ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

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

TRANSCRIPT OF PROCEEDINGS

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(Opening waiata and karakia)

CHAIR: Tēnā koutou katoa, kua huihui mai nei i tēnei rā. Welcome everybody to this fourth week of hearing on this case. I particularly welcome members of the public who happily can now attend with the Covid restrictions over and, in particular, I welcome any survivors who may be attending today. The Commissioners particularly welcome survivors attending our hearings and we ask only that you observe the tikanga of the Royal Commission. Tēnā koe, Mr Mount.

MR MOUNT: Ata mārie e te Tiamana, tēnā koutou e ngā Kōmihana. Tēnā koutou katoa.

A short procedural matter, if I may, before we start proceedings proper. You may recall on 21 September at my invitation the Commission made a section 15 non-publication order in relation to two names. We have reflected on the situation and it appears that we may have been over-cautious so far as one of the two names was concerned.

CHAIR: Yes.

MR MOUNT: In brief, in relation to Mr Chandler, the situation is he faced a number of allegations in the *White* trial in 2007-2008 and his name features through the public version of the *White* judgment in relation to those allegations. To the extent that his name features in this hearing, it doesn't go beyond the scope of what was addressed at the *White* trial in any material sense and so, for that reason, I invite the Commission to lift the order made on the 21st of September so far as the name Chandler is concerned. It may, of course, remain in place so far as the other named individuals are concerned.

CHAIR: Very well, thank you, Mr Mount. I think that's an entirely appropriate matter to deal with, so

accordingly, the order which the Commission made on the 21st of September 2020 under section 15 of the Inquiries Act is hereby lifted in relation to Mr Chandler but remains in force in relation to the other person named in that order.

MR MOUNT: As the Commission pleases, thank you very much, Madam Chair. Ms Aldred will lead the evidence of the Solicitor-General, today's witness.

CHAIR: Yes. Welcome, Ms Jagose, to the Commission's hearing.

A. Thank you.

CHAIR: Thank you, Ms Aldred, tena koe.

MS ALDRED: Tena koutou. I think the affirmation needs to be given.

UNA RUSTOM JAGOSE - AFFIRMED

QUESTIONED BY MS ALDRED

Q. Tena koe, Ms Jagose. I will be, just for the Commissioners' benefit, Ms Jagose will be talking through much of her evidence, rather than reading it, although some parts of it may be read but I will ask Ms Jagose to start from the introduction to her amended brief of evidence dated 28 February 2020. Do you have a copy of that before you?

A. I have.

Q. If you could turn to section 1, please, Ms Jagose.

A. E ngā Kōmihana,tēnā koutou, ko au te rōia mātāmua o te Karauna, Ko Una Jagose ahau. Greetings Commissioners, I am Una Jagose, I am the Solicitor-General and thank you, can I say, for your indulgence to my cold last week. I appreciate it starting today and the vestiges are still being heard, I think, you can probably still hear me.

CHAIR: I am conscious you probably haven't fully recovered. If your voice needs or you need to break, as for any other witness, please feel free, won't you? We are perfectly happy to take a short break to accommodate that.

A. Thank you. As Ms Aldred said, I anticipate speaking to my brief of evidence in the main and I hope that it's still polite to say that if you wish to talk to me in the course of that, please do. I don't mind an exchange, I welcome it in fact. There's a lot to get through and you don't want to hear my voice all day.

So, I am the Solicitor-General. I have been in that role since 2016 but, as has been evident to the inquiry, I have worked at the Crown Law Office as a lawyer since 2002. And I started first as a Crown Counsel, one of the lawyers in the office. I became a Team Leader of one of the Public Law teams and that team had responsibility, along with the Deputy Solicitor-General then and the then Solicitor-General for the management of the litigation of these historical abuse claims. And so, as you will have seen through the record, I have worked on these claims, have done for many years.

I was away from the Crown Law Office in 2015 at the GCSB [Government Communications Security Bureau] immediately prior to my current appointment.

Q. Ms Jagose, if you could be mindful of the signer, thank you, and the stenographer.

A. Aroha mai, I will try and remember to slow down.

I wanted to make the point that I think it is important that the Solicitor-General comes to this Inquiry to explain, not necessarily to defend but to explain the litigation that has gone on for some two decades, to put that into the context for the Inquiry of redress systems and options. And even though I have been involved, as I've just said, in some of the particular claims, I don't really feel myself coming

here to give evidence sort of as fact of those matters. They are all in the record and I will speak to them if questioned, of course, but it's important that the Solicitor-General is fronting this question of what was the litigation about? How did it work? And how did the Crown behave? Because the Solicitor-General's constitutional function is twofold; to be responsible for the Crown's conduct of litigation and how the Crown conducts itself in Court; and as adviser to government. In that latter role, adviser to government, the Solicitor-General is authoritative amongst the Crown as to the meaning of the law. Yes, authoritative about the meaning of the law.

My evidence is inevitably historically focused because I do want to make sure that it is clear to the Inquiry why steps were taken and what the approach has been throughout. So, when I refer to Historic Claims or historical claims, I think it is now quite clear that we are talking about civil claims filed almost always in the Wellington High Court registry by individuals who have a claim in the law of tort, so a claim for general compensatory damages and exemplary damages for breaches of the duty of care owed to them by the State when they were in State care.

Many are ongoing, although I often speak about these in the past, perhaps reflecting their historical nature.

Other witnesses have already addressed for the Commission the details of the informal settlements that occur sometimes alongside but to the side of the litigation. I might touch on that if you have more questions for me on those informal processes, I'll take you as far as I'm able.

I'm just going to turn over now on to page 2 and I want to begin by acknowledging the importance of this Commission, and in particular this redress hearing.

I acknowledge the survivors who have been instrumental in having this Royal Commission brought into life and who have had to fight for a long time to have their experiences in

State care closely and fully examined by an independent body. It is a very important time in our history as a country and I acknowledge the survivors who have brought us to here.

And as I say in my paragraph 2.2, those survivors, they are some of the country's most vulnerable people who have bravely spoken of their personal and traumatic time in State care. I understand that they will have low trust in State agencies and in the Courts and I understand that, in that context, litigation is extremely difficult and the processes can seem very harsh and cold.

And if I may, I'm just going to turn to my reply brief because it makes more sense for me to say the next paragraphs here. And I will be addressing them, not reading them, but I am starting at about 1.4 of my reply.

I said there that I have read all the survivors' briefs, I have since also watched the evidence of many of them who gave evidence at this Inquiry. I have read all of the evidence that they bring and I acknowledge the pain and the frustration that they have suffered in engaging with the Crown in seeking redress for their experiences.

And I get it that in the litigation response, which has been about ensuring that liability is properly found, that can be seen as the Crown ducking for cover. But, as I will come to, I want to set the litigation steps in the fuller context of the policy decisions that have been taken about how the litigation is to be conducted at a broad level, how the Crown went about approaching claims that didn't or couldn't settle in the courts.

But I want to make another acknowledgment too, and I've made it before in other contexts and it's important that I make it here too. I acknowledge that having the resources of the Crown at your back is an enormous privilege to anyone. I certainly understand that as a litigator and I certainly understand that as the Solicitor-General. And, as

I've said before in other forums, that privilege also confers on the Solicitor-General to discharge the roles properly acknowledging the force of the resources at the Crown.

And I think, and I hope that I can demonstrate, that over nearly 20 years working at Crown Law, I personally have understood and taken a shift in my understanding of that burden that the privilege gives me.

And so, in this context, I acknowledge that the Crown, as litigator, hasn't always been survivor-focused. And it might be that we are never as survivor-focused as survivors want us to be but, as I will go through, there have been significant shifts taken in the litigation processes. Undoubtedly, the Commission will recommend others and I am listening, we are listening. We are listening to the survivors, we listen to what this Commission records.

Ms McInroe said to the Inquiry that the Crown is a formidable opponent. That was a very polite way for her to put her frustrations with what must have seen like a machine operating against her. So, in that context, we need to put the litigation into that context.

The strategy, and that word isn't intended to be something underhand, the approach has been we were faced in the early days with law and practice that has been evolving over time but a legal framework which, generally speaking, supports the Crown as defendant in these claims.

The legal difficulties that face these claims in civil litigation shouldn't be understated. The relevance of the Accident Compensation regime [ACC], in particular, needs addressing or at least understanding. That unique context that we operate in, and have done for some 40, nearly 50 years, means that claimants who have cover from the Accident Compensation regime cannot recover general damages through the Courts. There is an absolute bar, to use that

legal phrase, to those compensatory damages being awarded by the Court.

There is, as I understand already has been addressed through Cooper Legal's evidence, the potential for a Court to award exemplary damages. Those damages are intended to punish, they are intended to punish the wrongdoer. They are generally reserved for the most egregious of cases. They are not intended to compensate.

So, that unique legal environment really starts to put into, sort of, stark opposition hundreds of claims that are filed in the civil courts for general damages for compensation on account of matters that the Crown will say, does say, are covered by the ACC [Accident Compensation Corporation] bar.

So, I just wanted to set that backdrop because I want to be clear that I will not try and defend everything that has happened in the last 20 years, even within the Crown Law Office. There are matters that I readily accept criticisms are well made and warranted.

And since this Royal Commission was established, I have been personally motivated to make sure that the Crown throughout, not just the Crown Law Office, comes to this Inquiry with that openness of view which is quite rare in litigation, to allow everything to be seen so that we can learn something. That is why the government or previous government established this Inquiry, it is to learn from what has happened. That has been my stance to my organisation, to my Chief Executive colleagues, to Ministers. And so, while I will be trying to help and explain why things have been done that way, I do not want to defend every step and I will accept criticisms as valid, and no doubt we will get to those.

The other thing I just want to point out about this appearance and why I said it's unusual to be so open, in this Inquiry the Crown has taken a very open approach to

legally privileged material and, as the Commissioners will know, legal professional privilege is a device, many hundreds of years old device, by which lawyers and their clients are able to speak to each other freely without the sort of fear that someone is looking over their shoulder to ask what they're saying, what they're talking about. It is not to hide matters. It is to make sure that decision-makers understand their powers, they understand their risks and opportunities and that they can openly, with their lawyer, explore that.

This Inquiry, as Commissioners will know, have had full inspection of the Crown's records and in that you have seen some pretty unvarnished comments going from lawyer to lawyer, sometimes expressing frustration with the litigation, sometimes saying things in a way that wouldn't be put in that way in a public record. And I don't step away from that, there are inappropriate comments in that record which we may come to. There is also that unvarnished comment that you might make to a colleague. We have been entirely open.

Just by way of procedure. When the Inquiry wants to use any of those records, then it comes back into a process to consider waiving privilege. So, privilege is something that can be put aside and matters would become public. And mostly privilege has been waived. I am aware of a few situations where that hasn't happened. So 4,000 privileged materials, privilege has been waived in. They tend to be around claims that have been resolved in some way or explaining the Crown's Litigation Strategy or advice from lawyers on issues of policy or approach at a broader level. And it might not be obvious to the public but for lawyers this is a very rare event. And so, I make the point to underline my commitment to this Inquiry and to being open to this Inquiry.

Is it worth just making a small detail point, sorry going from something big to something small. Sometimes the Inquiry has seen draft advice and I thought it might be worth just touching on that.

Draft legal advice in the Crown Law Office, the practice frequently is to provide advice in draft to our Agency colleagues who have asked for the advice, so that you make sure you understand what they've asked, so that you are getting at the right points. Sometimes exposition of things in writing leads to other questions. You just want to make sure you get it understood before you finalise the advice.

I'm not very keen on leaving advice in draft, I don't think that's right. Our office policy asks that we always finalise advice. But sometimes, and I understand there was some Ministry of Education advice in draft that was left in draft, so I have tried to understand why that is. And, as far as I can understand, the question that was asked there was, what are the risks with one Agency having a different resolution process to the other? And the advice was elevating or illuminating some of those risks. When it went back to the agencies in draft, they said, "Well, you've got our processes wrong, they're not that different". And having explored the apparent differences in process, it seemed the advice was no longer actually required. They were satisfied the processes were, broadly, the same, such that they weren't concerned there was a risk of disparity. So, the record now shows that that draft advice will not be finalised, it was no longer required.

Draft advice should be followed up by final advice. If there is a draft that you would like us to follow and to explain why it is a draft, please let me know and we will work on that.

I thought it was worth just interpolating that point about draft advice.

CHAIR: Thank you for that. Do you want to say anything about the weight that you would expect us to place on draft advice where it hasn't been finalised?

A. I'd say two things about weight. One is - sorry, not the answer, not the question you've just asked me but the approach that I take, and that the Solicitor-Generals have taken for as long as I've been in the office, is that even draft advice from Crown Law is not something you can put in the drawer and think that's just draft and I will ignore it, it should carry the weight of the office still.

But there might be times where, as I've just said, it's fundamentally misunderstood or you get something significant wrong, a good hygiene process would still be to complete it and say that and record that. No doubt we don't get that right every time.

So, to your answer then, Commissioner Chair, the weight that the Commission should put, could I invite that having asked where does this story end, that might be the better context to put weight on it. But Crown Law advice is weighty. As I have said, it is authoritative amongst government, amongst the Crown, as to what the meaning of the law is. We don't always get it right and even within our own Crown Agencies, that might get disputed and elevated through different players, ultimately the Solicitor-General's advice is authoritative.

CHAIR: Basically, the answer is the old hoary one, take it in context, once we've seen the whole of the story?

A. Yes.

CHAIR: Would that be right?

A. Yes. It's not beyond possibility, I don't mean in this particular historical abuse claims but, generally speaking, it might be that a department receives advice in draft and thinks, urgh we don't like that. I am not aware of that being an issue but that must never leave us with draft

advice, that people think, oh, I'll just pretend that didn't happen. So, to that end, I would say draft advice that is not countermanded or understood to be understanding the role points should be weighty.

CHAIR: Thank you for that.

MS ALDRED:

Q. Thank you. Ms Jagose, I think you'd finished addressing those interpolated points in your reply brief and you were around about paragraph 2.3 of your primary brief.

A. Yes.

Q. Shall I let you talk from there?

A. Is the Commissioner happy with my approach at going through my brief in this way?

CHAIR: I think it's very helpful. Just do be mindful because when you go off script, we all tend to go a bit fast, so just keep an eye.

A. Thank you. Perhaps if I pick it up really at 2.4, I can briefly deal with that point, just to say litigation is of course just one of the pieces in a reasonably complex series of responses by successive governments. It is the most formal of the processes in place in the redress area.

And it's important to understand, to reflect the Chair's comment just now, about context. The way in which the Crown, sort of the way in which these claims have been brought and the evolution of the Crown's response to them. Because up until about the early 2000s, I think in the late 1990s there were a couple of cases that you will have heard of but up until the early 2000s historical claims were few and far between and tended to come just in small numbers, you know in ones, and the relevant government department would receive it, review it, they would take advice from Crown Law about the relevant law and about the likely outcome of the Court hearing such a case. And, generally speaking, the Crown Law Office will then conduct the litigation if it was to be defended.

Taking instruction, in that sort of commonly understood approach between lawyer and client, taking instruction from a departmental Agency usually through their lawyers they would have their own internal Agency colleagues to take instruction from.

I've mentioned the Cabinet direction for the conduct of Crown legal business there, only it's a publically available document, only to mention that government since about 1950 has split its work into two concepts, if you like; its legal work, core Crown things, for which the Solicitor-General is to be the advisor and in charge of the litigation if those matters go into a Tribunal or into a Court; and non-core things. Perhaps an easy description is, what's the stuff that the Crown really needs to understand and do itself, exercise its powers, obligations under Te Tiriti, the criminal law, those sorts of core Crown things fall within the Solicitor-General's mandate.

Other things like buying 100 photocopiers, renting something, those sorts of things that are not particularly Crown, everybody does them, they are the non-core things. So, those directions that I just mentioned say if it's core, it needs to come to Crown Law. If the Department doesn't deal with it itself, it's non-core, the Department can go anywhere. Although today, these days we have a panel of providers for that other work. So anywhere.

By about 2003, it became clear that many historical claims were coming through the Court system and Cooper Legal, who you have already heard from, in those days Johnston Lawrence, another Wellington firm, were telling us that many hundreds of claims will be filed, and of course that has turned out to be true. The starting point was to think about what does this claim tell us about what happened? What's the likely liability? And then the Department can work out how do we respond to it. Do we defend it? Do we not defend it. And, I must say, that's

what happens throughout my office every time a matter is filed, that is the starting point.

But historical claims, as they started to come in large numbers, started to raise sort of significant issues and quite untested issues about liability of the Crown for which the likely outcome in Court was not clear.

So, I've already mentioned the significant feature of the legal landscape of the ACC legislation. And I don't need to go through that again, except perhaps to point out, as I say in 2.9, that that legislation has changed over time. One of the comments Mr Wiffin made was that the allegations or, sorry, the conduct that he complains of was pre-1974 but the ACC legislation, while it started in 1974, was amended in about 2005, I think, to cover certain conduct, mostly sexual crimes, pre-1974. It is a complicated regime to understand and work through but it was the first obvious legal barrier to these claims when they started to be filed.

And I just note that in the *White* litigation, the Court of Appeal was clear to say whatever you think about whether ACC is fair, the Court has to apply the law and that is the law, no compensatory damages if the Act covers it. So, there was that to start with.

And, in the early days, the bulk of the claims being filed were claims from former patients of psychiatric institutions, and so that had us dealing with the rather aged Mental Health Acts. They also had a bar against certain claims being filed and they gave a protection to people who took action in pursuance or intended pursuance of the purposes of that Act. The protection is against claims being brought against them unless the Court gave the matter leave. So, it wasn't a complete bar, in that you could get leave to continue, but you needed leave.

There was a time limit there which I've set out in 2.10, 6 months after the injury or damage ceased.

There was another hitherto unexplored aspect of the legal environment into which these claims were brought. Then further, there was the Limitation Act 1908 and 1950 and a lot has been said about Limitation Act before the Commission already. So, the defence that is available there is that a claim must be brought within two years or six years of the events complained of or the defendant may raise that as a defence.

So, already we're seeing that there is an absolute bar of ACC legislation, a sort of a bar because you could get the Court's leave and the Mental Health Act, and a defence available to defendants in the Limitation Act.

I will come a little bit later to the 2010 Limitation Act. I'm not sure to the extent that I need to address that but there's been a significant shift in relation to claims of sexual crimes in the new Limitation Act.

So, in the early 2000s, as legal advisers to the Crown, there was a lot to advise on as to whether these claims would succeed and, if so, what might that look like?

Other complications or difficult areas of law included vicarious liability. So, the liability of somebody other than the wrongdoer, an employer often, which the Crown often was or a Crown agent. So, how and when is the Crown responsible for wrongful acts done by others?

Now, can I just make the point here at 2.12, Cooper Legal correctly call out that the Court has made it plain that the Crown is vicariously liable for foster parents and I see my sentence there is unhelpfully worded as if that wasn't so, so can I correct that. Foster care liability is settled by the Courts. I think it was Ms Hill who made the point that other third party carers, that's still the question of what is the liability, is there a vicarious liability for the Crown from those other third party agencies? So, that is still not settled.

So, when the Crown conducts litigation, it must be mindful not just of the particular case but it needs to also be mindful of the precedent effect over time and also across other similar types of claims. So, to make the example clear here, and I suppose it's because the Crown touches on everything, roading, aged care, a lot of schooling although not all. So, the Crown, the regulatory models that are run through all sorts of industries, the Crown does need to be careful of the precedent effect.

So, to use an example here, as I've said, these are claims of tort, negligence, it might be historical abuse, it might be the incursion of a virus to a significant industry, the same law being applied and the Crown is mindful of how it behaves in the law that is made in one area will be applied to the other.

So, it wasn't clear from the claims themselves how the legal impediments that we could see would be overcome. And while it is required by the rules, that if your claim is out of time you should also file evidence to say why you can overcome the limitation hurdle, those claims didn't have that material in them. And so, the litigation processes began and they began with the filing of the claim. And the Crown took litigation steps in response, defending usually, not always. And the plaintiffs took steps too.

And so, I'm conscious there has been criticism of what's been called Crown tactics, and we will come to some of those particular criticisms soon. Tactics is a word that perhaps I wouldn't use. I would just say litigation steps. Both the Crown as defendant and the plaintiffs, the survivors as plaintiffs, took steps in response to what the other one does, litigation kind of works like that, that you take, oh, there's a defence, have I got an answer to the defence? And the steps follow.

And so, as I've said in my example of this, it was some time after the original cases were filed that the plaintiffs

would begin pleading International Human Rights and the New Zealand Bill of Rights Act as further breaches by the Crown that cover the same factual pleadings but were another development of bringing complex legal questions to bear. And I am not critical of that but it is just an example of the parties moving and taking steps as matters progress.

