know, we've had a lot of help in this and that hasn't, you
25 know, that's a cost. But as I said previously, IHC's willing to pay that cost and will
26 continue to do so until the substantive issues are dealt with. Alternatively, if it is struck out,
27 well that's fine, we'll regroup, you know, we want ways to, you know, the human rights of
28 this group of small New Zealanders can be considered in the way that Part 1A intended.

29 Q. Just in terms of your numbers, so I think you mentioned that there were 100,000 people in
30 the... --

31 A. Yes.

32 Q. - intellectual disability group. Do you have a sense of what your numbers are today? It
33 might be an unfair question, but...- --

34 A. No, it's not. I mean I think in our original claim we talked about 86,000 to 106,000. Today

1 I think those numbers have almost doubled. The Ministry itself acknowledges that we've
2 got about 20% of New Zealand's children and young people who require additional
3 supports to learn.

4 **Q.** And do you have a sense of the break-down of perhaps the ethnicity of that group?

5 **A.** We know that there's a high correlation with Maori and Pasifika and disability. And that
6 was acknowledged by the reviewers of Tomorrow's Schools who made some excellent
7 recommendations around improving equity in New Zealand's education system. They said
8 quite categorically that it was Maori students, Pacific students and disabled students who
9 missed out in our education system, who have been left behind for far too long.

10 **Q.** Thank you, I'll leave it at that, you've answered everything else very well, thank you so
11 much.

12 **CHAIR:** Commissioner Erueti.

13 **COMMISSIONER ERUETI:** Thank you Madam Chair. Kia ora Trish. Just seeking to elaborate
14 or clarify some points for me if you could help me with that please. So first on the question
15 of what is a disability, so I know IHC is focused on intellectual disabilities, but this claim is
16 a discrimination claim related to children with disability which includes intellectual
17 disabilities, but what other types of disabilities would fall within that group?

18 **A.** Right, so we took the claim on behalf of disabled students, and within that group of
19 children there will be children with autism, children who have neuro disabilities, children
20 who are hearing or visual impaired, children who have physical disabilities, children who
21 have intellectual or learning or sensory disabilities.

22 **Q.** Thank you.

23 **A.** All of whom are in New Zealand schools.

24 **Q.** Yes, yeah, thank you very much. And you noted I think in paragraph 18 you were talking
25 about the ORRS funding. What does that actually mean, what does that stand for?

26 **A.** Well, it's the ongoing, -- used to be reviewable resourcing scheme, it's now just the
27 on-going resourcing scheme and it is for the 1% of children who receive it.

28 **Q.** That's right, so it's funding basically, is that -- from the stats, yeah.

29 **A.** It's funding.

30 **Q.** And you said there's 1%, 1 to 3% that's there for assisting with teaching aids. And the other
31 amount is apportioned according to the size of the school roll, is that right?

32 **A.** Yeah, there are two forms of funding. One is an individualised amount of funding which
33 relates to small numbers of children who need a large, you know, a lot of accommodations
34 which can be expensive. The other funding is a Special Education grant which every

1 school gets according to the decile of their school. So that funding assumes that disabilities
2 are evenly represented through every school in New Zealand, and that's not the case, we
3 have magnet schools who open their doors and do very well with the constraints on their
4 funding who include,-- actively include all children. And part of IHC's claim was around
5 that thing, to include disabled children in the community of all children we need to provide
6 reasonable accommodations. In the absence of those accommodations, that the absence
7 creates difficulties, those difficulties create disadvantage and that is discrimination.

8 **Q.** Okay. So it's not based on the number of students on the school roll with a disability, it's
9 the numbers basically within the school, is that right?

10 **A.** Each -- well, yeah, the SEG grant you're referring to is about the decile rating of the school
11 and the numbers of -- total number of students.

12 **Q.** Yeah, and the decile rating, and that's still the case today?

13 **A.** That is. I think that was the recommendation of the Tomorrow's Schools review that that
14 would change but it hasn't changed yet.

15 **Q.** Thank you. I know you said that your civil proceedings with the Human Rights Review
16 Tribunal was costly to IHC and you noted how the board of IHC nevertheless supported
17 this initiative. I just wonder -- I'm assuming that's mostly legal costs, right?

18 **A.** Yes.

19 **Q.** I'm assuming also, well I just want to know whether the prior process, the non-legal
20 process, if you like, of actually making a complaint under Part 1A to the Human Rights
21 Commission was also costly?