And I would say that both these claims and the significance of them has always been taken very seriously by the Crown. And the Crown has been - when I say "the Crown", I mean government. I mean successive governments. It's easy to forget that we use that word and perhaps it's not very commonly understood who is this Crown? In this context, it is each government takes the responsibility and obligations of the Crown. So, my interchange government to Crown, I mean the same thing.

So, governments have also been keen to make sure that liability, where it is, is met but also making sure that the law develops or is applied properly or develops in a way that understands New Zealand's particular environment and features and also, as you will see through the material in the papers, a significant interest in understanding and properly managing the public money that is spent both in the conduct of the litigation but also in any compensation or other payments that are made.

So, I'm going to move on to 2.18, and my brief does set this out and the records certainly show it.

Other than the claims relating to the Lake Alice Child and Adolescent Unit, which was dealt with separately and I will come to that, successive governments have taken the decision not to respond to these claims as a group. This Inquiry is the first time since about 2004 that a government has said let's look at this in a wider frame.

But rather, the response has been twofold. To build an alternative pathway or pathways, as we will come to, for claimants who want to follow an informal process or to

resolve their grievances out of Court or litigation was left open as an option.

And there was never a decision, as we have seen in other areas, for example I've said there the example being Weathertight Homes Tribunal, there has never been a decision to establish a particular Tribunal or frame for these cases. I have said litigation remained an option.

The informal processes that were developed, and you will have seen and heard I'm sure about the confidential service for former patients of psychiatric institutions, then the Confidential Listening and Assistance Service. I know you've heard from my colleagues about the alternative and informal resolution processes that are conducted.

As you'll see through the Cabinet Papers, there has always been a choice being offered between which or both processes a claimant, a survivor, takes themselves through. In the litigation, governments have always said ACC bar is to be applied. They didn't need to say that, it just is part of the law. They have also said limitation defences are to be taken. They have also said claims in Court are to be defended because if you aren't defending a claim, it should be because you accept it. If you accept a claim, you should be aiming to settle it. So, that was the - it's set out in the paperwork but that's my description of it.

The intention was to reserve or to keep that formal mechanism of litigation for those claims that couldn't settle or didn't settle, for which areas of law and fact have remained in dispute for many, many years.

And if I go right back to the beginning in the early 2000s, we didn't have the handful of cases that we do now telling us how the Courts view limitation, ACC, exemplary damages, vicarious liability. And so, it has been an evolution to this point but those two pathways have been pretty constant.

And I say at 2.20 that one of the features has been that officials have been instructed, authorised, to pursue settlements informally without standing on the barriers that would be faced in the Court. And so, claims, this has shifted actually but claims where one might be able to say in the Court ACC bars, payment of compensatory damages or the defence of limitation prevents this matter succeeding, outside of that officials have been free to pursue settlements regardless of those barriers.

CHAIR: Could I ask a question in there, sorry to interrupt. You say that in litigation the Crown, as all parties do, either defend it or, if they accept liability, then they accept it and move on.

In this context of these Historic Claims, I wonder if you could explain to us and to the world what you mean by accepting liability? Does that mean accepting that something has happened or does it mean that you accept that the defences don't apply and, therefore, liability is accepted? Do you get the drift of my question?

A. Yes, I do, thank you. What I mean by that, is to say that liability is about would a Court, if it determines the facts to be as they are alleged or if in fact there's no quibble about the facts, would that lead the Court to say, "Crown, you are liable for this amount of financial compensation"? It is not the same as saying, did it happen? And I understand that a lot of the trauma has been felt or re-felt by survivors who receive correspondence written by my lawyers, sometimes by me, that make that point about this claim will not succeed as if we were saying we don't believe you, and I have learnt that well too late in this process, that those letters written by a lawyer to a lawyer, and so talking in that way about liability, bars, won't be made out, when it is seen by the person to whom this happened that is a very harsh thing for them to see. And I have said, I think I have said somewhere in my brief, in

particularly with reference to Mr Wiffin and the settlement letter that I signed out to Sonja Cooper, I think today I would write that differently. I said that in my written brief which I think I wrote in about February. Today, having sat through, listened to the evidence, I am confident that I would write that letter differently because the point the Chair is making, this dry idea of liability that lawyers have and "this happened to me" from the survivors, it's just one of many times where the litigation process misfires in offering what the survivors need.

CHAIR: The brutality of the litigation really shines through this, Ms Jagose?

A. Absolutely it does.

COMMISSIONER ERUETI: May I also ask, when you talked about the equivalence between the Crown and government and the Crown can be many things, you talk about how the government says that the ACC bar will apply for example and so on. When you say government, are you talking essentially about Cabinet, when Cabinet meets and makes decisions?

A. I think I am meaning that when I say, you know, who is the Crown in reality? And in this context, I mean Executive Government, yes, the Cabinet making policy decisions about how it will meet these claims because you could also see the Crown of course in Parliament and the passage of legislation, all sorts of other places, but I meant Executive Government, the Cabinet, yes.

COMMISSIONER ERUETI: Thank you.

A. I was at 2.20 and I see that the idea, that the word "meritorious" has been used a lot through these Cabinet Papers and decision frameworks and I see now but I didn't see this before, that what that is has really changed over time. At the start, I think in the early Cabinet Papers, and I don't have reference to it now but no doubt that can be put in our submissions or provided to the Commission, but

at the beginning it seemed to be that that was more about, meritorious meant a claim that could surmount all of those hurdles. And looking back at those early Cabinet Papers, you know in recent days and weeks, it struck me very starkly that that's what the first Cabinet decision was; meritorious being ACC didn't cover, limitation would be overcome, mental health bar wouldn't apply if that was relevant. To today, where what is meritorious is very influenced with a moral obligation rather than a legal liability. And I don't know when precisely that happened but over time, it I think quite quickly moved from it's not just strictly about liability but this idea of settlement on a moral basis because these things happened, are more likely than not to have happened, how do we resolve it, how do we provide some, when I say "we" I don't mean the litigation, I mean the other processes, how do they work to provide some relief in redress?

MS ALDRED:

Q. Thank you, Ms Jagose. You referred I think to one of the earlier Cabinet Papers, perhaps it would be helpful if I give the Commission the reference, rather than necessarily taking you to that. But an example of this, and I think it is just an example, would be at Crown documents tab 12. This was a Cabinet Paper in 2005 and at particularly paragraph 41 which really just deals with the point that Ms Jagose has made.

I think you were at the end of 2.20.

A. Yes, thank you. I think I can turn the page because really, for the last two decades that has been the approach and it has become different and I'm just about to come to it, I think more sophisticated. But, basically, this one side informality with lower expectations of financial outcome but a range of other options that litigation won't give you, services, counselling, being heard, or formal litigation process.

So, while I think it's more sophisticated today, that's perhaps not the right word, although it is the one I have used, but we are more sophisticated or perhaps more survivor-focused now in the litigation steps than we were. We have made many changes to how we conduct litigation in these cases, intending to be sensitive to the vulnerability of the plaintiffs but at the same time, and as we must, attend to the Crown's legitimate interest in proper expenditure of public money and the appropriate use of the courts.

And I think I might have touched on this point already but the Crown doesn't act like any other litigant and here, in these claims, we see very starkly that the Crown doesn't or perhaps no longer acts like any other litigant. And our understanding has evolved over time about what particular vulnerabilities or sensitivities of the claimant group that we should be more aware of.

And I acknowledge that we have been slow to bring a survivor focus, for those I will go through, we have been doing that for over quite some years but I take the criticism that that has been a slow process.

Litigation in itself is slow to move to a survivor focus and we see that in other areas of the law that I don't need to address but we see that in the criminal law, the Courts in litigation are moving, it is slow.

So, at 2.23 of my brief I have set out, in a relatively random order, some of the changes and I know some of these have been already described to the Commission and I am almost certain I will attend to each of them as I go, so I won't spend time reading those out but, in my assessment, that is a quite formidable list of the shifts that have happened over time so that litigation can be conducted in a less, to use the Chair's word, less brutal way than might be the straight old application of rules and processes.

But, in the end, there is a contest between parties in litigation in front of a person whose role it is to decide for one or the other, and I think that is hard for particularly survivors of sexual crimes to go through. That is the hard nut at the end if we cannot agree and if the matter is going to litigation, it is hard to accept - sorry, I do accept, it is hard to see any different way in our current system for that to operate.

I won't read out my 2.23 list. And if I go over to 2.25, this is just a relatively small point in this context, I think, because I'm not sure it's particularly controversial but one of the, and you will see it through the record, the Crown has also been anxious to make sure if we are looking back at things that happened 30/50 years ago, that we remember not to bring today's eye to those allegations but think about what they were like in their context.

Now, I want to be clear to say that sexual crimes have never been acceptable and so a standards of the day answer is no answer to allegations of sexual assaults. But conduct of residential care facilities, how these kids were treated, we do want to make sure that we understand and learn from the past but in the Court system we are held to a standard that wasn't the standard of the day.

I might just make another point here, if I may, I think this is the right point to make it, about the claims themselves. The Commission will have seen, I hope, examples of Statements of Claim and there is a lot of pain in those Statements of Claim and it's clear there is a lot of pain and suffering sitting behind them. The litigation doesn't really respond to, and I am not aware of a legal basis to sue someone for some of the pain that went on. So, for these young people who were in care who didn't feel loved, who were told, and I am using the examples that I recall from the claims, were told they would never amount to anything, who were told they were stupid, who were left

without being required to go to school, who were bullied, all these painful experiences come to bear in the Statement of Claim. And, again, I say it's another example of the mismatch of the method, I suppose. I understand that those claims need to be aired and those people need to be heard and their pain needs to be heard and the Crown needs to hear it. Maybe it needs to hear it over and over until we understand it doesn't matter about liability perhaps, this might be easy for me to say. We need to feel that pain and understand it and then think what is the resolution?

CHAIR: The Crown also has, I would have thought in part of that formula, acknowledge as well?

A. Yes.

CHAIR: I think that's a big part of it, is it, would you agree with that?

A. I do agree with that, yes, and I don't mean this to sound like an excuse but the litigation model, we start with the Statement of Claim, maybe we need to think about it differently. Acknowledging is not the first thing that comes to mind. The second step is the Statement of Defence, what do we defend? What do we not defend?

CHAIR: Yes. Which brings us back to those knotty questions of liability and what is meritorious etc.?

A. Yes. I acknowledge also that so many of the young people, the people affected are Māori and that damage continues to be felt intergenerationally in all of the people connected to that person. It brings up question for the Crown in its Treaty obligation to people in care. It raises tikanga Māori, that's something that the Court system is but slowly starting to understand that tikanga Māori is a part of the common law of this country. Where does that take us? I don't know the answers yet but that is an acknowledgment that we need to make, that we do make, that Courts are now making, that there is an impact for Māori that is bigger than these individual claims as they sort of make their way

through the Court. And reaching that resolution for iwi Māori, might be a very different approach to the ones that we used to.

2.27, that is just telling you what's coming next, so I'll just skip over that, Chair.

MS ALDRED:

Q. I think the general part of your evidence is the constitutional role of the Solicitor-General and Attorney-General. You have spoken a little of that, Ms Jagose, but perhaps if you could summarise that section of your evidence?

A. Yes, I think I probably have dealt with a lot of this, explaining the advisory and the representation Courts and Tribunals role that the Solicitor-General has. It's often said this way that the Attorney-General, who is the Minister of the Crown, who is the Senior Law Officer, and the Solicitor-General, the Junior Law Officer, together they have the obligation to tell the Crown what its legal obligations or what the law means and be responsible for how it conducts itself in Court.

I mention here in the written notes, that the Solicitor-General role is seen as one that is independent because it is important that governments and decision-makers have an independent stream of advice that isn't anxious about will I keep my job if I give this advice? For that reason, the Solicitor-General isn't employed by - you know, is appointed, not employed, all sorts of processes in place to ensure that independence. And that is very important to recognise and there is nothing as obvious of that independence and how that can be a slightly lonely place when giving unpopular advice or advice that you know isn't wanted but that is what the Solicitor must do.

But there's a point I want to emphasise there, once decisions are taken by government actors that are lawful, then the Solicitor-General and other lawyers are required to

implement those lawful decisions. We're noting elected members. You know, thing elected members are the ones who make decisions within the boundary of lawfulness, that is what governments must be allowed to do.

And perhaps again I'll give an example of where we might see these things come slightly differently. When does the Solicitor-General have the final say and when does somebody else? Maybe it helps to give you this example from the Limitation Act because it is so much present in this Inquiry.

So, advice as to whether it applies, how it applies and whether, on the evidence, a person or plaintiff could overcome the Limitation Act hurdle is a matter of advice that would come from government lawyers to decision-makers.

And that Agency would be able to decide for itself, do I hold up the limitation defence or do I not? Now, that is significantly affected by the advice, I accept that. So, that's one example.

To use the same example to different effect. If the advice was to say, the Limitation Act is no barrier to this claim; either it doesn't apply or, on the evidence that we have, this plaintiff will be able to overcome that limitation defence. I would say that is not a matter for an Agency to choose otherwise. That they should, perhaps we're coming to matters of how the Crown should conduct itself properly, the Agency is not free to then say, "Well, we'll put them to the test anyway".

And then a third relevant example is the one we do have, where government says if you're in the Court process and you're going through defending the claim, use the limitation defence if it applies. So, a policy call that departmental officials, including the Solicitor-General, are instructed to take and it's a lawful decision and we take it.

So, I hope that that sort of shows the difference in where the Solicitor's role comes to play. But I've just

touched on the Attorney-General's values for the conduct of civil litigation, I think I have there in that example.

Q. Yes. I think perhaps I think we might bring that document up. So, the document reference for Trial Director is MSC1077. This is a 2013 document. And if we could call out paragraph 5, please? I think there might be some more at the bottom, no, that's all right, we've got to the end of that. If you could just explain perhaps, Ms Jagose, or talk to these values and how they fit with what we've heard about as a model litigant approach?

A. Yes, thank you. I mentioned in paragraph 3.8 that in 2011 Miriam Dean QC and David Cochrane reviewed the role of the Solicitor-General and they identified there that people referred to the model litigant obligation but there was no exposition of what that meant. And, as you have already heard in this Inquiry, right from the start those Cabinet Papers refer to the model litigant. And again, without anything in the background to say what is that, the Crown Law Office's response to that was to do this work which resulted in these 2013 values, rather than calling them a model litigant policy, they're called the Attorney-General's values. I actually think they are in large measure the same as what you would expect a model litigant policy to look like.

In New Zealand, the only other place I am aware, oh there might be two now, the Accident Compensation Corporation has a model litigant policy. It is very similar to this set of values. And, as I think the Inquiry has already seen or perhaps will see, our neighbours, the Australian Commonwealth also has a model litigant policy. And I would say in large measure they are the same. And what's at their heart, is that, it's really fair play in action actually. I think it's an expectation on the Crown to play fair, and that's not to do a disservice to summarise it in that colloquial way. But it is about recognising, as I said at

the beginning, the weight and might of the Crown, all of its resources. We are expected in litigation to act fairly and we do get held to a higher standard by the Courts and by litigants and so we should. I firmly am of the view that that is proper obligation on Crown lawyers because of the privilege that I've already mentioned that we work with and under.

We might come back to model litigant, and in fact I'm certain that we will but can I just make one point about that? I think what's been really clear in this Inquiry, is that there are vastly different views about what the model litigant should do. In fact, I do come back to it, so perhaps I will be more expansive later.

But our Courts occasionally use the same phrasing but, again, without much behind. It's like everyone knows what that means, I think is the fair play idea. But in Australia where I've just mentioned there's the Commonwealth policy, and I can provide the references at some other point of this, but at the time that policy was put into place, the Law Commission, the Law Reform Commission said "the model litigant rules require fair play but not acquiesce and government lawyers must press hard to win points and defend decisions they believe to be correct". And Justice Whitlam in the Federal Court made a similar comment, "While the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant, notwithstanding it assumes for itself the role of the model litigant".

And the Australian policy actually has this as part of its policy. It is in the Inquiry's material and so I'll just tell you that it is note 4 of that policy that says, "This obligation does not prevent the Commonwealth agencies from acting firmly and properly to protect their interests.

It doesn't preclude all legitimate steps being taken to pursue claims or testing and defending claims against them".

And I think there's a large measure of commonality between these values and those model litigant policies.

The difference, I suspect, is, well there will be different perspectives as to whether defending a case or seeking the Court's determination of a question that parties are just unable to work out for themselves is unfair, which I think is a proposition that was put to you by Cooper Legal, or is fair and in fact the proper way for parties in dispute to work out the answer.

So, we do come back, I won't jump ahead, if that's all right with the Commission, unless you want me to, into the substantive - I do come to model litigant a bit later.

COMMISSIONER ERUETI: If I may ask a quick question? In essence, it seems to be about fairness, fair treatment, perhaps that's a reflection ultimately of human rights, maybe international human rights. But I'm just wondering as the Crown, a representative of the Crown, about the Treaty and how you would see, I mean I don't see that in this code, how it would apply in this context, particularly when you are involved in cases that involve, you know, a lot of Māori survivors and historical claims but also defending claims to natural resources against iwi and hapu bringing the claims against the Crown?

A. You're right that it doesn't expressly call out that obligation but that obligation is understood by the Crown in mitigation, that it does have obligations to its Treaty partner that will sound differently depending on the context. But given that these are about how you behave, rather than the substance of what you do, I see it being borne out in places like kaupapa inquiries, just by way of example. In there, the Crown parties allow the Inquiry into all of the material in order to work out where it should own

its view, clearly making concessions about wrongdoing so parties don't have to be put to proof about those, might be another example of seeing that in action where the Crown as Treaty partner accepts it did not conduct itself to its Treaty partner, but I am thinking of Waitangi Tribunal claims here, in making appropriate concessions. That would be an example of the values in action.

COMMISSIONER ERUETI: Yep, thank you.

A. I think I can come to chapter 4.

CHAIR: Is your voice getting croaky or is it an illusion?

A. It probably is getting a little croaky.

CHAIR: Just to be humane about this, I wonder whether, we have 10 minutes to go until the morning adjournment. Would you like to take a break now?

A. I am happy to keep going for 10 minutes, thank you, Chair.

CHAIR: Are you?

A. Yes, thank you. I'm at chapter 4, I think I have covered those points but Ms Aldred will tell me if I haven't but I'll turn the page because that's more detail about the Accident Compensation Act or Acts.

I just want to bring up a point about paragraph 4.6. I think one of the points of contention in these claims, and therefore in this Inquiry, is that if the litigation process has barriers to resolution, the Crown should remove or set aside those barriers in the litigation.

My perspective on those claims, sorry on that point, is that the concessions should apply if they are to be made outside of the litigation context in ADR [Alternative Dispute Resolution] or other informal processes. But if, for example, the ACC Act is a barrier to a claim, I don't think the solution lies in sort of one-off concessions in a claim that allow, or even if this was possible, the Court to make a damages award in the face of that ACC Act because those are big, sort of, policy machinery questions that need

significant attention to if a government is going to promote legislation that does away with ACC or that enhances it or changes it in some significant way. I see this morning in the news Sir Geoffrey Palmer calling for a Royal Commission into ACC, those are big policy questions that, sort of, the lever of individual civil litigation just doesn't extend that far.

But, by contrast, the out of Court processes should be able to take a more flexible and I say generous, and I don't mean financially, I mean generous to the evidential threshold, generous to the legal barriers that might otherwise occur. Because if the law, as it is, is not providing a just result, then the matter really does need to go back through and often through to Parliament for an answer that either ringfences certain claims to be dealt with in a certain way or changes the rules for everyone.

That is the ACC question. And the limitation defence is question, as I've already said because it isn't a bar, it is a voluntary defence that may be raised and that is different to a bar. And there's a lot of criticism that the Limitation Act is a technical defence and Mr Wiffin before this Inquiry said that the Crown uses the limitation defence to hide the abuses of children. And I disagree with that. I can understand his perspective but I disagree that that is what the Limitation Act is used for.

In statutory limitation defence, they are attempting to balance competing policies. One really important policy is finality, and finality in being exposed to claims many years after the event. But, by contrast, our criminal law doesn't take that approach to historic crimes, so there is no similar barrier for criminal matters.

But they also try and balance the unfairness to a defendant who has to - who might have to defend matters long in the past and for institutional defendants like the Crown, like governments, that is particularly so because an

individual is unlikely to be still here 50 years later or 60, we might be if we're lucky, facing these claims, but the Crown is always here. And so, the reason for it is to try and balance justice being done with injustice being done.

You know, in preparation for some of these cases, the people who are said to have conducted themselves unlawfully towards the plaintiffs, they might be dead. I think I remember the Court of Appeal or maybe it was the High Court in *White* observing that the last person available to speak to the social work practices was in his late 70s and hadn't practised as a social worker for some 40 something years. So, that's why limitation tries to balance out those.

So, it isn't, well I disagree it is a technical defence. It has real substance and is doing a job.

It reflects another important principle, this is a general comment rather than - this is not a criticism of today's plaintiffs but it's trying to balance that idea that people should pursue claims with reasonable diligence. The 2010 Limitation Act makes specific different provision for abuse claims. So, it is carving out there an exception to these ideas that, you know, it's starting finally perhaps to understand that pursuing your claim of sexual crimes done against you as a child with diligence is something that makes no sense. So, it does something different and I do come to that.

So, I will come to part 5 of the brief. Again, I think I have covered that. It's just talking about those early 1990s periods and the different approach that was taken to the Lake Alice Hospital Child and Adolescent Unit unit claims.

I didn't intend, unless the Commissioners want me to, to go through part 6. I mean, I think you'll take the evidence as read and I don't intend to read that out. Is it worth calling up the difference between the Child and Adolescent Unit claims now around the Historic Claims Strategy?

CHAIR: It is certainly something that we are very interested to hear.

MS ALDRED: I wonder whether that might be addressed now before the break and then we can take the break.

CHAIR: Yes. You're talking here about the way in which the survivors of the Lake Alice Adolescent Unit were treated in terms of the Crown's response, compared with the other Historic Claims?

A. Yes.

COMMISSIONER ERUETI: Could I just sneak in a question before we get into that? There was something that was raised about the options if litigation isn't working, then the answer would be to get legislation or take the issue to Parliament.

With your brief, you also note that the government makes these decisions as the executive. It's Cabinet that says rely on the limitation defence.

So, the other option in addition to Parliament, is actually the executive, right?

A. Yes. The executive couldn't change the ACC bar. It could change how we dealt with limitation, yes.

COMMISSIONER ERUETI: Thank you.

A. So, the Lake Alice Child and Adolescent Unit claims were dealt with in a very different way. And I set out in my brief at part 6 there, that it had been setup in 1972 and the only psychiatrist there was Dr Leeks who was employed by the Hospital Board.

But the Crown took a different approach to the claims that Dr Leeks was abusing the children in that institution, just to summarise the allegations, not to downplay them, because the record itself showed that Dr Leeks and other staff were using ECT [electroconvulsive therapy] and other forms of things that are treatment as behavioural modification and/or punishment for those purposes and not for treatment.

There had been an Ombudsman Inquiry in the 1970s that identified some serious, sort of, system failures about how children and adolescents were admitted into that ward, failures about consent to treatments being given. So, when the claims - so, they did also come to the Crown's attention in the late 1990s through filed claims but, in that context, the government of the day could see readily that the record showed that the psychiatrist, Dr Leeks, was using treatment methods to punish and attempt to modify behaviour in a way that the Crown then, and still, thought was unacceptable, an unacceptable way to treat those children, and didn't put any of them to proof over that because the proof was right there in the file, in the very systems that the hospital and Dr Leeks ran.

And so, that was an approach in the early 2000s, I think, to say to some close to 100 former young people in Lake Alice, you know, come out of the litigation, we will setup a separate process, a sum of money was set aside and a retired High Court Judge, Sir Rodney Gallen, was engaged to hear those experiences and to apportion that money amongst those claimants.

That was primarily a confidential process with Sir Rodney and the survivors and through their lawyers. And there was a second round too, I say at 6.9, by the early 2000s another 60 people had come forward and a second round of process occurred. That itself led to some offshoot litigation but perhaps that's not relevant yet.

The point to make is that being able to see on the record system failure and the not covert but very overt, we now say, misuse of treatments on those kids led the Crown to be able to quickly move to a redress model that didn't require litigation at all.

And of course I understand it's a matter of enormous contention that Dr Leeks has never been prosecuted for that conduct.

MS ALDRED: I wonder whether we might take the break there?

CHAIR: Yes, I think this is an appropriate time. We will take the morning adjournment for 15 minutes.

Hearing adjourned from 11.30 a.m. until 11.45 a.m.

MS ALDRED:

Q. Ms Jagose, just before the break you were discussing the Lake Alice Child and Adolescent Unit claims and the Resolution Process that eventuated and the reasons that factor or weighed in terms of the government's decision to handle those claims in the way that it did. Do you want to go on from there?

A. Yes, thank you. If it suits the Commission, I'll move to part 8. I anticipate part 7 could be taken as read, the Waiouru claims.

CHAIR: Certainly. You can be assured we have read all the brief of evidence.

A. Just before the break, I was addressing Lake Alice and why those claims were dealt with differently. So, the obvious question is, well why not? Why did that not happen again? And even though I'm going to go through it in a slightly slow chronological through part 8, that answer is given or at least the reasons given for not doing something different in these claims does come through the Cabinet Papers that I'm going to mention. We might go to one or two.

I'm at part 8 and I've already said, I don't think I've said it quite like this but in 2004 Cabinet were saying, yes, if we can't settle meritorious claims, which we've already discussed, back in the day, meant when the legal hurdles would be overcome, Crown Law would continue to represent the Crown defendants in Court and that limitation

defences should be taken or waived on an individual basis and you might settle cases where justice demands it on its factual merits. So, this was, as I say at 8.3, about recognising the law, we didn't have the cases, even just the few we have now, the law wasn't clear. It was inevitable that there was uncertainty and risk for the Crown in that, so in 2004 that was the sort of framing.

The Cabinet was concerned or the government was concerned about consistency. They were also concerned about the flood of cases. And it was clear, and it is mentioned in the Cabinet Papers, that money is not to be paid simply because it's more efficient to do so. And, as we'll see as we go through, they're quite strong parameters to be working within.

And so, that Crown Litigation Strategy, I guess that's where that began, that framing of what the boundaries were within which officials were to work. And at that same time, the Confidential, the first Confidential Forum was established for former psychiatric patients and it was to be a confidential, a listening forum, a non-judgmental but also non-determination of rights and liabilities, a non-critical forum where patients could - you've heard this evidence, I think, already, so I don't need to go through that.

I come next to the 2005-2006 period where government had asked officials of relevant agencies to come together and review, come together and review the cases and come up with a strategy for Cabinet to consider. And, in that context, just going back to my earlier comments about the Crown Law Office and the Solicitor-General's role, we were working then with a group of other officials, health, Social Welfare, whatever it was in the day, education, Justice, a group of officials where Crown Law's role would have been advisory from what it knew already from the litigation, of course, about the law as we understood it. So, we would have worked together with our colleagues on that.

And the Cabinet Policy Committee that decided this matter set the strategy, as at the top of my page 15, claimants would be required to file claims in Court, it's subsequently changed but that was the position in 2005. Cabinet Policy Committee then noting that there is great advantage in settling meritorious claims and noting that the Crown was considering filing applications to strike out some claims. And, again, going back to my earlier conversation, I can see from a different perspective that might look like the Crown taking steps to say none of this happened. From my perspective, it is the Crown testing the legal framework to try and work out what does the law say? What are the boundaries of it? So, a strike out application was brought to test particularly the statutory immunities under the Mental Health Act, so that was part of the Cabinet noting we were going to be taking litigation steps to test the law.

CHAIR: Can I just check, we talked earlier about the meritorious claims and you mentioned there was two versions of them, basically the earlier, slightly if I can call it legalistic view.

A. Mm.

CHAIR: Where had the Crown landed in 2005? Was it still taking that frame or had it changed to the moral justice type -

A. I think it was still taking that framing.

CHAIR: The legal framing?

A. Yes.

CHAIR: Meritorious, in the sense there were legal bars?

A. Yes.

CHAIR: That could render them unmeritorious?

A. The reason I say that is in 8.8 I have set it out in a slightly more granular form. The Crown strategy was acting as a model litigant, meeting liability if established but not paying out public money without good cause. And I think

there we're seeing still some of that, to use your words, that legalistic approach to meritorious. I suspect about now it starts to sort of fade but I think at that point it was still that way.

Also relevant at that time, 2005-2006, the majority of claims had been the Psychiatric Hospital claims and we were starting to receive a large number of child welfare claims at that mid-2000s.

And further at 8.9, the documents showing that the first step would be to require the plaintiff to particularise their claim. It might be worth noting that as hundreds of claims were filed, they had a lot of similarities to them, in terms of the templated Statement of Claim that was being used and so part of this was to say we need to get to the individual's claim, the well particularised is not just being difficult, it's really trying to understand what does that particular plaintiff say? And then officials, counsel, that's lawyers and relevant officials, were to look individually to see what do we think of those claims. And to answer the Chair's comment or question, there I note that if the bar against damages in the ACC legislation applied, the Crown wouldn't offer settlement for compensatory damages even if the claim known fact could be substantiated. Also noting that Crown Law had recommended not paying exemplary damages where the liability was vicarious, so remembering they were about punishing the wrongdoer if there was sort of a more distant connection to the Crown that they weren't the actual wrongdoer, the position was exemplary damages shouldn't be paid.

But also, as I cover there in 8.10, agencies were directed to start making, also to consider making settlement offers directly where there was that prospect of liability, coming to that point again. And still the thinking is global settlements weren't considered to be something to pursue because individual testing of the evidence was still

required but, and I'll just check the date, we're still in 2005 here where government was still saying settle these matters where that is possible, although, and this is a direct quote from that paper, "Settlements would not be proposed merely because it is more economic to settle than to defend a case. To do so would run the risk of encouraging non-meritorious claims against the Crown".

You can see there the anxiety that these need testing and that, this is a criticism I'm hearing of the Crown, that it would be cheaper to pay money to people than to defend the claims. And there's the opposite side of that being reflected, the anxiety that that approach would encourage more claims, perhaps ones that didn't have the same basis in fact. That was the anxiety that's being expressed there.

You can see also in that paragraph 8.11, that Cabinet is keen that agencies work in one Crown Law to try and make sure that these claims are dealt with in a consistent way. Another sort of broad principle. My own summary, no I think this comes from the Cabinet Paper, the reasoning being about the sensible use of public money and efficiency but also making sure that the processes are fair to those who are accused and not wanting the Crown to be a soft target. So, balancing a few things in the mix of setting that strategy.

MS ALDRED:

Q. Just to clarify, that Cabinet Paper is the paper referred to at footnote 40 dated 11 May 2005.

A. At that time, 2005, the decision was taken that the Law Commission should have a look into what alternatives or complementary processes should be or could be implemented. With the benefit of hindsight, that would have been a very helpful thing to have had done. That was deferred by decision in 2005, so that never got off the ground, to my reckoning or remembering or researching.

Q. You then go on to talk about the establishment of the Confidential Listening and Advisory Service and direction to

review the Crown Litigation Strategy from 2007, Ms Jagose. If you could address that part of your evidence.

A. At 8.14 and 8.15, I think it's just setting that context that we were a bit stuck, I think, as between Cooper Legal for the main part representing all the plaintiffs and the Crown and this idea that we needed to have - some cases needed to go through the Court. It's probably one of the first areas of real disagreement between the lawyers about whether the claims should all sit still in the Court while one or two get taken right to the end or whether they all needed to be advanced. And I do come back to that theme because it does reflect in some of the decisions taken and criticised by Cooper Legal, and fairly criticised, about the steps that were taken in the litigation. I will just flag that and I'll come back to it.

You will know that by June 2007, Cabinet set up the Confidential Listening and Assistance Service and I understand - well I'm not certain, I think that you will have heard from Judge Henwood.

CHAIR: We did.

A. Either you have or will, right yes. So, I don't need to say anything more about that, other than that was when it was established. I think I'm trying to point out the theme that government did keep trying to think with what might - what alternatives might there be that sit alongside the litigation.

So, I come to part 9. In 2008, a renewed and further strategy was adopted by the Cabinet with a request that the Ministry of Justice and the Crown Law Office keep that under review and come back in 2010 to Cabinet with the strategy.

And while it has similarities to the past, it was that grievances could be now dealt with either through the Confidential Listening and Assistance Service or direct negotiation with an Agency. So, removing the requirement to have filed in Court or filing claims in Court. So, that

sort of three-pronged approach was that agencies should be now working to resolve grievances early and directly with the person, if that is practicable.

I think the Commission has already heard evidence from other Crown witnesses about the many hundreds of claimants who have come direct to agencies and settled their grievances without litigation and in many cases, although not all, without lawyers.

So, that was the first tranche. The second settlement was to be considered for meritorious claims, and again I think we're talking there about a more formal - there is a claim that needs to be settled but also, and you'll see reference there to meritorious claims being let's put aside defences and investigate the allegations to some standard but not a particularly high one, certainly not absolute proof.

And then third, if the matter doesn't resolve or settle and we are proceeding to a Court hearing, then defend it and conduct yourself according to the Cabinet's Litigation Strategy.

All the pieces of the fast few years are starting to come together, with that strategy still being that ACC, Mental Health Act, Limitation Act defences are all to be used where they are properly used.

MS ALDRED:

Q. Just to interpolate there, Ms Jagose, when you say those defences were to be used according to the 2008 strategy where they could properly be employed, you are referring there to within the litigation process or the proceedings; is that correct?

A. In the Court, yes, in the litigation. Not in the informal processes, yes.

Q. I think you possibly covered off paragraph 9.3 of your evidence and then at 9.4 you talk about 416 claims having been filed in the High Court in Wellington as at the end of

December 2007 and break those down by Agency, noting that the bulk of the claims at that point or over nearly half were against the former Crown Health Financing Agency?

A. Mm.

Q. And noting the potential role for the Ministry of Education at paragraph 9.5. If you could perhaps continue from 9.6?

A. Thank you. At 9.6, the point that we finished just before the break comes up about, well, why aren't we or what is there to be seen that we might think in a more global way about these claims? The advice that was given to Cabinet, which is referenced in my footnotes, that there were individual incidents of abuses being found, so those allegations were true and were believed but that officials didn't think or didn't see any evidence of systemic abuses within the two major areas, psychiatric care or child welfare.

This theme comes back about what is this idea of systemic versus individual abuses having occurred. And while it comes back in themes, I must say I'm not certain that anyone has ever really grappled with this question about what, if it was systemic, what would that look like? And maybe it's because we're in the litigation frame in the main, and that's part of my own, you know, perhaps tunnel vision, that's certainly been my experience of these claims in the litigation, that claims that put evidence of individual abuses aren't evidence of systemic, what was being done to look from the other end. And I'll come to the things that were done but I do wonder whether we have properly, kind of, grappled with that question about what would we need to have changed in order to have stopped what happened, and was that, rather than starting with what happened because we started the litigation, what could have been done, what should have been in place to stop what happened happening, and does that reveal a systemic failure?

It's easy perhaps with hindsight -

CHAIR: I am glad you raised that. This is something that exercised us over the last weeks as no doubt you followed the evidence.

I was interested, and this I am sure will come up again but just for the moment, you said the advice that went to Cabinet was there was no evidence of systemic abuse and that that advice came from the Department or I think - the Department or Ministry or something; is that right? Did it come from the officials who were in the Departments, do you remember that?

A. I think I'm right about that. Perhaps we might look at that paper.

CHAIR: I don't want to get us bogged down, and it might be something we look at later, but I think you're right in terms of nobody being able to properly define it and the difficulty of when you are in a litigious situation of looking at just the case and not being able to take a wider view, a view that I think all the Commissioners believe the officials in the Department were better placed to get a proper overview, quite frankly.

A. And I know there have been some examinations of some institutions. Like, I recall, although I don't recall much, I confess, but could find out, that there was a review about Kohitere, perhaps with some of that thinking. I wasn't involved and I don't know particularly, although it led to a number of claims being settled in relatively, well, I would say swift order but people might disagree with that and fair enough but it did lead to several claims being settled in a row.

And there was a period in the Cabinet Paper, I think about 2009, where it references that the Ministry of Social Development had done some work in looking at that and didn't believe there was a systemic failure. One has to wonder

whether we even understood what we meant when it was said that there wasn't a systemic failure.

CHAIR: I think we can all agree with that, that the evidence to dates demonstrates that quite adequately but thank you for being frank about it.

MS ALDRED:

Q. Thank you. So, I think you had just dealt with paragraph 9.6(a) and we're coming on to (b).

A. Yes. And this is, I think I've touched on it but at 9.6(b) it sets it out more clearly that a real anxiety or perspective of the Crown was that the cost and delay of running these claims through the litigation framework was going to be significant and that the way the claims, the nature of the claims, again this individualised approach to the claims, was requiring a lot of detailed investigation which was contributing to the cost and the delay.

I see that my very next paragraph addresses the point that I was trying to recall, sorry, Chair. In answer to your question, that's a reference to the Ministry's briefing in December 2009 and prepared in consultation with a range of agencies, including Crown Law, noting that Cabinet in 2004 had said there was no evidence of any systemic failure or systemic abuses. In the 2009 briefing saying this is still the case. It was so often put in stark contrast to the Lake Alice Child and Adolescent Unit where we could see that the system that was in place was the thing that was wrong, not aberrant people or people conducting themselves unlawfully or not as part of their official kind of practice. And the criticism might well be levelled that that's a pretty basic perspective on systemic versus not systemic but right through all of this material, officials were telling and Ministers were hearing that there is no basis that we can see. And I've thought about it of course particularly since this Inquiry has been asking these questions, and it seems to me that the litigation path is

not an excuse, this is just a comment which led us to not thinking about it in that way. It led us to thinking about it in an individualised way but there was that paper that was sent, done, that briefing which is in the material.

Q. Perhaps I can give the reference to that. Perhaps we will bring it up, it's at Crown tab 47 and I'd like paragraph - so, this is the paper you are referring to, Ms Jagose?

A. Yes.

Q. Dated 15 December 2009 and if I could just take you, I think, to paragraphs 26 and 27.

A. Is it going to come up on the screen?

Q. I think it will come up. We just need to have those two paragraphs pulled up. So, under the heading "Public Inquiry". Just to bring that up because it simply records, I think, what you just mentioned?

A. Mm.

Q. Particularly at 27.

A. Right, yes, "MSD [Ministry of Social Development] has recently received results of a year-long research project into what appears to have been the roughest child welfare residence based on claims received". CHFA [Crown Health Financing Agency] had done the same and I don't recall now what those documents say or whether the Inquiry even has them but it led to the advice that we were advising that there wasn't a systemic problem here.

Q. Thank you.

COMMISSIONER ERUETI: Can I clarify too? This is a briefing to a Cabinet Subcommittee, a Policy Committee, it is a meeting of Ministers and they make a decision at this meeting? They agree there's no evidence of systemic abuse? I am trying to get a sense of what is happening after the briefing. Who is involved in the briefing and what happens at that briefing?

A. So, that Policy Committee would probably have noted that was officials' advice, rather than having come to it themselves and agreed it. But those policy subcommittees, as you say, of Cabinet, groupings of Cabinet Ministers with responsibilities in the areas the papers were about, would expect to have seen at that meeting the Ministers of Social Welfare, perhaps Education, Health, I'm not certain now. They would have a more in-depth discussion and say, I suspect, note that that is the advice that they are receiving. And then just in a routine way, those matters come before the full Cabinet again but it's usually dealt with in more detail at the subcommittee but I doubt very much the record will tell us that Ministers would have actively come to their own conclusion about that but I mean they could, they would be acting on advice, Mm.

MS ALDRED:

Q. At 9.8 and 9.9, you deal with the Gallen report and I think that's already been dealt with by other witnesses, so we might have that taken as read. The next section of your evidence deals with the further development of Crown Litigation Strategy and perhaps you can - it simply refers to an update in December 2009.

CHAIR: I think that's what we've just been looking at, isn't it?

A. That paper, do you mean, Chair? I wonder if that was the same. No, I think that was different.

CHAIR: It was one that was put up.

MS ALDRED: It was the same paper, yes.

A. Okay. I'm just wanting to point out a different point there, which is that the strategy continued as before but something new that went into the mix was that we were uncovering or discovering that the Legal Aid, the potential or perhaps the Legal Aid debt that people might be left with if they settled claims, we realised it was starting to be either a barrier or potential barrier to settling, and so we

got the authority from the Cabinet to also be able to find a way to forgive those Legal Aid debts of the plaintiff, so that they could, if they wished, exit the litigation without that debt.

Q. So, the next section is around the Limitation Act reform and the new Act 2010 which came into force on 1 January 2011. While you've already dealt with limitation to some extent, would you perhaps just like to touch on the reforms?