22 **A.** In time and effort probably. Yes, I mean Part 1A was meant to be quite accessible, wasn't
23 it, it was meant to be a process that ordinary people could go, could engage with or without
24 a lawyer to have human rights examined. I think the barriers to engaging with the, - I mean
25 our experience with the Tribunal has shown some real, has shown,--- I think what we've
26 experienced is not consistent with the intent of Part 1A and the spirit of Part 1A which was
27 around having Government policies, putting the ruler through those policies and saying are
28 these compliant with our human rights obligations. And as a result of that exercise,
29 increasing the knowledge and capacity of the public service around human rights
30 application and recognition.

31 **Q.** Yes, because it seemed like that first phase was actually-- a lot of legal arguments raised
32 about justiciability and jurisdiction that would require legal advice and therefore legal cost,
33 right?

34 **A.** Yes, and we did spend money on that, we engaged private counsel prior to the preliminary

1 proceedings. We had a spell there where we got free legal representation through the
2 Office of Human Rights proceedings, but that was a short time in its 12 year journey.

3 **Q.** I had a question following up from Commissioner Alofivae's question about the data on
4 ethnicity, but you could say gender too, about IHC's work. You refer to the survey carried
5 out by IHC in paragraph 70. Do you want time to look at that?

6 **A.** Yes please, 70?

7 **Q.** Paragraph 70, about a survey carried out recently to get a sense of the numbers with
8 disability challenges. I wonder there, and also in the data that you're asking the
9 Government to provide you with as a remedy, whether the data that's been collected is
10 looking at ethnicity with Maori and Pasifica, for example, but also issues of gender boys
11 and girls?

12 **A.** There is some data, a lot of data available which points to the fact that there's an
13 over-representation of Maori students with disability and Pacific students. There's a big
14 correlation between poverty and disability. There's also differences with particular
15 disabilities in respect of gender, for example intellectual disability there are higher rates
16 with males than with females. But I guess our point about data with the Crown was that if
17 you're going to develop a policy framework and you're going to provide some level of
18 resourcing, let's base that on sound prevalence data, internationally accepted prevalence
19 data. And that's not -- that hasn't happened yet in New Zealand.

20 **Q.** The data you're seeking is prevalence but also ethnicity of --

21 **A.** Absolutely.

22 **Q.** - disability.--

23 **A.** That is one of the things that there has been significant progress on, the Ministry's now
24 setting up a better way to capture data for all students, but more particularly for students
25 who need supports to learn. So there is a learning support register, we're working very hard
26 to ensure that the whanau own the data, you know, so that they have a say about what's
27 collected and what it's used for. So I think that's one area of significant progress.

28 Whether that will inform a better policy and resourcing framework is another
29 matter, but I think, I mean because we know with disability, you know, what you count you
30 value and what you don't count you don't value. So part of our claim was around
31 monitoring what happens to disabled children. So they matter, that they're visible and what
32 happens in schools and in the education system. So I understand that there is progress on
33 that in terms of the Ministry's plans to capture more data and to use it to ensure that there's
34 quality improvement in the whole system.

1 **Q.** Thank you for your answers, thank you, that's really helpful, thank you.

2 **CHAIR:** Most of my questions have been covered. Am I right in hearing that you say that only --
3 it's only up to about 3% of disabled children are funded with full teacher aide support in the
4 education system.

5 **A.** You are right and it's only 3% and unfortunately that 3% doesn't mean that you're fully
6 funded. I'm working with an individual case -- situation now, right now and despite this
7 young man of six and a half having all this funding, that doesn't provide him with what he
8 needs in that school, his wonderful school who are operating on a zero budget, because
9 they're poor, it doesn't provide him with what he needs and it doesn't provide the school
10 with what he needs. So that 1% doesn't mean that you can get everything you need or the
11 school has enough to do what they need to do the best by that child.

12 **Q.** It sounds as though you would not regard that as reasonable accommodation?

13 **A.** Absolutely not.

14 **Q.** Arising from that, do you think - it sounds self--evident, but you must be given a chance, is
15 3% too low, I mean are there more than 3% of the disabled children who need or deserve to
16 have teacher aide support?