A. Yes. In some measure, I think this was a part of the value of Sir Rodney's review that has been mentioned already on this page, that he was thoughtful about whether sexual abuse, the tort action from sexual abuse would be viewed in the same way for limitation purposes than other things because, of course, until about now in these cases, limitation exceptions had really developed up in a very different area of torts, in latent building defects, and the idea of reasonable discoverability, in that you were unable to reasonably discover the defect until, in the building context, a crack formed in a wall or water suddenly poured into your house, that was how the law had developed about reasonable discoverability. Obviously, the application of that to sexual crimes on children was not comparable. Anyway, that was Sir Rodney's thoughtful comment in that report and, in part, that did lead to the policy work that was done about the Limitation Act 2010, in that it continues a lot of the Limitation Act provisions and modernises them but it particularly deals with the ability for the Court to grant relief in relation to claims that include sexual or non-sexual, physical abuse of minors, even though a limitation defence might be available. So, it takes a different approach. An approach that we perhaps better now understand about sexual assaults particularly on children but not on sexual assaults, about why people don't come forward, how children are disabled, how people might be disabled from bringing their claim and all those policy

reasons I mentioned about prosecuting your claim with due diligence, this is recognising that in a sexual crimes area something different needed to be done and it has been. Although in these claims they still - sorry, I think Ms Aldred has said it came into force on 1 January 2011, so we have a long tail of Limitation Act 1950 cases.

So, the 2010 Act would allow the Crown defendant to raise the limitation as it does now but what it gives the Court is that ability to say even though you might make out the defence, for these reasons we set it aside.

Q. So, that brings us then to section 10 of your evidence which deals with the 2011 review of the Crown Litigation Strategy and if you would like just to speak briefly to that part, please.

A. And really, it's to continue operate a strategy, officials will attempt to settle where there's a good evidential basis to do so, even if there were legal barriers in the way, such as limitation or ACC. But, again, claims won't be settled simply because it's more economic to do so and claims that can't be settled will be defended in Court. That is the framing that Cabinet agreed should continue to be the approach.

There was, and I think Mr Knight has covered this off and I don't need to mention this in much detail, at 10.2 there was a global settlement offer agreed to by Cabinet for claims against the Crown Health Funding Agency in relation to Psychiatric Hospital claims. So, there had been a negotiation which the CHFA, as it gets called, CHFA, went to Cabinet for approval where they established a set of claims where a sum of money was available, CHFA would pay any Legal Aid debt, the person was able to exit their litigation and settle, pretty modest financial contributions which were focused on how does that contribution help the person achieve wellness. I think you've heard evidence of that different approach that settled, sort of, a rump of

psychiatric claims that were sitting in the courts that weren't really advancing.

Q. I think at 10.3, that refers to the Crown position again continuing to be that a Lake Alice type approach was inappropriate. Is it fair to say that was continued for the reasons that you've just discussed with the Commissioners?

A. Yes.

Q. In relation to advice about systemic versus individual abuse? And perhaps if we turn to paragraph 10.4?

A. So, that 2011 review also brought up a new, sort of, feature of claims that alleged breach of the New Zealand Bill of Rights Act in relation to the right not to be subjected to torture or cruel treatment, and while that was noting that the certain conduct to which section 9 applies is a high threshold, there will be claimants for whom the sexual abuse allegations that they make deserve resolution, including acknowledgments or apologies and compensation. So, that is a slightly new feature of the claims and Cabinet was being advised of them and that there will be meritorious claims there.

But, again, I think feeding into this issue of systemicness, noting at 10.5 the paper also addressed there are claims that have this moral element, I think this goes back to an earlier exchange with the Chair. Even if we would say they are legally meritorious, there's this new exposure of a moral concern. Even so, difficulties are being pointed up that assessing credibility is difficult, that there is not always necessarily a link to what happened to adverse life outcomes and some of the allegations, I mean this is more reflecting of the things that were filed in the Statements of Claim, are not actionable. There isn't a cause of action behind them, reflecting that some of the claims, the conditions that these young children were living in were harsh and unloving environments is not a, there is no cause of action, it's hard to put into a legal frame,

although of course as people officials are saying this deserves resolution if we can get there.

So, I think really, the theme I think I need to draw out is that it changed, the Crown's Litigation Strategy changed, but not enormously to offer informal settlements with modest applications of some sort of financial payment and/or litigation, smattered, I suppose, with some attempts at some different fora like Confidential Listening and the former Confidential Forum.

COMMISSIONER ERUETI: Can I ask a quick question, Ms Aldred? Ms Jagose, if there was a finding of systemic abuse at this time, what were the options? So, one would have been this global broadbrush settlement or an Inquiry?

A. Mm.

COMMISSIONER ERUETI: What were the options on the table?

A. I think in the papers, officials are saying there's no need to do anything different like Lake Alice, global, or an Inquiry. And I don't recall there being other alternatives that were being said not to be necessary but I guess thinking for myself in answer to your question, it could be that there were discrete inquiries, rather than a significantly large Inquiry, there could be inquiries established into specific times, practices, institutions, a very different approach to litigation. That's one option.

Or, as you've already said, the Lake Alice type model of a sum of money, an independent person. Actually, just answering that question reminds me that at one stage early on, it would have been the early 2000s, and it is in the Cabinet Papers, that Cabinet did instruct Crown Law and other officials to try and negotiate what an alternative model might look like, where an independent person would be asked to assess a set of facts and allegations and have - so, I guess it's still a global but it's more testing

of - it was still a testing of the evidence and coming to a distribution of money, rather than in Lake Alice it was accepted, the allegations were accepted, there was no testing of it, so that was a slight variant on the Lake Alice that might have been possible.

COMMISSIONER ERUETI: Yes, yes. So, if there was evidence of say systemic abuse within MSD as an Agency, you would think, Ms Jagose, it would follow that rather than a global settlement process like Lake Alice, that you might go further and actually have a root and branch inquiry into what led to the systemic abuse?

A. You might, yes. I mean, slightly out of my sphere of knowledge, I confess, but just answering that question, a process that perhaps when you're a lawyer everything looks like litigation and when you're facing litigation clearly everything looks like litigation, but a different process which allowed for hearing and feeling the pain and responding to it. It might be none of those that you and I discussed in that exchange, it might be something quite unique and powerful, where the right person gives the right acknowledgment and apology and actually is able to be heard by the survivors. I don't know what that looks like. That's quite a different -

CHAIR: I think that's one of our tasks, is to come up with some answer to that very question.

MS ALDRED:

Q. The next subject is the 2019 update to the Crown Litigation Strategy and the formulation of the relatively new Crown Resolution Strategy. And I think I'll have that brought up, please, it's Crown tab 95. Although I think, Ms Jagose, you summarise that at 11.2 of your evidence anyway but if the principles at paragraph 3 could be brought up, please? Perhaps if you could speak to paragraph 11.2 of your evidence and the principles set out?

A. This is the latest version of the strategy now being reframed as a Resolution Strategy. A small point perhaps but a significant one, thinking about how do we get this into the right framing for resolution, even though it looks a lot - perhaps some of its elements continue to look a lot like the Litigation Strategy, but it is reflecting the most recent approach to how do we resolve these claims?

And you'll see there -

Q. Excuse me, sorry I need to interrupt there. Sorry, I brought up the wrong paragraph. These are the previous or the current Crown Litigation Strategy Principles. If we could bring up, please, the next page, and the principles at paragraph 9? These are the new Crown Resolution Strategy Principles?

A. Yes, well, I won't read those out, but I think it is reflecting some similarities and some differences. Meritorious claims is there mentioned again, but in the context of that Resolution Strategy is much more focused on resolving matters that need resolution, rather than being too legalistic about it.

Principle 3, yes, these will be full and final settlements but, actually, if you have settled with the Crown and something new comes back, the Crown will think about that again. So, again, being more expansive and open to these claims or grievances.

Principle 4, a reflection of actually the Crown's civil litigation values. Matters that aren't in dispute are not to be disputed.

And then the final point about how the Crown will go about both the dispute resolution and the litigation, about being guided by some principles that we haven't seen - in the previous Litigation Strategy we hadn't seen this quite so open expression of the principles with which the Crown wants to come towards these claimants to try and resolve them in a really meaningful way.

So, the Litigation Strategy is still quite new. It does have some, I think, significant pointers that the Crown is still trying to openly - come openly to these questions and resolve disputes, but I have to say, but at the points at which the matters are litigated in Court, we are back to a system that pits one party against another and somebody else decides. It continues to be the method by which irresolvable matters are resolved and that does require testing of evidence where it's disputed, and it does require difficult, and I've heard it from the survivors, the difficult process of reliving and returning and publicly addressing those matters in a public and pretty cold and impersonal forum. So, I don't want to be - I'm not being smart about it but that Resolution Strategy, genuine as it is, at some point some of the old problems or the problems are still there.

Q. At 11.4 and 11.5, you deal with - well, 11.4 you deal with some of the additional expectations claimants can have of the Crown and litigation and deal with matters about, for example, communication and witness screens and so on. I think we will have that taken as read and also paragraph 11.5. But you specifically mention at 11.6 a particular direction in the Cabinet recommendations which was to direct officials to commence consideration of potential options for the central assessment or review of Historic Claims.

A. Mm.

Q. And also, Limitation Act reform. But just coming to the first of those, would you be able to comment or provide some information by way of update in that regard?

A. For the central assessment or review of claims, I am not able to update that, I'm afraid.

Q. Oh, in relation to limitation?

A. The Limitation Act, I do know that policy work is being undertaken in the Ministry of Justice, thinking about well

what do these - is this a particular class of claims for which the reform of the Limitation Act 2010 wasn't enough and do we need to think further about that?

I'm not aware that that is - I know that work is underway. I am not aware of where that is at. Sorry, I can't say more than that. I know it isn't yet at a point of solutions or conclusions.

Q. Thank you. The next section of your evidence relates to engagement with claimants and, in particular, those represented by Cooper Legal.

A. Mm.

Q. And at 12.1, you talk about the communications being generally through lawyers and the formality of the communications. And I think you've already dealt with that?

A. Yes, I did touch on that. I wouldn't mind just making one point about that paragraph though because I've touched on and acknowledged that the lawyer to lawyer communication can seem very dry and my own sort of reflection on my own self, that perhaps today I wouldn't write the sort of correspondence that I did that you have seen. Mr Wiffin's settlement offer to Cooper Legal is one of those where I hope today I would write that thinking more about the individual who it was about. I've already addressed that.

But one thing I do want to point out is that occasionally I was at one of the meetings that the individual claimant would have with MSD officials and I think in all cases, I think I might have been to three such meetings, the MSD officials included Mr Garth Young who I know you've heard from and those face-to-face engagements, it was not really the time for the lawyers to be speaking about matters of law but I was enormously impressed by the compassion that was shown to those individuals from officials in hearing of their experiences and of trying to think of some ways within the framing of the instructions that we had of how to conduct the litigation, how to meet those needs, accepting

entirely at least in the evidence that's come to those meetings those needs have not been met. I did just want to draw attention to some of those engagements that weren't in the correspondence, where a person to person, particularly with Mr Young, enormously professional and compassionate engagements. It's not common for lawyers to be at those meetings and in the early days, as I say, I went to a few.

The other thing I perhaps would like to draw out of that paragraph, is something slightly unformed about how in the correspondence between lawyers even things that are intended to be thoughtful and open can be seen as manipulative or unfair or - I was really struck by something Mr Wiffin said actually to you, where he said it's just a game to the lawyers, and it isn't a game but I understand his perspective that we write to each other about stuff that's not about us, it's about him, and so I understand his perspective. I want to say to him it isn't a game, that we do take it seriously, we do take our obligations seriously. And I would say today for the last 10 years, more than ever take him and other individuals' needs seriously, but I can see his perspective. I also don't know the answer to that, but I can understand his perspective.

Q. Thank you. You then turn to the agreement that we've heard about from some other agencies as well, about stopping the running of time under limitation legislation that was entered into between MSD initially and Cooper Legal.

A. Mm.

Q. Perhaps if you could just talk through from about paragraph 12.3 of your evidence?

A. Yes. And I know the Inquiry has heard a lot about this idea that we can stop the clock running. As a matter of law, the clock, if it's running, stops running when you file a claim. And so, it was actually something of an innovation that the lawyers were able to work out a way. Actually, back in the day we weren't really even sure it was something that would

work but we thought let's try. Let's stop trying to require you, forcing you to file everything in the Court. If we can agree that you will come in to engage with the informal process, we'll agree to informally stop the clock. So, as I say, it was quite an innovative approach to it.

And I was interested in looking back at this because I was involved in that early engagement with Ms Cooper in particular, getting agreement to that first stop the clock agreement. And when you look at that now, it is very modest and simple, possibly wrongly so, because the complexity that emerges, not only understanding if the clock has been stopped, how does it start? What does it mean? How do we agree with each other about some of the - some of the complexity was not in the original agreement and is being worked on actually literally right now by Cooper Legal and Crown lawyers to try and cover all the complexities that occur, not just with when did it start, when does it stop, but also how do different agencies' systems kind of work in with that.

And I acknowledge that there has been a very long delay and an unacceptably long delay, although I do say that officials and Cooper Legal, I'm not suggesting otherwise, have actually been working all that time to try and work this out. That has not been fast and it should have been faster.

It is complex. It will be retrospective, but whatever result is come to, there is a commitment to make sure that it will be applied to people looking back so that no-one is disadvantaged by the delay. So, if you filed your claim or you didn't file your claim in 2015 but you could take advantage of an agreement we reach tomorrow, we will let that happen. So, yes, there's a delay but we're trying to ameliorate the effect of that delay by making sure no-one is at a disadvantage.

It has become contentious, and I heard that contention coming through with this Inquiry with Cooper Legal's evidence, and I have spoken to my own colleagues and looked at the file, of course we're not involved in detail, responsible for it, not involved in the details, I've gone to look at it in order to give this evidence. The question I think of contention, well the contention was over the time it's taken, but also about why is this a Crown policy but it doesn't seem to apply to all of the Crown? I think it's perhaps worth filling out here what that Crown policy means. I think the question was put, is, was if this is a Crown policy, as the heading on it now is in draft, why are all the Crown Agencies not in it, like Police and Corrections and - I think the answer to that is not all Crown Agencies have Alternative Dispute Resolution processes for historic abuse claims. That is what it's trying to get at. It is trying to not simply say the Crown will stop the clock in limitation matters for everybody, leaky homes or what have you, it is actually trying to pin this policy to those agencies where there is a Historic Claims Alternative Dispute Resolution process. That is the first answer why it isn't just applying to every Agency. But also, some of those agencies are at slightly different points in the process and I think you heard that Education is one of the difficult ones to fit in because of the different relationship in that Agency between Boards of Trustees and their liabilities and the Ministry itself. So, again it is a complexity that we're trying to work through. I'm happy to say that in the last week there has been further engagement in person between Cooper Legal and lawyers from Crown Law who are making progress towards resolving some of those complexities.

So, I think, we will get there, we will aim to make sure nobody is disadvantaged by the time it's taken, but a lot of the time is explicable by the complexity.

The other question that was asked and a bit of time spent on, why is this a policy and not an agreement? I am not sure that I understand particularly the criticism, but I would say whether it is an agreement or a policy from the Crown, it's the same thing. I think the criticism was we can enforce an agreement but not a policy; I don't agree with that. I think the extent that you could enforce an agreement, you should also be able to say, "Well Crown, you said you would do this, now you must do it". I am not sure there's much magic in the difference between policy and agreement, except that the agencies did want to make sure that people that weren't represented by Cooper Legal could take advantage of the policy. So, it needed, from our perspective, to expand from an agreement with Cooper Legal to a policy that will be applied to all who come through this process.

CHAIR: Maybe it's because fingers were earlier burnt in judicial review proceedings over policies and the reviewability? I'm just speculating here.

A. Yes, that might well be so, that the two path process was changed with the Court finding that was open to change the policy, yes, that's right. It may be, except that I would hope a Court would still say if you said you would do something and someone relied on that to their detriment in this litigation, you can't renege on it.

CHAIR: We would all hope a Court would say that.

A. Well I would hope the Crown wouldn't put the Court to that. That actually the Crown would say we can't renege on this, we've said something that people have shifted in reliance on it, we can't go backwards.

MS ALDRED:

Q. So, the next part of your evidence is in relation to costs and Legal Services Agency funding and if you could perhaps just speak to the next couple of paragraphs of your evidence relating to that?

A. Yes, and this aspect of this whole issue might take us over into the afternoon session too because there's quite a lot packed into this question or this issue.

Maybe I could summarise by saying that I see three ways that the Crown has engaged with the question of funding.

The first one is set out at 12.6, which is that in an early judgment, it's not terrifically early, I see it's 2008, but it was one of the early claims, a Psychiatric Hospital claim, Justice Gendall made this observation, "The Legal Services Agency ought to be accountable for funding litigation of dubious merit either on the facts or by reason of the Limitation Act provisions", I think it's been obvious in my narrative that the Crown did view these claims as being of dubious legal merit because of all these barriers in the way. So, that judgment was referred by the Crown Law Office to the Legal Services Agency for them to see that the Court was making that observation.

And I understand, although I wasn't involved in this, but that that was a trigger for the Legal Services Agency to start reviewing its allocations of funding. And I know you've heard from the Agency already.

That's the first way that the Crown involved itself in funding, and I mean that in a very broad level.

The second way was in about 2009, I think it's about there, when the strategy started to realise that there was a funding question, sometimes a barrier to people being prepared to exit the litigation because they worried or were going to be left with a debt to the Agency. And so, I engaged then with Mr Howden about trying to find ways to - what were the ways that we might be able to negotiate something so that people could leave their litigation without a debt? I think the phrasing in the Cabinet Papers is "leave the litigation without debt and with dignity", so there was nothing, there was no - so, that was another sort of part of the engagement.

And the third engagement with the Funding Agency would be where - sorry, I would say that the Crown did not ever involve itself in individual claims for funding. Those are matters for independent judgment by the Legal Services Agency.

But there were claims where we understood that when settlement offers were being made to plaintiffs, Cooper Legal was not providing those settlement offers to the Funding Agency which they were obliged to do. We thought that was happening. We raised it with Cooper Legal on the basis that can you confirm for us that you are putting these offers to the Legal Services Agency, and it was in the absence of confirmation that they were being put to the Agency that we would just forward them without comment, we would just forward them to the Agency, and that was an enormous bone of contention between Crown Law and Cooper Legal that we would do that.

So, those were the three, I think those are the three - no, not I think, those are the three ways in which Crown Law and the Legal Services Agency kind of came together, if that's the right word.

And you will have seen, I think you have already seen in the document that I refer to in paragraph 12.7 - is that right, Ms Aldred?

Q. Yes, sorry, yes, 12.7.

A. Crown bundle 39, that letter from Mr Howden, the Agency to me. Anyway, it might not be necessary to bring it up, but I was then emphasising that I was interested in meeting with the Agency to see if there was a way out of the claims for the plaintiffs with no debt and that I was being instructed by MSD to see if there was a way to talk with the Agency about that. And, in that phone call and discussion and letter, we realised that we needed to make sure that Cooper Legal was kept in that loop because it wouldn't be proper just to simply have that engagement with the Agency. And

so, I don't actually recall whether we ever did have a meeting, but I recall that Ms Cooper thought it was improper to be asking for such a meeting, even though we were inviting her. I didn't think, and I don't think it was improper. It was really trying to work out is there a way we can find a different outcome for these claimants but, in any event, that letter is before the Inquiry and Cooper Legal wouldn't participate in those meetings, which perhaps it didn't matter, perhaps it took longer for us to get to the same point where we got to which is addressed in 12.9, where we got to the point where the Ministry of Social Development would agree that it would pay two-thirds of any outstanding bill for the Agency, and the Agency would write-off the other third, making sure that the person, the claimant, would be able to get whatever was offered to them in the hand. So often, not in these claims but with legal awards, actually what the person gets can be significantly eaten into either by the lawyer or the funding arrangement, so that was the deal that was struck then.

Q. Just confirming, I don't think the Inquiry has been taken to that document before, including during Mr Howden's evidence, but just the reference is to Crown tab 39 and the letter as described by Ms Jagose is to be found there.

We are at 1.00 now, so I think it's probably a good time to take the break.

CHAIR: All right, we will then adjourn until 2.15.

Hearing adjourned from 1.00 p.m. until 2.15 p.m.

CHAIR: Good afternoon, Ms Aldred.

MS ALDRED: Good afternoon.

Q. So, Ms Jagose, we were at about page 26 of your brief of evidence and in the section beginning there you deal in the written evidence with quantum, specifically in relation to the informal settlement processes of the agencies.

We will largely have that section taken as read, although if you could provide some commentary on that topic for the Commissioners?

A. Thank you. Good afternoon.

CHAIR: Good afternoon.

A. So, quantum, I just want to point out a few things there.

One of the issues, of course, that you will have heard about, is that two of the very earliest historical claims that went through the Courts, and we know them as W and S, the Crown conducted the litigation in the same way as is now familiar with bringing the limitation defence and so on, and those plaintiffs surmounted each of those hurdles and their compensatory damages because they were also able to show that the ACC Act did not apply to their cases, their compensatory damages were $180,000 in one case and $160,000 in the other, and costs were included in that, which took the - sorry, costs were added to that, which took the totals to $350,000 and $370,000. So, again, my earlier comment that costs is often a significant part of the overall award. Anyway, $160,000 and $180,000.

Those early - those were the settlements, I'm sorry. I think I said they were awarded. I beg your pardon, they were settled at those amounts, but they were reflecting following the trial that the factual findings had been made and that the legal thresholds in any of the Crown's defences had been overcome, so that was settled at what is now said to be now quite a high figure.

Since then, along with Crown Law Office advice and as I note there, there isn't one piece of advice, there's several, many pieces of advice on various issues, Crown Law offering advice in relation to quantum. It is, itself, a relatively difficult area because there tends to be no Court based set of findings for us to use as a model or as a way to check our assessment to something sort of independently set.

Also, in the mid 2000s, 2007, the Supreme Court dealt with a matter, that I mention at paragraph 12.14, which was - sorry, I'll slightly go back.

Because of the ACC bar, we don't have a wealth of up-to-date Court cases about compensatory damages. And so, when the case that I am about to refer to, Taunoa, went through all of its stages through to the Supreme Court, that was a different factual and legal setting to the cases that we are talking about here, but it was the case of several people who were subjected to what was called the Behavioural Management Regime in prison. And the Court found that those plaintiffs' Bill of Rights Act allegations or claims were made out and that they were not treated with humanity and with respect for their dignity, as is required by law. And the Supreme Court reduced the compensatory awards that the lower courts had made and in the most significant of the cases, Mr Taunoa himself had spent 32 months in this regime, his award was $35,000. Now the Court was careful to point out that Bill of Rights Act damages are different again from compensatory damages and that the law needs to be careful to develop in step with the ACC bar and compensatory damages. So, Bill of Rights damages also can't start to themselves compensate for the lack of compensatory damages. So, they are quite modest, the least serious. I mean, these were all serious cases, but the least serious, the Bill of Rights award was $4,000 and that did inevitably lead to a shifting, even though they're not directly comparable, but to a shifting of what might be an appropriate setting for quantum.

In an entirely different context, can I just sort of add in there that when a Court does say this is the breach, this is what it's worth, it does make it a lot easier for us to match and to do something different. So, in a completely again different context, a case called Marino where the Supreme Court again found that the Crown, through the

Department of Corrections had been miscalculating sentence lengths, such that people were being kept in prison longer than their sentence and were thusly false imprisoned. The Court made findings of the award for false imprisonment in two people's cases and awards were given of $60,000 in one and $12,000 in another, and the difference was the length of time spent, but that was able to provide us with a guideline, if you like, in that the rest of those, there were more people affected and we were able to apply that guideline and simply resolve the cases without going through the litigation.

And we don't have that here, and so agencies have been trying to establish appropriate quantum, not to be compensatory, not to be compensating for the losses, for economic losses or losses of opportunity in that sort of true compensatory damages way, but by way of an acknowledgment of the harm suffered along with other things, such as acknowledgments, perhaps payment for referrals to services. So, it's a different character than what a Court might do if we had a personal injury body of law to reflect back in these settlement awards.

I noticed that it's been said before this Inquiry, I don't recall who by, but I deal with it in 12.16 where I make the point that Crown parties tried to get to the point of saying "this is our final offer" and I was interested to see that is being viewed as a "take it or leave it", an arrogance, I think, that wasn't the word used. But, in fact, as I recall, the Crown parties, the departments in particular were anxious to not require sort of bargaining, but actually just to genuinely come to the best answer and say "this is our offer". Anyway, there is a different perspective on that approach that we need to reflect on how that is seen. So, setting of the payments and then relativity or consistency across individual claims is also a very important part and I understand that you have had quite

a bit of evidence already on that, so I won't go through that again.

I pick out Crown Law's role in 12.19 just on a few points of, again, advice about perhaps international comparators, comparators from different jurisdictions, like say privacy breaches or employment. None of them are brilliant comparisons, but trying to assist with setting of those sums.

That's all I wanted to say on quantum, unless there were any particular questions.

Q. So, the next topic for your evidence is civil litigation itself, and that's at section 13, and you start at section 14 talking about - you start at section 14 speaking about litigation before the White case. The White case took place in 2007 and was finally concluded by the Court of Appeal in 2009. If you could just briefly discuss, please, the themes, I think, that came out of that litigation before the White case?

A. Thank you. At 14.2 and onwards, I address what I've said are themes. I think I've touched on this a bit already in the course of the day. The way I've put it there is these claims were showing us that they are - for the most part, resolution wasn't going to come through the Courts. Justice Gendall recognised that, when he commented that the deep grievances that the plaintiffs hold and yet they face an insurmountable hurdle, he said there of limitation. He observed that if any remedy should be given, it should be thought of differently through the executive branch of government.

So, right from very early on, the Courts were making this comment too, that these are - the resolution of these complex and multi-dimensional problems or grievances are not being met by the thing that we are meeting them with. And so, I think that was a theme of pre-White and it perhaps sets some context around the White brothers' cases.

Also, just noting that the claims as they were filed then and possibly still now, are I've already mentioned something of a templated nature to them but also very varied. I think I've already mentioned this too actually, very varied in terms of whether there's even a tortuous conduct alleged or whether it is the still painful and still harsh but not necessarily something that can be sued on conditions of how we cared for children and for psychiatric patients, particularly in the past.

I've mentioned - I don't need to go on again about the statutory barriers.

The White litigation -

Q. Sorry, just before we turn to that, just noting for the Commissioners that there are some summaries of the cases decided before White at Appendix A to Ms Jagose's brief and those are at pages - the pre-White litigation is dealt with at pages 39-42.

And then just turning to the White case now, again if you could just turn to paragraph 15.1 of your brief, Ms Jagose?

A. Thank you. And I don't intend to go through that Appendix or those summaries, although the next pages are a summary of the White litigation too and I think I have already mentioned that I did both read Mr White's evidence and watch the evidence that he gave to this Inquiry.

These cases show, well they were the first - they weren't the first ones, but it was the first Social Welfare claims to be brought and - sorry, to be heard. They were I think somewhere in my evidence I've incorrectly said they ran for 7 days or 17, I think they ran for nearly 40 days in the High Court. It was a very complex – well actually one of the Judges commented later that the matters of law weren't particularly complex, but the factual background was very complex and widespread. And the result shows the problem, I suppose, that Cabinet has been advised on all these years and that I've been addressing in the course of the day,

about even where some things were found to be as the plaintiffs said they were, they didn't sound in any damages. So, yes, there was a breach of the duty of the social workers in relation to Mr Earl White, or maybe both the brothers actually, and they should have been spoken to in private by the social workers. So, some social work findings. The Judge was saying, well, that doesn't really attract damages. And I was interested to hear Mr White say that he - I think he said he was shocked, I think that was his word, to prove his allegation in relation to Mr Ansell, the sexual assaults allegation, and to lose on the law. And I can understand from his perspective that it does make me wonder how he understood what was happening because I find that hard to hear that he was shocked by that outcome when that was an outcome that we had seen coming for some time. So, that is difficult, and I understand that he was shocked by that.

The other point I want to say about White, I don't wish to read all of this material to you, just to point out a few things. Discovery and evidential issues were difficult, in the main because of the time that had passed. I think the period of time at question was from 1965 until the early 1970s and this was a case that was heard in 2007, files were lost, witnesses had died, people that could have been witnesses, other people, I think I've already mentioned, the Judge's comment about the social worker was in his 70s and hadn't practised for some decades. I mean, it shows up the difficulty of the sort of close scrutiny of facts against a backdrop of some decades, many decades having passed, where the files weren't as they should have been.

The other point to draw out here, I am not even sure if it's stressed at all in this note, is that, as with almost all of these claims, settlement was attempted. Both the Crown and the Whites made settlement offers to each other and really didn't - obviously didn't settle, but didn't come

to a meeting of the minds. When you look back at the schedule of offers backwards and forwards, they did move to a point where at one point the parties were quite close, but that didn't settle at that point and then the moment was lost. I only want to point that out to say that even in the face of what might now appear to have been a strong case for the Crown, the first, those risks were still real, litigation always has risks, not to mention costs and delay, so settlement was attempted but at too far apart, it never completed, that process.

I've already mentioned the reasonable discoverability doctrine and traditional negligence cases and the challenge of applying that and the new laws, so I won't say that further.

One criticism that is made of these claims is how long it took. It took a full decade to get through from the filing of them in 1999 to the Supreme Court saying in 2010, refusing leave to keep going. And much of that process, particularly in the earlier stages, although the trial itself took a long time, was about trying to get - both parties trying to get the case into a proper state to be before the Court. And I will come to name suppression because that was a highly contentious aspect of this case, but there were certain steps that were taken about getting the case into the right form to get before the Court. It did take a very long time.

There are two particular points that I want to draw out. One was that I understood Cooper Legal to say to this Inquiry that the Crown wouldn't say who was coming to give evidence, leading to a huge burden on the White's counsel for preparing for all manner of things that might have happened the next day. That didn't seem right, that is not how it should have been conducted and I didn't think so, so I've been looking to see if I can find what happened.

I can find a record as between the parties recording agreement as to a witness list and that they would each provide a witness list and do their best to bring the witnesses or to call the witnesses in that order but acknowledging that that wasn't always able to be determined in advance. That doesn't take us very far.

Beyond that -

CHAIR: Were the witnesses named on that list or was it just an agreement to advise?

A. The letter that I can particularly recall is from Cooper Legal saying we've reached this agreement and here is my list.

CHAIR: Okay.

A. I haven't seen the other list. So, no, I anticipate that the other list would have said "here are ours as well".

I can't find any further reference or record to help us with this question. I did speak to counsel who argued the case, who don't recall that that is how it went and who, like me, thought that would be quite an unusual way to conduct the litigation. And I suppose my final point on it is there was a Judge. If the Crown behaves in a way that is improper, tell the Judge. It's not something I say lightly and I hope that that doesn't happen, but he was there. So, I can't take that terribly much further.

There is another point that has been raised with this Inquiry, and I address it briefly at 15.9, that counsel for the Crown's cross-examination of Mr White is criticised for being said to be or potentially to have been suggesting that he had consented or he was a willing participant in the sexual abuse. And I say two things about that. First of all, if that was the nature of the questioning, it is entirely improper. Misunderstands the nature of sexual abuse absolutely. So, that's what I say is the first point.

But the second point is that, again the Judge interfered - sorry, I don't mean to say interfered, the

Judge intervened in that matter to ask that very question in the moment of Crown Counsel, "Are you suggesting that this is a defence of consent?" and she said that wasn't what she was intending. With the passage of time and the fact that you can only look at the transcript, we can only take it from that, that that wasn't what she was meaning, except I do want to be clear that if it was, or if it can be taken that way, it is an improper question. It cannot be a Crown submission and the Crown Counsel said that it wasn't and it never was and never came up again in the submissions in that way, so I can't take that much further, except to address how I feel about it now and what the transcript tells us.

We come back to several points in the White litigation further as I talk to matters such as name suppression and processes. If that's all right with the Commissioners, I will keep going in the order of the written evidence.

CHAIR: Yes.

A. At point 16, again it goes back in time, but I think this part shows that the Crown was participating in managing this sort of scale of litigation in a different way from ordinary litigation. And having already addressed that there was anxiety about cost and delay and about whether the bulk of the claims could ever be passed, you know, successfully through the legal hurdles, a few years in, by 2006, Cooper Legal and Crown lawyers were working together to agree a protocol for how those should be case managed through the Courts.

That was something that in the psychiatric claims, again we had agreed a protocol, so that a Judge was overseeing all of the claims, rather than just hundreds of claims sort of lying in the Court or being called individually. There was a relatively large measure of co-operation and of course it raised issues that we disagreed with each other on but a large measure of co-operation about the mechanism at least by which the Court would monitor and manage the cases.

What it did reveal, was that we were - we, as parties, the Crown and the plaintiffs, at odds on a very large number of significant issues; limitation, how those limitation hearings should be done, should they be done at trial, should they be done early, discovery, examination by psychiatrists. You know, looking back at those memoranda and that protocol, we disagreed on an enormous amount of process, so I can't take too much out of this, except to say it was a different way. Again, I think the Crown wasn't just acting like any litigant. It was taking its responsibilities seriously, including its responsibilities to the Court, to make sure that the Court wasn't being overrun by claims that were not able to be properly organised. And that process has got more and more refined, but at the beginning the Crown was concerned that a huge number of claims being filed and left to sit would be used to criticise the Crown by the sheer numbers, as if the sheer numbers themselves were the answer to, what we still don't know the answer to, the systemic question.

So, the Crown was pressing claims. The Court itself was concerned, individual Courts I should say were concerned that there were so many claims that just appeared to be not making progress or not intending to make progress, which wasn't and isn't the modern case management way.

So, I've set all the detail out there, I won't go through it, but it did lead to regular appearances before the Court of Crown and Cooper Legal and generally lawyers to work out which ones should we move forward, what should we put on the track to trial, what are the difficult issues that we need to resolve between us?

And we get to today and the process is broadly the same. Justice Ellis now convenes regular case management conferences. One difference I think is that it is primarily plaintiff-led, in that Cooper Legal are assessing which cases should be progressed, which ones should be set down

for trial and moving cases through the system that way. And the Crown is more passive about those and deals with them as they come. So, that's where we are today on the case management.

CHAIR: Can I just ask, in the past at these case management conferences, did the Court leave it to the parties really to try and sort things out amongst themselves or did the Court take a proactive role, as far as you know? I don't know if you were involved in any of those?

A. I was involved in many of them, yes. The Court would always encourage parties to try and make as much progress together as we could.

CHAIR: Of course, but obviously progress was not being made, the parties were disagreeing on a lot of very important pre-trial matters, weren't you?

A. Yes. And the Court I think probably was a bit forceful in pushing some things to certain types of hearings. Judicial settlement conferences were another thing that the Court was prepared to engage in at a time when they were becoming a bit unpopular. I think the Judges might have seen that as a potential way through. Some cases did settle through those conferences.

Working out how are we going to deal with limitation questions. I think the Court was a bit more forceful. I am not criticising that.

CHAIR: Proactive?

A. Thank you, better word, not entirely party-led, yes.

MS ALDRED:

Q. The next section of your evidence deals with the case of XY v Attorney-General which was a Judicial Review brought by Cooper Legal clients of the Two Path Approach to settlement that MSD put in place around 2016. That has been the subject of some discussion in both phase one and by MSD and I won't take you to that.

So, in that regard, your evidence will be taken as read, but if we move on to the next topic, which is the disclosure of information on the Court files to protect the safety or to promote the safety of children in care, and you deal with that from paragraph 16.8 and if you could just speak to that section of your brief?

A. Thank you. The Commissioners will have already heard from other witnesses that this is an ongoing issue of dispute between Cooper Legal as lawyers for many or most of the survivors and the Crown about how to deal with allegations of serious sexual or other misconduct in relation to tamariki, particularly where those people alleged to have acted in this way are still involved in the care of tamariki. And I hope that it's been clear to the Commissioners from my other colleagues giving evidence that that is something that makes the Crown side anxious, that it has allegations of criminal wrongdoing in a civil litigation and what do we do?

We have grappled with this over many years of trying to understand what is the Crown's proper duty here? And it is, of course, possible to deal with criminal allegations in civil litigation, but there is a concern that a civil process of investigation might impair any criminal investigation and subsequent prosecution if, for example, if the processes are done wrongly. A brief example, in the criminal process, of course, a person being questioned for something that they might stand to be convicted of needs to be warned about that. They need to be given their rights, they need to understand their rights about whether they need a lawyer, all those things that keep them and the process safe. In civil litigation, if lawyers or others are out investigating and talking to people who it might turn out Police are interested in, we might have already muddied that water. It was and has been a genuine concern about

investigating to the civil standard in matters that are crimes.

So, we've long had this disagreement with Cooper Legal about when should we be providing material to the Police for the criminal investigation. In my brief, I address the sort of most recent example of how this turned out really in this case J v Attorney-General, where the claimants in that group applied to the Court to stop the Crown providing information from claims to third parties.

Slightly leaping off the topic but to say I know this came up when Cooper Legal was saying how a model litigant should behave and I think this was one of her examples. I think this was one of her examples where she said, you know, the model litigant should be open to talking and the model litigant should be able to discuss things with us when things get hard, instead of rushing off to Court. Actually, this isn't the right example because this was Cooper Legal's application.

But actually lying behind that is a whole lot of talking but disagreeing and it must be, or I say that it is the case that in litigation, yes, Crown should aim to do as much as possible by agreement, of course we should. But if we don't agree, it isn't not being a model litigant to then ask the Court to decide it. That is what the litigation leads you to. And so, in these cases about how do we make sure that we properly deal with criminal allegations, particularly where people are now working with our tamariki that has really been a matter of most anxious, most highest anxiety on our side.

In any event, the Court did deal with it in a cyclical way, I suppose, in that those nondisclosure orders that it made have been revisited to make sure that they do what they need to do but also putting in place a process where the Crown can go to the Court and say, "We need to make this disclosure".

We should have been able to get to that by agreement, but we didn't, we couldn't, and we now have a process in place. It does still worry me that we might have in our hands material that later is said "You knew that person, what were you doing?" I do worry about where that takes us and so, I also am anxious that my colleagues don't too lightly ignore or avoid material that they have that, yes, they need to deal with it with a civil claim, they might also need to do something else. We can't get too compartmentalised, I mean we're not Police Officers of course and that's an independent assessment and judgement that's made about crime or prosecuting crime. Anyway, it is a matter of real anxiety.

Sorry, I was just going to say, which might explain why, I know it's been criticised, that the Crown appealed that High Court judgment and the Court of Appeal said, no, the High Court got it right and we left it there, but I think it's the anxiety behind it that reveals why those steps were taken, rather than, as I think it is being put to you, sort of tactically trying to do something unfair.

Q. Thank you. So, you turn briefly to the current litigation and note that some spreadsheets have been provided to the Royal Commission setting outed the position in relation to claims filed.

A. Yes.

Q. And you just have a correction to paragraph 17.1 of your brief?

A. Thank you. Yes, I say at 17.1, there is one case progressing to a hearing August 2020; and that is no longer accurate because of time passing and no doubt because of Covid, but that case, which in fact is two cases, is scheduled for June 2021 to be heard in the High Court at Wellington.

Q. Thank you. At section 18 of your primary brief you turn to some further matters, including firstly international law

obligations. Again, we'll take this section of your evidence as read but I believe you have some comments that you would just like to make in that regard?

A. Yes, thank you. And, again, they are sort of updating comments. 18.3, I mentioned that the government's - that the 7th periodic report is currently underway. It is now publicly available.

I anticipate that the content of these international law obligations as they relate to Dr Leeks in Lake Alice might be a topic that the Commission covers, I understand you are covering that in a separate hearing, so I don't know if I need to say too much. I just need to correct or update 18.8. In relation to that survivors case that went to the United Nations Committee Against Torture and is in receipt of a successful, if that's the right word, or at least a positive finding that New Zealand as a state was in violation of its Convention Against Torture Rights, at 18.8 I say the response is required within 90 days. That response has been made in April 2020. It's posted on the New Zealand Police's website. I don't know whether the Commission has it yet or not, but I am happy to provide it through counsel.

But what the New Zealand State has done with that finding from the Committee, is put the New Zealand Police as the State party actor who is to respond to that finding, so that's the competent national authority is the New Zealand Police. They are now undertaking what New Zealand's response calls an extensive file review of the previous investigations in a three phase investigation plan to look at and in some cases relook at Lake Alice and, in particular, Dr Leeks as a person of interest.

So, at least at April, New Zealand's comment was to say that significant Police resource is being applied and New Zealand Police is committed to keeping the complainant and others who have alleged criminal mistreatment updated.

Now, I haven't explored whether that is how those survivors feel about the Police process, but that is where that process is at.

Q. Thank you. The next section of your evidence deals with the investigation and report commissioned by the State Services Commission into the use of external security consultants. Again, that is a matter that you are going to speak to your evidence from 18.12.

A. So, in this part I set out what the then State Services Commission investigation uncovered in relation to historic abuse claims and the use of private investigators. I won't go through all of the detail of that.