17 **A.** I think we have a history of thinking that if we input enough dollars or raise the percentage
18 then we'll get the outputs that we're seeking. Actually if disabled children were included in
19 the community of all children we'd use a universal design principle that says if we get it
20 right for disabled children or Maori children we'll get it right for everyone. So let's stop
21 creating buckets of funding for those special children and creating a workforce just for
22 those special children, you know, let's look at what all schools need to do the best by all
23 children, and that's the beginning point.

24 Just to follow on from that, IHC's very worried at the moment that in 2020 we
25 have the largest investment in special schools and specialist settings than we've had for
26 decades. And what the stories that the Commission's hearing every day at the moment,
27 there's no question, and the research, you know, segregation away from public view, you
28 know, can, you know, there are --yeah, so my question is, why not invest in inclusion to
29 safeguard children from harm, abuse happens away from view. We know that in the recent
30 statistics on restraint that the majority of those incidents on restraint happened in special
31 schools.

32 So we're worried about that and there's no question that we have got large numbers
33 of children coming into schools who have really challenging behaviours. So we're saying
34 it's about understanding that child, understanding what's happening before the incident, well

1 before any notion of restraint or -- yeah, so we can do better with this. I think that the
2 investment-- the new investment in special schools is, you know, IHC and other disability
3 and human rights organisations are flagging a big concern about that. We don't want those
4 students in these new places to be the subject of another Royal Commission of Inquiry.
5 And that's not making any -- casting any aspersions on the fantastic staff in those schools
6 and the work that they're doing, but actually, you know, we've got to accept that isolated
7 activities for vulnerable population groups do not always have good outcomes.

8 **Q.** Yes, thank you, that's an interesting observation which we will note well. The second
9 question relates to the role of the Human Rights Commission and the way you perceived it
10 to be acting from the time you engaged with it in 2008. It appeared to me when you
11 referred to the fact that -- you referred to three arms of the State, the Crown Law Office,
12 Ministry of Education and the Human Rights Commission in one breath acting together. I
13 don't want to sound legally preachy, but section 19 of the Human Rights Act requires the
14 Human Rights Commission to be independent. Are you prepared to give any observations
15 about your view of the role of the Human Rights Commission in relation to this particular
16 claim that you brought?

17 **A.** Thank you for the opportunity. It wasn't until we received -- we asked for our file from the
18 Human Rights Commission in 2015 and we didn't expect to see what we saw, which was
19 evidence of lack of independence and - as I said previously, initially when we lodged the
20 complaint it was greeted with enthusiasm and then there were a very,- - there followed a
21 very,-,-- and of course they had to sort out jurisdictional issues, but what we saw in the file
22 was discussions between Human Rights Commission, Crown Law and the Ministry of
23 Education before notification but those conversations deepened and broadened after the
24 Crown had been notified. So we had major questions to this day around the impartiality
25 and independence of the Human Rights Commission. I'm not -- and that was some time
26 ago now and I'm certainly not making any comment about the present role and function and
27 the way they perform and the way they function. But certainly, their file that we requested
28 evidenced a lack of independence.

29 **Q.** To a large extent it sounded as though it was IHC against the Human Rights Commission,
30 Crown Law and Ministry of Education. Is it fair to say that?

31 **A.** Yes, yes, we felt very.. --it's quite a brave thing for IHC to do.

32 **Q.** Yes.

33 **A.** And we felt intimidated actually. We felt that we were batted away, fobbed off, that the
34 whole process was very legalistic and of course it did if we were going to go down that

1 pathway, but we didn't see a shared -- we didn't experience -- we didn't have a shared view
2 of the human rights issues at stake here. And we had every expectation that we would have
3 that from the Human Rights Commission.

4 **Q.** Yes. Thank you for that.

5 **CHAIR:** Are there any questions arising Ms Janes?

6 **MS JANES:** No thank you ma'am.

7 **CHAIR:** Ms Grant, Ms Turner, thank you very much indeed for your evidence. It's been an
8 interesting insight into yet again the State processes which claimants come up against and
9 we value your evidence and you can be assured that you've been heard and that it will form
10 part of our deliberations. So thank you very much.

11 **A.** Thank you.

12 **MS JANES:** Thank you ma'am, that concludes the evidence for the afternoon.

13 **CHAIR:** Thank you very much Ms Janes.

14 **Hearing closes with waiata and karakia mutunga Ngāti Whātua Ōrākei**

15 **REGISTRAR:** This sitting is adjourned.

16 **Hearing adjourns at 4.49 pm to Tuesday, 29 September 2020 at 10 am**

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32