At the time of that Inquiry, and as is recorded in the Inquiry's report, I was critical of Crown Law's practice, in that while we used private investigators, and in fact still do and I'll come to that about the limited way in which they might be used, the instructions that were given in the White case were too broad to be proper. I mean, I've said this before in the previous Inquiry, that they were not properly bounded in a way that meant that the Crown could be confident that its agents were doing not only what it could by law but what it should. So often for the Crown, it’s not just a question of, is this lawful? And the other question is, should we do it? That was the big distinction that was drawn out in that Inquiry for historical claims litigation or I think that was the big distinction that was drawn out. That question was never asked, should we? And should we have better controls over how we instruct that investigator? So, there was an investigator used to assist the Crown, in part to find witnesses, that was one of the functions and that's a common use of third parties still today, to find people, because they have a better skillset than lawyers and other public servants in looking through publicly available records to track where a person, you might know somebody who worked in a school in 1982 with this name, where are they

now? Those sorts of - can you find these people? That is the most common thing to use them for.

In the White case, that person or that firm also assisted in briefing witnesses, so just helping them look through the record and getting them to recall their story.

This is, of course, as you will know, is contentious for Mr Wiffin who has always said that he was subjected to surveillance by the Crown's investigator. And until that Inquiry, the Crown had always said we never instructed surveillance of Mr Wiffin, and that is true. But now that we see the problem which that Inquiry found, which was that the Crown's instructions were too broad, and that that Inquiry found Mr Wiffin's account credible, I think we can only say we didn't instruct the investigator to put Mr Wiffin under surveillance and, as that Inquiry found, we can't conclude whether it happened or not, but the Inquiry found Mr Wiffin to be credible.

And I said then and I say it again, that I regret that Crown Law fell short of what I would have said or I say now, is the right standard to using a third party agent. That we should have had better controls around how that was being used because, yeah, the investigator themselves when spoken to by the SSC's Inquiry, they said - they sort of quibbled with the detail from Mr Wiffin saying, well, if somebody came up to us and said, "Are you watching me?", as Mr Wiffin says he did, the investigator said, "We would never say yes, we would make up another story". Yet that Inquiry also found that that investigator wouldn't have called somebody sitting in a car watching somebody surveillance. So, I think the true answer is lost. I think all I can say is that we didn't deliberately put Mr Wiffin under surveillance, there was no instruction to that end, but we lost control of the investigator to the extent that that might well have happened.

Q. Thank you. Just in relation to that particular point, Ms Jagose, it might just be useful to give the Commissioners the reference to the particular part of the report for the State Services Commission that deals with Mr Wiffin's allegations, and that is at Crown tab 90, which reproduces the report, paragraphs 3.64-3.71 of the report.

Sorry, Ms Jagose.

A. No, thank you. So, what we have done as a result of that Inquiry, is put in place a policy which is now Crown Law's policy about how we will go about gathering information in relation to the work that we do, and it's on our website, so people can see the sorts of things that we might do to collect information and fill in the gap that we had in 2007, no-one is able to instruct an external third party, whether they're called a private investigator or security consultant or some other sort of agent, other than incredibly routine things like serving documents. Other more substantive tasks have to be done with approval of a more senior person in the office, Deputy Solicitor-General or the Deputy Chief Executive or of course the Solicitor-General could also authorise it. So that, we now have in place oversight of those engagements, that should avoid the problem that we have and can't really resolve from 2007, but I accept that that was not good enough back then to have had such a loose set of instructions, because the criticism, of course, is that there is a risk or there is a problem if the Crown can by engaging a third party agent do things that you wouldn't do yourself, and that was the whole point of the SSC Inquiry to uncover what had happened, actually not in historical claims, that was something that came up in the course of the Inquiry.

So, I understand that there is a current case in which they have a third party person engaged, they have very detailed engagement instructions and they are not watching plaintiffs, they are not looking at them, they are not

exploring their personal lives. They're looking for people primarily from the Crown who we can't find and they are also putting together documents from the record.

Q. Thank you. I think you've come to the end of your primary brief of evidence and we might return to your concluding comments at the conclusion, which will be perhaps after we turn first to your reply brief, Ms Jagose, and that is dated 13 March 2020.

A. Perhaps I should start at 3?

Q. Yes, I think that's right, so taking the first two sections of that as read. The first dealing with an overview of the introduction and the second dealing with the independence of the Courts in response to some of the criticisms of judicial decisions by Cooper Legal.

And then going on at 3 to deal with particular suggestions or allegations in relation to improper conduct on the part of the Crown and if you could take the Commissioners through that part of your evidence, please.

A. Yes, thank you. I'll start at part 3 and I think I have already made the point that the evidence that this Inquiry has heard has been of Crown tactics which, from my perspective, appear to say that legitimate steps that are taken in litigation where parties are in disagreement should be criticised as bad faith or the Crown trying to stop an otherwise just resolution. While I accept that there will be times where we don't meet the high standards that I have and we should have for ourselves, as a general rule I say that these steps need to be taken in the litigation context, that they are steps taken by a party in an attempt to have the matter either put into a proper footing or otherwise resolved by the Court.

And, as I say, there will be times where I might be taken to a paper or an email or an application and I can't defend it and I won't. As a general proposition, it has not been what motivates the Crown. And I feel that strongly as a

need to make that statement here because I do believe that the Crown does meet its high standards mostly. Sometimes we don't and we have to apologise for that, we have to learn, we have to be open to that, but we do set ourselves high standards and we should be able to meet them.

And I've already mentioned that it has been part of that high standard that we have been very open with the Inquiry and it has seen all or almost all of the litigation files it has wanted to see has been available.

I mentioned already the point at 3.3 which is that at the beginning the relatively orthodox approach to litigation probably did result in correspondence and perhaps even face-to-face communications that were direct in tone and might today be criticised for not being sufficiently sensitive to the needs of the plaintiff.

In looking back over two decades, I can see that that's how we started. And there was plenty of frustration I think on both sides about these steps and I've mentioned some of them already. And so I make that point at 3.4, what is sometimes said as tactical, the other perspective of it is it's just a proper step getting claims into a better state and being able to clearly see what is said and what the challenge is being brought in the Courts.

And also, to make the point I made earlier, this is all done under the supervision of the Court, more close supervision in that regular case management sense since about mid 2000.

So, what one side might say is a tactic, the other side might say is a genuine step. I leave it to the Commission on that.

I think it's particularly so with these novel and difficult areas of law. Yes, I recognise it, that the individual person, the plaintiff, the survivor, cannot see themselves represented in the steps that have been taken and cannot see any care for themselves in it. I understand

that, but I also say, I hope without seeming too hard, that is part of the litigation process.

And I certainly reject any suggestion that the processes are designed to exhaust or to run out or to wear down plaintiffs. That is not their purpose, although again I have to accept that might be how they feel. That is not the purpose of taking steps to get cases into a proper footing for the Court to determine them.

Whoops sorry, for hitting the microphone.

I'm just looking at the balance of part 3, I think I've said everything I need to say. 3.9 is my correction saying the White case took 17 hearing days, I think it might be 37. I think that might be just a typo.

Q. We think it's 36.

A. Okay.

Q. Mr Clarke-Parker has counted the hearing days on the judgment.

CHAIR: I'm sure it felt like 3 years.

A. I'm sure.

MS ALDRED:

Q. I'm sure it did.

CHAIR: Just in the scale of things, Ms Jagose, that's a long time for a civil trial, isn't it?

A. It is.

CHAIR: Compared with others?

A. Yes, indeed. Justice Miller in the High Court made the comment in relation to the costs matter, which we might come to too, making the point that it was a wide ranging factual narrative that the Court had to deal with, which associated, which meant there was an associated high amount of discovery and better particulars requested and, you know, in some ways we come to so many years later with one or two particularly stark allegations but, in fact, invite the Commissioners to look at the claim. It is a very broad factual claim.

I come next in part 4 to Mr Wiffin, in particular, because, as I've said, I've watched Mr Wiffin's evidence. I dealt with Mr Wiffin's claim at the Crown Law Office. I remember this matter and there are several points that I want to address that actually aren't here.

I have already mentioned the one about him being a credible witness in the State Services Commission Inquiry.

I saw in his evidence to this Inquiry but I hadn't seen it before then, that the Crown said if you want to complain to the Police about Mr Wright, the sex offender Mr Wright, your civil claim needs to go on hold. And so Mr Wiffin chose not to pursue that criminal process at that time, expecting that we would because we said we would speak to Mr Wright and then we didn't. And I can't explain that and I don't try and excuse that. We should have spoken to him. I see on the record that we looked for him, we found him, we got clearance from the Police to speak to him and yet it seems that in the civil process we still didn't speak to him. I can't - I don't want to excuse that, it shouldn't have happened, particularly in the context of Mr Wiffin having chosen not to go to the Police at that time because we needed to do it in this other process. And I regret that and I apologise to Mr Wiffin for that on behalf of Crown lawyers because that should not have gone that way. We should have spoken to him or gone back to Mr Wiffin to say we're not going to, do you want to make your choice differently? And of course, Mr Wiffin did ultimately pursue that criminal charge and good for him, but we did not assist him in that process.

Mr Wiffin was also critical, and in that context, you can understand why, he was also critical of the settlement offer that was made. And maybe I can't take this very far and I certainly don't want to say he should have felt anything differently but from the other side of that letter, there was an attempt to investigate those, not the sexual abuse

complaints actually, but those other complaints made. I think you may have seen the settlement offer letter, it says that the Ministry doesn't agree with I think it's the scale of physical assaults alleged, but does want to help Mr Wiffin with some resolution, and offers services, to pay for services, noting I think - the letter notes that he had been using the services of a counsellor and that that had been good for him. And I hope Mr Young has also, I think Mr Young does address this and I know what he said it to you in his evidence but that letter was a genuine attempt to try and work with what we understood Mr Wiffin wanted in the context of our own instructions about settling matters where we could but not simply paying money because it was more efficient to do so. And it was one of those offers that was quite different, it wasn't a money offer. It was actually Mr Young was offering to go with him to Epuni, I think he saw his files. He was offering to keep him going through this process of - that word has gone out of my head - the counselling that he had said he was finding useful.

So, it was actually trying to come towards what we understood Mr Wiffin wanted. And I get it that it wasn't what Mr Wiffin wanted and he says so but I thought it was important to put that side, that that settlement offer was genuinely an attempt to reflect what was understood by the Ministry.

I said at 4.2, and I will just address it again, that I looked back at that letter in the course of this Inquiry and I understand Mr Wiffin's criticism of that settlement letter, and in my brief I said I would like to think, today I say I would think differently. I would think how does the person feel when they receive this letter from the Crown? I already mentioned to you Commissioners that this sort of work, this legal language about liability will not be made out versus we don't believe you. I would be more careful to attend to those things as needed because acknowledging the

survivor's reality in no matter how we are responding, is critical, and I didn't do that, we didn't do that in 2009.

CHAIR: That type of response you've just described would be more in line with what you call a trauma informed approach?

A. Right, yes.

CHAIR: And I don't know if Crown Law has embraced learning about the trauma informed approach in any way. It's something we've discussed with the Departmental witnesses.

A. I can say that we haven't done any formal work about that. I can see its benefit.

CHAIR: Yes, it is about the way you approach, the way you do your work with a survivor focus?

A. Mm. I wouldn't say that - I mean, without stepping away with what I just said about the failings in Mr Wiffin's case, 11 or 12 years on we are different, we are responding very differently, even having not taken formal steps in trauma response but because we do learn, we are learning from the processes that we've gone through. And I think I heard that even - not even, I think I heard that from Cooper Legal too, acknowledging that the way that we work today is very different.

MS ALDRED:

Q. Thank you. And the next section of your evidence is issues regarding the proper defendant to claims and responding specifically to some evidence from Cooper Legal about difficulties it saw arising from the Crown taking the approach that it could be regarded as an indivisible entity. Do you want to comment briefly on that?

A. Yes. I can't quite understand the concern, so I'll just say what I think the position is, which is that it's very common to sue the Crown through the Attorney-General. In fact, the Crown Proceedings Act tells us if you're not really sure or you can't find a person who can sue or be sued in their own

right, sue the Attorney and that's just a common way to bring a claim. In fact, the White claim was brought against the Attorney. I'm not sure, I'm trying to understand the criticism might be that this allows people or agencies to hide behind this amorphous Crown and not fulfil discovery obligations. I think maybe that is the criticism and it's just not so. When the Attorney is in receipt of litigation, as is frequently the case, the named party is the Attorney. The practice is to find the Agency or Agencies most responsible, and it might be an Agency that no longer exists so we have to find somebody to hold that liability, to make sure that the Crown's obligations of discovery and other processes are properly dealt with.

And so, it wasn't - it was a process that, in fact, Crown lawyers thought actually is this going to make it more straightforward, instead of having to keep adding new defendants when a new part of the claim might come forward. So, for example, adding Oranga Tamariki after its establishment as a separate Agency. Instead of adding sort of all these defendants to the claim, when in reality it's just the Crown. Our lawyers thought, actually, let's make this more straightforward. When it wasn't straightforward and it was strongly perceived as something else, the lawyers just said let's just leave it. I don't think that is - I think we still want to see if we can resolve that because it just seems tidier, but it isn't something that's critical. Whether or not it's in lists of defendants or whether it's just one, the Crown will always aim to meet all of its obligations as it should.

Q. Thank you. And then you turn to Legal Aid, again in relation to particular criticisms in the Cooper Legal brief of evidence about Legal Aid. And if you could - if I could just have you talk through, please, from section 6 of your evidence?

A. I've said something already about the three ways in which we've been involved with Legal Aid at a broad level, but there are just a few points to make here.

One is that I mention at 6.4 that the High Court in a case Martin v Legal Services Agency, the Crown was criticised in that case. That wasn't a historical claim, or at least it wasn't a Cooper Legal claim, Martin, I don't think, but the Crown wrote - in that case, the Crown wrote to the Legal Services Agency to say this case is weak, it will never make it over whatever threshold or barriers were in the way, and the Legal Services Agency withdrew the funding and Martin brought proceedings against that decision. It was in the course of that the High Court said, "Crown you should not do that. If you think the case is hopeless, the right thing to do is to file a strike-out application" and the Crown Law Office then implemented a policy of saying "If we think the case is hopeless, you don't write to the Legal Services Agency, you bring a strike-out application", so we changed our policy.

But I understood Cooper Legal to say a week or two ago, I think they were saying this High Court judgment was to say that the Crown should never engage with the Legal Services Agency; I don't think that's what that case meant.

Q. Ms Jagose, I think, if I can just reflect back the Cooper Legal evidence to you, it was to the effect that after - there was evidence that after the judgment in Martin, there had been a discussion or meeting in 2009 between I think you and Mr Howden of the Legal Services Agency, so that was the criticism that was made.

A. And those meetings, as I have already addressed today, were about trying to sort of understand how we might deal with the Legal Aid debt problem, in terms of settling claims. It wasn't about saying this individual case, "Please withdraw the funding because this individual case is hopeless". The Court told us not to do that and we did not do that.

Q. Thank you. I think that takes you to the end of about 6.4.
A. Yes. So, this is a criticism that the Crown has taken steps to seek costs against individual plaintiffs in a way that is criticised as harsh, overbearing and/or standing in the way of access to justice, if I can summarise the criticism.

I might deal with two of these together. At 6.5, I deal with a case that is variously called W v Attorney-General or P v Attorney-General but, in any case, it is the Navy case.

There were two costs issues in that case. First of all, and the point that's raised in 6.5, the Crown did seek costs against Mr W, sorry Mr P, Mr W, for a step that was considered to be an outrageous step to take in litigation from our perspective where the case was doomed to fail in substance, as it did when it was finally heard.

The point there was that an Associate Judge had made a timetabling order and the plaintiff complained, it's called a review when you want to appeal that Associate Judge's order to the High Court, and the High Court had not set that aside. The plaintiff wanted to go on to the Court of Appeal. And for a review of a timetabling order of an Associate Judge, it struck the Crown lawyer that that was an outrageous waste of time and money and Mr P wasn't then in receipt of Legal Aid funding and so he did stand at risk of a costs award. Costs awards and the threat of them, I don't mean to be threatening with them but the idea that you might have one against you, is supposed to encourage efficiency in litigation and not taking steps that are silly. And the Crown's view was this was one of those times where the timetabling order was not something that warranted going to the Court of Appeal. Sorry, it was an application for leave to go to the Court of Appeal which the High Court refused and ordered costs against Mr P.

Now, I haven't been able to find, so I'm confident that the Crown never did actually pursue those costs against Mr P. And there is a distinction to make between getting the

Court to agree that you're entitled to the costs order and actually enforcing the costs order because it can be a useful thing to have a costs order from, and I'm not intending and I don't impugn any of the current plaintiffs or witnesses in this Inquiry, just as a general proposition, irregular or perhaps vexatious plaintiff that continues to bring cases or take steps that are silly and put you to cost. It is a good thing to have costs orders in order to say perhaps don't let them start again, perhaps - do require them to pay costs before they bring this case because look at what we've had to be put through. So, there is something proper in using the costs awards to insert discipline into the process. That's what I say about that first step. Costs were never sought, in fact, from Mr P.

But I just want to be clear that in the conclusion of that case, the Crown also made a costs order, and I think you have been taken through what a "but for" costs order is. I just want to be clear that at the end of that Navy case, the Crown sought one of those "but for" costs orders. Mr P was by then legally aided, the "but for" costs order was made by Justice Mallon but that didn't and wasn't any risk or threat to Mr P himself.

There is a further question about costs that I don't think is in my brief but it's in relation to Mr Paul White, that the Crown also made a costs award and it's been criticised by Cooper Legal of making an order against a plaintiff, you know, directly.

CHAIR: Just to be clear, the Crown didn't make the order, did it? The Court made the order?

A. Sorry, I beg your pardon.

CHAIR: You sought the order?

A. Sought the order, applied for the order, yes, thank you. In that case, both the plaintiffs were legally aided and so shielded from any costs awards against them personally. But there is provision in the legislation that says even a

legally aided person might have to face costs personally in exceptional circumstances. And in Paul White's case, it turned out that innocently he had not - it turned out to be an innocent error that he didn't fully produce all the material that he should have in discovery and the Crown had to go to additional cost of making a third party application for discovery in relation to a settlement arrangement with another - with a faith-based institution. And for that, I'm just explaining how this came to pass, rather than saying it was something that we would do today, but there the Crown thought we shouldn't have had to be put to this additional expense from a plaintiff who didn't properly fulfil their obligations. As the Court shows in the judgment from Justice Miller, it was an error by Mr White. He undertook an obligation of confidentiality in relation to that material which he understood to mean he couldn't tell anyone, so he didn't, and the Court said "It's not an exceptional circumstance and I'm not ordering the costs". I just wanted it to be clear, not particularly to defend it but that it wasn't the Crown was seeking costs for all of the case. The Crown was very clear in its application to say it should be a notional costs award only, to reprimand, I suppose is the right word, I'm not sure what word was used, for the failure to meet this obligation of disclosing relevant material and putting us to additional cost.

MS ALDRED:

Q. And just to be clear, no sum was specified?

A. No.

Q. It was simply sought on the basis of being a notional order, is that correct?

A. It was notional, yes.

Q. I think you go on now in your written brief to address two occasions on which the Crown opposed the adjournment of hearings.

CHAIR: Just looking at the time.

MS ALDRED: Yes, sorry, we're into afternoon tea.

CHAIR: We are 4 minutes late for our afternoon tea. We'll take a 15-minute adjournment.

Hearing adjourned from 3.30 p.m. until 3.45 p.m.

CHAIR: Yes, Ms Aldred.

MS ALDRED: Thank you.

Q. Just before the break, we were coming on to paragraph 6.7 of your reply evidence, Ms Jagose, relating to opposition to Adjournment Applications by plaintiffs. If you could talk to those issues for the Commissioners.

A. Yes, thank you. So, there are two cases that are mentioned here and criticised by Cooper Legal as being not model litigant conduct to oppose adjournments or adjournment applications. And I will address by way of explaining what the Crown thought at the time and then I'll come to what the Crown, what this representative of the Crown thinks now. So, in the first case there at 6.7, the Crown opposed adjourning the hearing, it was on the basis that Legal Aid appeals aren't a reason to vacate a hearing. That is true and the Courts have said, particularly in these early days, that whether the funding is on-stream or not, is not necessarily a reason for an adjournment. And the Crown was there saying it would be prejudiced because it just adds to the delays from the events at issue to the hearing date.

It looks, from the record, as though the Court initially thought that there shouldn't be an adjournment but then did grant an adjournment after Cooper Legal applied to withdraw as counsel.

Now, I think what I would say to that, is that it's reflecting the Crown's view that matters of funding aren't for the Court and that where a plaintiff is still represented by counsel, whether or not their funding

arrangement has become uncertain isn't actually the reason for an adjournment.

With 2020 eyes, I would say what is the prejudice to the Crown? What is the further prejudice to the Crown in a short adjournment? Looking back at the file, I don't see that - there was one asserted, even more time will pass between now and the events complained of. I don't think we would take that view today. It would depend, I suppose, on all the circumstances but it's hard to really see what the prejudice that was said to exist is or was.

The next case is one that at the time the record shows that I thought, Mm, should we be opposing this adjournment or not? It becomes slightly sort of harder, in that it's more personal, but similar expressions of frustration from the Courts about the delays and the frustrations of cases seemingly piling up without being able to be moved, aligned with what looked like the Legal Services Agency, Legal Aid as it was then I think, regret at how, I don't know how it had funded all of the claims but there was a process in place with reviewing that, coupled with our view that these cases shouldn't be being heard in this civil jurisdiction because they face too many hurdles and with that, frustration of delays, I formed the view in the second case that it was an acceptable position to put, to oppose the leave to make the Court - sorry to oppose the adjournment, to make the Court decide the question because also in that case the file shows that Ms Cooper said she would, as in the first case, withdraw as counsel, which the file records that I thought was unfair or words to that extent, I can't now remember the precise words, to the plaintiff. I heard a different side of that story of course when Ms Cooper was going the evidence to the Inquiry. That that was, in that case, Mr B's own view that faced with the Crown saying we won't agree to the adjournment, that he was saying, "Ms Cooper, you can't appear for me without being paid". In

any event, again I think can we explain what the prejudice was? No. Again, it was frustration. There had been a longer adjournment. And I don't want to try and say that was acceptable. It's hard now to see what the prejudice was that we could see, so I've tried to explain what we did say, to let you know what the Crown was thinking, but without really supporting that as a step that we would take today. A short adjournment while a leave question was being concluded seems entirely reasonable.

CHAIR: It is that question of balance of power, isn't it?

A. Yes.

CHAIR: That you referred to right at the beginning?

A. Yes. The next paragraph only needs brief mention, in that - it might have been cleared up by the Legal Services Agency but to confirm that Crown Law doesn't give legal advice to the Legal Services Agency. That would be a crossing over the border of party and independence in a way that it shouldn't be done. We did look for the advice that Cooper Legal referred to. We think she must be misunderstanding where that advice had come from.

So, just to conclude those points, you know, even accepting that it's hard to justify now why some particular steps were taken, except to note that when Judges are supervising the process, you know, they can see it, you know. They were, in one of those cases, or both of those cases about adjournment, they did adjourn the cases. They weren't lost in the frustration of the moment. They were able to see it in more clear than the Crown did. In any event, notwithstanding that, Ms Cooper and Ms Hill said in their brief that they thought there was a strategy to remove them as a provider of Legal Services, and that isn't so. I've not - I say that isn't so and I am not aware of any suggestion that that would be something that was attempted. It would be quite wrong to do that.

Both Cooper Legal and Mr Wiffin have made the point, and perhaps others have too, that this is public money that is being spent, the cost is very high. Isn't it obvious, the submission or the point seems to be isn't it obvious that we should just do something different? From which I take it we could be making payments to many more people and it would still cost less.

And I say there's a flawed logic in that. I mean, the Crown has to be able to defend itself against liability where it says none exists or even to contest that point or to test difficult points of law in the Court. As I pointed out earlier, in Australian Model Litigant, it is accepted that testing points of law and defending yourself are not anti-model litigant conduct. At some point there might be a calculation which says if the Crown had paid every applicant or every plaintiff a sum of money, it would still be cheaper. That was a specific point early on in the Cabinet instructions about don't just settle claims because it would be kind of quicker and easier to do so because that is not how the Crown needed to conduct itself because of the precedent effect which was and is of significant concern to the Crown, not just in these cases.

But I've already covered the point that the Crown is careful to make sure that where settlements are accepted, and many hundreds of settlements do occur with survivors, that they aren't imperilled by Legal Aid which is often a loan rather than a gift. That they get in their hand what the Crown has offered, rather than having to lose some of that through to the funder.

MS ALDRED:

Q. Thank you. Section 7 of your evidence deals with name suppression applications and the Crown's approach to those, which you explain has changed over time. Can you talk through that part of your evidence, please?

A. Yes. So, name suppression and the Crown's opposition to name suppression is another example of the criticism that's made of the Crown's conduct. And, as Ms Aldred just said, it is a practice that has changed over time. Name suppression, well sorry to go back slightly, the principle of open justice, and that justice is to be done in public and be seen to be done in public, is a very weighty one in our system. That doesn't mean that there should never be name suppression but that does lead to the Crown's view to go to the past, back in the *White* days, that name suppression for witnesses shouldn't just be something that is automatically given.

In *White*, the Crown also opposed name suppression for witnesses who were giving evidence of sexual violence and sexual crimes done against them and it was said that the principle of open justice required them not to have name suppression.

And if I sound sceptical in explaining that reasoning, it is because I am sceptical and, as you'll see, the Crown has come to a different point on name suppression now.

But the record shows that the advice that was given to MSD, and it's at 7.3 of my written brief, was that it was seen "*as very important that these witnesses should not be protected from publication and should be called to publicly account for the allegations they are making. We also felt it would be likely to discourage other persons in the same position*". That is remarkable and improper, if what is being said there, is that if we allow name suppression, if what is being said is this would stop people who have been abused in care in coming forward and so therefore we should do that, I find it hard to believe that is what is being said and yet the record, that is what it says. That is not a good basis to oppose name suppression. It is not good Crown conduct to say if people have name suppression, if they don't have name suppression then others will not come

forward. I can't even make sense of it because it's not able to be justified, that comment. If that is what is said, if that is what is meant, let's see if we can stop people who were abused in care coming forward, that is appalling.

The Court dealt with that matter of course in *White* by giving name suppression and there was some contest in the Court of Appeal on some of the name suppression issues. And in that process it was more, the matter was more refined, in that some people should get name suppression, others there might be a question of that and others get none. So, it sort of did get refined. Probably even - no, I don't think as early as 2007 but, you know, now we see the Courts generally taking a different view about the open justice and how do you balance that against the name suppression or the protection of name suppression for vulnerable witnesses, and I've mentioned the example in sexual violence cases, in criminal cases, name suppression for survivors is now automatic, so again representing change both of society and the legal system about that growing appreciation of the vulnerable position that abuse survivors are in.

So, the Crown's position has shifted from there because in our current state, today's state, the approach now is that the Crown won't put obstacles in the way of name suppression. Using the framing that the Court has given, Cooper Legal puts up certain information and explains why the suppression is required. The Court determines it and the Crown stands by and just lets the Court deal with that.

I was going to say but - sorry. I'm just checking that I've said it correctly at 7.6, which I understand I have.

And so, going from some 12 years ago of thinking, no, interests of justice should be balanced like this, we see it differently now and we don't take that approach. Name suppression has been one of the contentions certainly in these proceedings.

I haven't highlighted it to mention but I just might mention it because at 7.5 of my written brief there's an example of the Crown taking a slightly nuanced view about name suppression for witnesses who give evidence of sexual offending versus other witnesses. I think I'm pointing it out only to show the sort of growing change, the evolution I think is the right word, of the Crown's approach to these now.

Q. At paragraph or section 8 of your evidence, you deal with referrals to Police in response to Cooper Legal's evidence but I think you've probably already addressed everything that you would want to in relation to your earlier evidence about this, your earlier evidence.

So, that takes us to paragraph 9, which is some criticisms made by Cooper Legal in relation to the Crown's performance of its obligations under a model litigant framework. If you could perhaps just address that?

A. I can't now remember if I've already said it but the Crown never did step away from that model litigant standard and I know why Cooper Legal says it because it fell out of the language that we used. But the Crown has always said it holds itself to a high standard and wants to be held to a high standard of conduct. Doubtless, we fail from time to time but that's not to say we've stepped away from that ambition. But I was interested in, as with so many things, perspectives on the same issue can be so different.

I understand the Crown to be criticised for taking limitation defences or for taking steps in litigation that any litigant could reasonably take. Accepting too that there's a line, which is not entirely clear, taking a limitation defence is not anti-model litigant, in my opinion. Contesting name suppression or survivors of sexual assaults, I think was a failure to meet those high standards. Contesting admissibility, which was another example given, I don't think is an anti-model litigant

conduct because admissibility is an important critical part of the Court being able to determine in a contest the way a matter should go.

So, I was interested, so I think Cooper Legal puts everything into the same bundle and says it's all anti-model litigant behaviour, when I would say some of that is just taking steps that are quite proper to take in litigation. We might not unbundle all of those but contesting admissibility is one that I just want to touch on a bit more.

What I understood Cooper Legal to say when they gave evidence, was that a model litigant works co-operatively with us - this was their language from our notes - tries to reach agreement but MSD and Oranga Tamariki box on with no attempts to reach agreement. And that was very frustrating to hear and in particular in relation to the admissibility, I think you heard from Cooper Legal that the Crown conducts a line-by-line challenge to admissibility and in the Court of Appeal there was a lament about why can't you work together better? That might well have been what was said in the Court of Appeal but when I look at the record and speak to Crown lawyers about that, there was a lot of attempts to agree or at least put the point to see if we can agree admissibility questions.

In fact, in the High Court, Ellis J begins her judgment of the admissibility challenges by saying, "The parties have been able to agree in large measure to various changes in tracks", so again it was the knotty hard stuff that we couldn't agree with that went to the Court.

So, I do reject the description that the Crown doesn't try and work co-operatively, doesn't try and reach agreement, just boxes straight into the Court with litigation; that is not the perspective of the Crown. It says it does try to reach agreement and failing agreement, needs to use the Court to get to a resolution.

I think that's the admissibility. There was one more, oh I think I've already addressed it actually, it is the referrals to the Police where there are processes in place, both to seek agreement if we can from the plaintiff or the Court process in place, so I don't need to deal with that.

Q. So, I think at this point, if I could take you back, please, to your primary brief. Unless there's anything else, the concluding comments at paragraph 19?

A. I've written this in paragraph 19 and I think I've probably already touched on it on the way through too, to say that today litigation is actually a really small part of the historic abuse claims resolution. There hasn't been a case since the *White* trial and yet there have been hundreds and hundreds, in fact choice to if not on 2,000 claims settled through Historic Claims redress processes. And so, you know, my part of this narrative has been about the litigation, which tends to be where the knotty and difficult issues emerge, but that does need to be seen in the context of considerable settlement through a process that has been evolving over time, doubtless can be improved, doubtless will be improved with both commitment and energy on the Crown side but also the recommendations, of course, from this Royal Commission about how we might deal with redress and truly meeting those grievances in a way that's meaningful.

Commissioners, that is all of the evidence that I want to give. Thank you for the opportunity to do that and for the questioning along the way. I appreciate it.

CHAIR: Thank you. Sadly for you, it's not the end but I believe there's been agreement with counsel that we will conclude the evidence at the end now of your evidence-in-chief and we will resume again tomorrow for cross-examination.

MS ALDRED: Thank you.

CHAIR: You have nothing further, Ms Aldred?

MS ALDRED: No, nothing from me.

(Closing waiata and karakia)

Hearing adjourned at 4.17 p.m.

ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter	**of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions**
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes, Mr Andrew Molloy, Mr Tom Powell and Ms Danielle Kelly
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	3 November 2020

TRANSCRIPT OF PROCEEDINGS

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(Opening waiata and karakia)

CHAIR: Āta mārie, tēnei te mihi ki ā koutou katoa,tēnā koutou katoa. Tēnā koe, Mr Mount, and good morning to you Solicitor-General.

A. Tena koutou.

UNA RUSTOM JAGOSE

QUESTIONED BY MR MOUNT

Q. Solicitor-General, tēnā koe.

A. Tena koe.

Q. As you might imagine, I have quite a number of questions to ask on behalf of the Commission and I'm sure, like me, you would welcome any questions from the Commissioners directly as points arise.

I will generally try to keep my questions as short as I can but I'm going to start with a long question and the reason for that is I want to try to summarise what the Commissioners have heard over quite a long time in private sessions and in a public forum, such as this public hearing, and to offer you the opportunity to respond on behalf of the Crown in an overall way. Rest assured we will come back to the detail over the next day or two.

Broadly, what the Commissioners have heard, is that the claimant group is diverse but many of the claimants include some of our most vulnerable people, many of them Māori.

As a group, they have been people in care of our State and in that situation they have found themselves to be the victims of crime, sexual assaults, physical assaults and other serious deficiencies in care.

At some points in their lives, they have turned to the State looking for some form of redress for what has happened to them because, for many, the impact of the abuse they suffered and neglect has been extremely serious in their lives.

Many have told us that there have been some positives about their experience and, indeed, that they have had very high expectations of the Crown, that it would respond with integrity, that it would admit mistakes where they have been made and that the Crown would want to put right the serious harm that has been done. But in very large numbers, people have told the Commissioners that they have struggled. They have struggled first to understand, in a coherent way, what the Crown's processes will be and, indeed, they've often found seemingly inconsistent or even arbitrary processes.

When they have asked for information, including information about their own documents, files, the records of their lives, they have struggled.

And for those who have chosen, as is their right, to file a lawsuit against the Crown, often with those high expectations that I mentioned, what they have found has been long delay, a highly legalistic response from the Crown, the use of what they perceive to be technical defences, an aggressive stance, sometimes aggressive questioning in a courtroom situation, or what have seemed to be strategic or tactical decisions by the Crown in the way that the litigation process has played out.

They have met virtually no culturally informed response and their perception has been, including from the Crown Law Office, that the general attitude has been one of disbelief, a starting point that their complaint is incorrect, exaggerated, perhaps false. And a perception that the Crown has been focused on itself, focused on what it would describe as legal risk or civil liability, the possibility that the Crown might have to pay money.

And at the end of the process where many of them have been left, has been with offers that to them have seemed like take it or leave it offers. And for many, they have told us that they had little choice but to accept those offers because the Crown's conduct of the litigation essentially ruled out the courts as a reasonable option for them to turn to.

And the result of all of that has been some very angry people with very dim views of the Crown, and specifically the Crown Law Office and the calls which ultimately, in part, have led to this Royal Commission.

So, that in a nutshell is the narrative that has been heard by this Royal Commission and, as I say, I want to offer you as Solicitor-General the opportunity to respond in a global way, if you wish, to that.

A. Kia ora, Mr Mount, thank you. Tena koutou, Commissioners. If I can address Mr Mount's nutshell narrative to the Commissioners direct. It touches on a number of the matters that we have engaged in already yesterday and I have already acknowledged, and acknowledge again, the pain and suffering that we've heard, through this Inquiry primarily but also through our conduct in the Crown Law Office of the litigation, and I just want to acknowledge that. The anger that Mr Mount just mentioned at the end there, I acknowledge that too.

I do want to point out that my appearance in the Inquiry is about the litigation and the matters that the Solicitor-General can speak to. And, as in the exchange with Commissioner Erueti yesterday, the Crown unhelpfully is said as one thing but is multifaceted and must speak as one but some of the questions or the comments from Mr Mount earlier might also need to be put to other parts of the Crown, for example the emphasis that many of the survivors have been victims of crime, of course that part of the Crown that deals with that is not the Solicitor-General of the

Crown Office, but the Police. I don't mean that as an excuse but just to say there are other avenues to get the full Crown answer to this question.

And I acknowledge and I hear it very strongly that what survivors are looking for and have been looking for is redress from the State to address the impact that the State had on them, often as children, not always, but the impact that the State has had on them.

And I come to the point quite readily that I addressed the Commissioners about yesterday, is that when we are at the point that litigation is the vehicle, it is ill-suited to deliver what survivors want. That's not to say that it never will provide redress that addresses the impact, but its very nature is adversarial, not inquisitorial. A contest between parties who can't agree, being put to a third person to determine, by its very nature, delivers up these features that are, and I understand it and I see it, are hard.

Mr Mount mentioned the challenges about understanding the process and that the claimants find it difficult to navigate the processes. I think the Crown has been working to that end, but can do more about explaining and making it clear what processes are available.

The litigation process is murky to people outside it and challenging, and I hope that survivors who choose the litigation model do that clear eyed about what it will require of them because I don't doubt for a moment that it is challenging to stand in front of strangers and tell of your most intimate story from which a great vulnerability comes.

The system of litigation can deal with those things to some extent. We get better at that, although I must say not in civil litigation and certainly not in these cases, the last one as we know having been heard in 2008 and 2009, I think. There was no different method put in place for the hearing of that evidence. Maybe that's something to explore.

Certainly, the litigation system in the criminal law has moved along, as I think I've already addressed.

And I was struck by Mr Mount's comment that survivors find it difficult in relation to their records. I think there might be two parts for my comment on that.

One is that I understand that there's been frustration in the delays in getting records and also a frustration in the record appearing - yes, appearing with deletions or redactions in order to protect privacy of other people referred to in the record. Those are frustrations that we can perhaps do better with, although sometimes the passage of time means the record might not be as good as it should be.

But I also get the sense that just receiving the record itself might be very challenging for people who for decades have not seen what is said about them, so they have their own traumatic experience that they want to and need to obtain redress in, and then a further process is gone through in which they get to see how they have been referred to in a public record. And I can understand that that is challenging but it brings me back to a question about wanting - I absolutely understand wanting redress from the State to address the impact that the State has had on you. We don't yet have a process that I am aware of that starts that process in a way that sort of begins in a more therapeutic or empathic fashion because, as lawyers, the time-honoured approach of saying "Here are all the materials about you or relevant to your case" is actually, I understand, very challenging. And so, I keep coming to this point and it's not to excuse it but to say litigation, the way we do it, maybe that needs to be turned on its head. But the way that this system of civil law in New Zealand does litigation starts that way, with a statement and the records that the parties say are relevant to that record. Very

challenging and should that be done through lawyers? Should that be done through other professionals?

The question for you, if I may, about how do we start that process off?

Anyway, I'll keep going, if I may.

So, we can do better about helping people understand what the processes are that are available to them, so that they can make choices and clear eyed choices about what might be required of them in each of those processes.

Mr Mount mentioned that the experience is of a highly legalistic response and I acknowledge that that is so. That is so when the first approach is also a legal one, as I mentioned in my evidence yesterday, back in the early 2000s or perhaps 1990s we, the Crown Law Office, was receiving files, so the first thing we knew was a filed claim. It's a step in the legal process and so the next step was the legal step as well.

We have changed that process, to the point where it is no longer required that people who want to engage with the Crown on a redress option have to file claims in order to enter the informal processes, nor with the stopping of the clock agreement that we have already discussed, even to preserve their litigation option, if that's what they want to take.

So, we have put in some places systems to ameliorate, you know, to listen the impact of those very legalistic responses but, again, of course, litigation is full of legalistic steps. I'm not saying that therefore they have to be brutal and unpleasant but at their core, they require a certain discipline and a certain set of standards of what is being said, what is being alleged, what does the defence say and why.

To that end, you know, there have been times where, you know, when I've looked through a lot of the record in preparation for this Inquiry, you see tone and - I mention

tone in one of my own letters yesterday - you see tone and language that is not on its face empathic and we see frustrations being expressed by lawyers with other lawyers. And I do want to draw the distinction between a frustration between lawyers in doing their work and being motivated by a lack of empathy for the person. I say that a distinction should be drawn, although I do understand it is hard for that to be seen on the record. But it's not about lawyers, this case shouldn't be about lawyers and how we feel about each other. It should be about providing opportunities for survivors to get redress from the State for the impact of the State on them.

But I just want to make the point about aggressiveness. It is often said that litigation is aggressive but the reverse of that or the opposite of that might be, well, I see that as saying but litigation steps can't be too passive because the matter, if it's going to litigation, you do need to elevate for the Court the areas in which the Court is going to need to determine a contest between two parties. That is hard to do in a passive way, but it is easy to do in a polite and respectful way.

And my ambition and my own professional experience tells me that Crown lawyers sometimes miss the mark but mostly hit the mark of empathy to the individual and politeness in expression. But aggressive as, sort of, angry and ugly, is not the right sort of way to put forceful steps in litigation. They can still be not passive and be polite.

I heard and I've already addressed yesterday the challenge or the criticism about technical defences and tactical decisions about the process. I don't know that I can say more than I said yesterday, that they are legitimate steps in litigation. Whether you call them tactics or steps in litigation, I don't think that's underlying a bad faith motive to take steps to defend claims.

I've already addressed defences that are said to be tactical that I say, particularly the limitation defences is the particular one that gets called out as a tactical defence, to say that it is a substantive policy laden reason, encouraging the balance between pursuing claims with due diligence, acknowledging that there are those exceptions that can be provided for, and not requiring defendants, particularly institutional defendants, having to answer for allegations that they can no longer defend themselves against through passage of time.

There is a strong policy rationale there, but I have also addressed the change in the law, where that balance has shifted in relation to sexual crimes and physical crimes. And there is work being done by the Ministry of Justice to think, have we got that right yet?

I heard from Mr Mount and I've heard it from the survivors too that we are yet to see a culturally informed response in the litigation, I accept that. The courts are, and the litigation process is, now starting to grapple with, in different parts of the law, the impact of the law on Māori, the tikanga and the role for New Zealand common law to develop consistent with tikanga. That is starting to happen.

In the informal processes, there has been more of an effort and doubtless more can be done to bring a better cultural understanding to the engagements with individuals and their whanau.

Coming to some particular points that I understood about the Crown Law Office. The feeling from survivors is that the starting point is that they aren't believed or the Crown Law Office or the Crown lawyers start from a position of disbelief. That isn't the case. There isn't a thinking or a mindset that we're starting from having to bat away wrong or made up allegations but that process does require a person to say "I say these 5 things", the defendant to say I

agree with them or disagree with them or I look at the record and I don't know what to say, we need to keep going further down the process.

It's always the process that sets up that view, so I understand it, that a claim is met by a defence and sometimes the defence will be that we don't know enough and we need to keep going through the process. But that is different from starting from at position of not believing. Rather, starting from a formal process that brings out, over time, litigation does move through its paces delivering different perspectives and agreed facts and challenged facts from when the parties begin. The case will be quite different usually by the time it gets into court, if it gets there.

Mr Mount mentioned the Crown focused on itself in relation to legal risk and civil liability and expenditure of money, and I accept that that has been, and is always, the Crown's view about what is our obligation here and what is our exposure? What should we do and how do we decide what resources should be - resources like money and people should be spent dealing with this issue, as opposed to other issues? That is a classic policy choice for governments and they stand or fall at the ballot box of course on how the public views those choices.

While Mr Mount put it as the Crown being focused on itself, I wouldn't accept that sort of very self, sort of, Crown centred view, but it is a natural way of executive government thinking about all of the matters that it deals with and where it wants to put its resources.

And finally, Mr Mount was addressing that at the end of the process people are often faced with what they perceive as take it or leave it offers of settlement and that the Crown's conduct rules out the courts as a reasonable option.

I addressed the first of those points yesterday. Perhaps we need to revisit this approach. The Crown's approach on

offering settlements has long been that we shouldn't make people get into a bargaining match with us. We will do our best to come up with the package of settlement offer that is thought to be fair, is thought to be consistent with others and is reasonable and make that as the offer, on the basis that there isn't sort of - we're not putting the survivor into a negotiation with the Crown. It was supposed to be a good thing, but I am hearing that it's being perceived differently.

But also, I observe that the Crown Resolution Strategy has expressly dealt with part of that to say if you have settled a matter and some aspect is not dealt with, the Crown is open to that being revisited. So, again, perhaps listening to some of that concern of take this and then that's it. But also, the proposition from Mr Mount that the Crown's conduct rules out the Courts as a reasonable option. The litigation steps don't do that. There are many things that say that the courts are not an easy option, litigation, as I've already mentioned, by its very nature, but also the legislative landscape that I covered yesterday, in particular ACC, the law of tort and what are the sorts of and positions on the person or the person's interests for which the law recognises some redress.

And so, the courts as a reasonable option is a proposition that, you know, I invite the Commissioners to think about, as I'm sure you will, to help with this question, help everyone with this question about is the court a reasonable option? Is that really the answer to this hard question facing us and facing society, that we must face, about survivors who are wanting, demanding and fighting for something that helps them relieve the impact that the State has had on them.

The courts might not be the reasonable option and I accept that at the beginning of this sort of narrative, late 1990s, it was really the only one we had and so I'm not

critical at all that some claims were filed to test those waters. There are different options in place.

I think you'll see from the Crown's Resolution Strategy that the Crown is open to thinking about what other methods and other things, other professionals need to be put into this mix in order to work out redress options that work, that provide the therapeutic and - I feel like therapeutic sounds condescending but the meaningful redress option that is being sought.

And I have to hear it, that a very dim view has been formed, as Mr Mount said, of the Crown Law Office, and I am responsible for that. And in my approach to these things, I see my colleagues actually working hard and diligently with considerable empathy for individuals' experiences but I understand that that gets hidden from those individuals through a process which looks very hard and uncompromising, and it probably doesn't mean much to the survivors to say that I hear that and I am committed to, and have always been, and work with a whole lot of other people also committed to an empathy for people in society for whatever reason who aren't as privileged as we are. We see that and that is certainly part of our professional practice as lawyers.

Just can I make one more point before I come back to Mr Mount. Lawyers themselves have changed over years about how we deal with each other. I mean, over the last few years we've come to some pretty grim revelations about ourselves, about how we speak with each other, how we work with each other. I think that is changing. That better politeness between lawyers, rather than aggressive dashed off letters that are "you're wrong and I'm right". I think we're seeing less than that, I hope we do. I think as people we need to do better there and that is a shift in our profession too that might be relevant to this Inquiry.

Thank you.

Q. As I say, we have a couple of days at least set aside now to go through many of those points. It may be helpful for me to say that the broad structure of the questions will be in four parts.

Firstly, to look at the way that the Crown has conducted historic abuse litigation.

Secondly, to look at the Crown's approach to policy and strategic questions at a high level.

Thirdly, the Crown's approach to Treaty and human rights questions and perhaps a broader view of the rule of law.

And then finally, the future.

And it's perhaps also worth emphasising that while all Inquiries have a backwards looking function, as well as a forward perspective, even the backwards looking material which we will go over in a lot of detail looking at documents and so on, even that at its core is not purely backwards looking. We will always be looking for opportunities that this can be done better, if that makes sense.

I should also say that as we encounter policy questions for the future, which inevitably we will, this Inquiry will have further processes next year and coming months that will revisit many of these policy questions. And so, I realise some of them will be too big for us to get to the bottom of them in this forum but just to reassure you that we will be able to come back to many of them.

And perhaps lastly in this extended preamble, there are some other topics that we will be coming back to next year. They, of course, include the Lake Alice Child and Adolescent Unit, there will be a whole hearing on that topic next year, so we will talk about Lake Alice today and tomorrow, it's very relevant to this topic, but in fact it's so important we will be coming back to it.

The first topic then is the way the Crown has conducted historic litigation. And to set the scene for this,

yesterday you said, I think quite rightly, if I may, that there are high expectations on the Crown and that you embrace those high expectations in terms of the Crown's conduct.

You mentioned the review by Miriam Dean and David Cochrane in 2012 and I just wanted to put that up on the screen. We have Ms Wills in the area there with you and she will help you find hard copies of all these documents to turn to, so that if you want to see the broader context you can but I'm sure you will remember this document, a review in February 2012 of the Crown Law Office?

A. I do.

Q. If we turn over to page 27 of the electronic document, there is the section, see the heading, "Being a model litigant", if we just zoom in on that. You will see the reviewers noting 6.12, "It is generally accepted that the government and its lawyers should behave as "model litigants".

And they explain that that meant observing notions of fair play and not to win at all costs but rather ensuring that justice is done.

Would you accept that as a reasonable summary of a model litigant concept?

A. I agree, I think I said yesterday that at its broadest, the sort of most agreed version of what is a model litigant is that idea of fair play.

I think the idea of ensuring justice is done and not winning at all costs actually is something that sort of sounds more readily, at least to my ear, in the idea of Crown lawyers as criminal prosecutors because there is a very strong principle in criminal law to that the role of the prosecutor isn't to win. The role of the prosecutor is to make sure it is the court who has all the right material in order to find, convict or otherwise, the defendant in front of them.

And that paragraph from the Dean Review has always struck me as referring to that very serious obligations on the Crown as the prosecutor but I can accept that the Crown as a civil litigator also has to behave fairly, as I've already acknowledged. And winning isn't really - and winning at all costs isn't really sort of the language that I would use to describe defending a claim and testing the evidence and testing the law as it applies to the facts. That's more about defending a claim consistent with the law and instructions. So, I don't recognise civil litigation in that phrase.

As you will see, it goes on at 6.13 or is it 6.14, specifically about the criminal prosecution function.

Q. Yes, I think it's 6.14, talking about the criminal law but 6.13 certainly does refer to a reported perception that Crown Law at that time, 2012, did not always adhere to the model litigant model and the reviewers wanted the Office to know that there was a perception that sometimes the Crown Law Office is driven too much by the wish to win. Of course, it's recorded that Crown Law rejected that criticism.

Did you, at Crown Law at the time, perceive that concern that there was too much of a wish to win?

A. I don't now remember what I thought at the time, so I can't quite answer except as I have today, which is to say I don't think it is the right characterisation to say driven too much by the wish to win when a desire is, if we're instructed to defend, to defend the matter and to have the law apply to the facts as we think the law should apply.

And I am probably doing exactly what the Crown Law Office did, as recorded in 6.13. It is not a perspective that I share about how the Crown Law Office lawyers or the Crown's lawyers go about its role.

Q. Today, if you perceived within the office a sense that people did have a win at all costs approach to litigation, would you regard that as something of concern?
A. What do you mean by win at all costs? I mean, I would agree if that meant hide relevant material, just keep pressing on with the might of the Crown until you burn off a person with less money. Those are not model litigant practices, so I find "win at all costs" is a phrase that will mean different this thing to different people. As I've already said, the criticism that it would cost more to defend an individual case than it would be to pay the person a of money, I don't think that is a win at all costs concept, so you might want to unpack what that expression means.
Q. Perhaps we're best to look at specific instances as we go through the questions.
If we move over to the next page of this document, the recommendation from the review at 6.17, the third bullet, was a recommendation to publish a model litigant guideline similar to Australian policies.
A. Mm.
Q. I think it was about a year and a half before the Attorney-General values on litigation was published and I think you established yesterday that the Attorney-General's values document was the response to this litigation; is that right?
A. Yes.
Q. Were you involved in, or aware of the process that led to the Attorney-General's values document?
A. I certainly would have been aware of the process, yes. I doubtless would have had a role in it as well, although I am not sure I recall precisely what that was but at that time I would have had a senior role in the Office.
Q. We'll go to the document in a moment but one thing I want to ask immediately is why the words "model litigant" don't appear at all in that document? Words are important to

lawyers and it does leap out that there was a specific recommendation to publish a model litigant guideline but the words 'model litigant' dropped away; do you know why that was?

A. I don't remember. I remember that there was discussion about this is more about values, rather than sort of precise rules. Maybe that encouraged that view. I don't remember. I'm happy to find out. I mean, if that is - the material will be in the office somewhere that takes us through this process, so I can come back through counsel, if that's useful.

Q. If you do turn up any information, by all means, thank you. The recommendation on the screen was specifically to publish a guideline similar to Australian policies, and so it may be helpful if we can look at the Commonwealth Litigant Obligation, which is document MSC1103. This is the most recent version, obviously it was updated after the Dean Cochrane review. Ms Wills may be able to find that for you, it is a document which came into the hard copy collection a little later. It's a very short document, so it's probably sufficient for you to see it on the screen.

If we can go to the second page of the document, and perhaps if we zoom in on the top half of the page. If we could just perhaps note some of the obligations in the Australian document. They include at 2(b), there's an obligation to pay legitimate claims without litigation, including partial settlements or interim payments, where it's clear that liability is add least as much as the amount to be paid.

2(d), a positive obligation to endeavour to avoid, to prevent and to limit the scope of legal proceedings wherever possible.

If we go down to 2(g), not to rely on technical defences unless interests would be prejudiced by that requirement.

Perhaps go back up slightly at 2(e)(iii), again a positive obligation to monitor the progress of litigation and to use methods appropriate to resolve it, including settlement offers or ADR.

If we go across the page to 2(i), in the top half of the page, an obligation to apologise where its lawyers have acted wrongfully or improperly.

And if we go across the page again to the last page, two more pages on, 5.2, we see a positive obligation to ensure the representatives participate fully and effectively in alternative dispute resolution.

I've rattled off a lot of these provisions, but I wanted just to check with you, would it be your view that all of those obligations are sufficiently captured in our New Zealand Attorney-General values document?

A. Have you got this document there? I am going to need to go back to each of the ones that you've highlighted. I did say yesterday that I thought they were pretty much, much of a muchness, the values and the model litigant values. I can go through each of the points that you mentioned and match them and review the values again now, if that's useful but perhaps it isn't.

Q. I don't think we need to do the specific comparison to that level of detail but was there anything in the document, the Australian document, that would raise your eyebrows in terms of what the obligations on the Crown should be?

A. It slightly brings me back to the point I was making yesterday to the Commissioners, not that my eyebrows will raise, but rather how individuals' perspective on have I, the Crown lawyer, behaved like that or have I not. It is just so a matter of perspective about whether this is a technical defence, this is a substantive defence or you should be settling with me, versus we still need to test the evidence. And it is hard to simply agree that, yes, these

are the standards and they will never be deviated from because everyone's perspective on them is so different.

CHAIR: But as a starting point, I think the question was more general; is there anything in there that would look foreign to us if they were adopted as part of the New Zealand model litigant standards, just on the face of them?

A. I don't think so in particular. I mean -

CHAIR: I think you're hampered. You don't have a copy of the document, is that right?

A. Thank you.

CHAIR: Are we able to provide Ms Jagose with that?

MR MOUNT: A copy of the Australian document?

CHAIR: Yes.

A. It is in this material somewhere, I know that because I've seen it.

MR MOUNT:

Q. Because it was one that was added relatively late, I don't have a page number, I'm sorry, but it is only about a couple of pages long.

CHAIR: I think somebody has gone rushing off to photocopy it.

MR MOUNT:

Q. While we're doing that, perhaps if we can go back a page. In your evidence, you refer to Note 4. I just want to zoom in on Notes 2 and 3 of the Australian document. So, Note 2 is a requirement to act with complete proprietary, fairly and in accordance with the highest professional standards.

And Note 3 talks about requiring more than merely acting honestly and in accordance with the law.

Would you agree that the concept in both of those Notes is that the obligation on the Crown should be higher than -

A. Yes.

Q. - the baseline obligation of lawyers?

A. Crown lawyers should be held to a very high standard, I agree with that. In fact, we see that, if I may, just on Note 3 in particular, we see Crown behaving in that way, conceding things that aren't in issue, pointing out in respect of lay litigants steps that they might need to take or errors that they have made, even to the Crown's disadvantage. I mean, the Crown is known for having and meeting that higher standard.

Q. Yes. And in fairness to you, yesterday you did refer to Note 4, so we should zoom in on that as well, where we see that it doesn't, this obligation of being a model litigant does not prevent the Crown from acting firmly and properly to protect interests and does not preclude all legitimate steps being taken to pursue or defend claims. That's what you referred to yesterday, I take it you'd agree with that?

A. I do, and yesterday I gave some examples of where we failed to meet that high standard. I think my examples yesterday were what was the prejudice really in a further adjournment. I can see that now, what was the prejudice. So, there are examples of us not meeting - that I've already addressed, not meeting that standard. But as a general proposition, it's in Note 4 that the, sort of, different people's perspective comes to bear, isn't it? And it's wide and Note 4 is the clarifying point, as I said yesterday, I think, in the Australian courts and the Law Reform Commission have also taken this point about, yes, the Crown or Commonwealth is a behemoth, I think the Criminal Court says, we expect and require them to act fairly but they don't have to, I think the expression was, have one hand tied behind their backs. It's that perspective that I'm trying to emphasise that needs to be brought to bear.

Q. We might do a couple of side by side comparisons, we're going to try this on screen. One would be to compare on the page we're on, Notes 2 and 3 of the Australian document,

with paragraph 2 of the New Zealand Attorney-General's values.

So, Notes 2 and 3 on the left-hand side we've just looked at and agreed the concept here is that the Crown will reach a standard higher than what's expected of, if you like, ordinary or other litigants.

Paragraph 2 of the New Zealand document, as you can see, talks about a standard of fairness and integrity as befits the Crown.

The question is, from your perspective, does the New Zealand document, in your view, sufficiently capture the idea that the Crown ought to reach a standard higher than that of other litigants?

A. From my way of looking at it, it does because it calls on that, what is the standard of fairness and integrity that befits the Crown? That is recognising the Crown has a different, I mean it goes, it harks back to that perhaps old and a bit more forgotten view that the Crown is there to protect and serve its subjects, which is language we don't really talk about anymore of course but it's reflecting as befits the Crown. To me, that is saying a higher standard than the private litigant.

Q. Perhaps if we just do one more side by side comparison. If we stay on the first page of the New Zealand document on the right-hand side and zoom in on paragraphs 1 and 2 on the right-hand side. I am sorry actually on the right-hand side if we go to 5.1. On the left-hand side, if we go to the Australian paragraphs 1 and 2, so that's on the previous page. 1 and 2 of the Australian document, if we could squeeze this onto our screen. The Australian document at the top begins with the emphasis of behaving as a model litigant and then goes through to explain what model litigant means in the various ways that we've been through.

New Zealand in contrast at 5.1, the first point about what the Crown will do, is that the Crown will take and

defend litigation in accordance with the Rule of Law, ensuring the government is able to pursue its objectives and responsibilities lawfully and effectively.

The question is whether in New Zealand our document, by emphasising the document pursuing objectives effectively, there is a change of emphasis in the New Zealand document towards the Crown being able to litigate effectively, as opposed to an emphasis on this higher elevated standard that we see in the Australian document.

A. Is the question, is there a difference?

Q. Yes, a difference in emphasis?

A. Well, it's expressed differently but I know that's not the question you're asking me, sorry.

I find it hard to answer this question, again because in the values paper 5.1 is one of a number of things which include be fair and objective, consider early resolution, don't take unfair advantage of an unrepresented or impecunious opponent. It sort of pulls out, I would say more expressly, maybe the Australian document does it too, but it's pulling out more expressly that idea about fairly handlings claims and litigation, dealing with them promptly. I see them here too, not just in the paragraphs you're comparing.

Q. The Commissioners will need to form their own view of the documents and I realise there's quite a lot of technical detail here and it's not easy to cover in this forum. Can I ask you this, you've said that you are not aware of any reason that the Crown backed off the model litigant language. Would there be any reason now to shy away from that language 'model litigant'?

A. I mean personally, I don't know that there is. I would rather see the reasons why it went down the Attorney-General's values. If that was a matter that the Attorney-General, I don't know, them self was particularly keen on. That is something we would want to test with the

Attorney-General now. It is a bit hard to answer that question, but I hear you, what's the difference, when I say there isn't really one.

Q. As I say, perhaps the best way to make some of this concrete would be to go through some of the cases and see some of the steps taken and we might come back to some of these documents.

A. May I say something, I hope it's clear in my answers that none of this is to say we should step aside from this high standard. I hope my evidence yesterday was clear that I am committed to those high standards and that is the standard we should be held to and sometimes we will not meet it. I don't want to quibble about language to be seen as stepping away from what I said yesterday.

Q. In order to test the criticism that has been made, what I want to do is focus on three cases as examples and we'll go through it in a bit of detail, I'm sorry.

One was a case that did settle with a financial statement. One is where there was no agreed settlement through the litigation process. And one went to trial.

And the first is one of the Lake Alice claims, in fact I think the first that was filed in Court, and that was Ms McInroe's case. And of course that case was dealt with before you came to Crown Law, I believe?

A. Yes.

Q. Or largely before you came to Crown Law. And, as I say, we will come back to many of the other cases involving Lake Alice but in case there could be any doubt about the human impact of the way that Crown Law has approached litigation cases, what I wanted to do was start with Ms McInroe's evidence itself about how she felt about Crown Law after the nine-year litigation experience.

I don't know whether you have had a chance to see her evidence at the time she gave it?

A. I did. I said yesterday that I read her evidence in advance and I watched her evidence that she gave, yes.
Q. Well, for those who may have missed it, we do have the ability to replay part of her evidence. And so, this segment was from the 24th of September into the record, it was at the transcript page 183. This is Ms McInroe's description of her experience of the Crown at the end of that process.
(Segment of evidence of Ms McInroe played).
The background, as you know, to Ms McInroe's claim was that it was filed in 1994 and her legal team over the years included highly competent counsel, I think three of whom became Judges, Judge Cunningham, Justice Duffy and Justice Robert Chambers, one of our most eminent jurists. She was represented by highly competent counsel who I think we can assume knew absolutely how to conduct civil litigation to the most effective extent but still it took nine years for that claim to be resolved. Are you able to say anything on behalf of Crown Law before we move into some of the detail as to how that could be that such a well-represented claim could take nine years?
A. All I can say to that, is that I heard Ms McInroe's evidence when she gave it and just now. I hear the impact that that process has had on her and I acknowledge her today and I hear the pain in it, the revisiting of the pain in it. Crown Law accepted that there were unavoidable delays in that litigation.
Q. I think you said unavoidable?
A. I beg your pardon, I have written avoidable but I've read out the wrong word. Avoidable delays, it has recognised those avoidable delays and I don't know that I can say much more, except that this is a case where there were delays that shouldn't have happened.

Q. Just stepping through it perhaps. Yesterday, what you said, I think, about Lake Alice, was that this was a case where "the proof was right there in the file"?
A. Yes.
Q. I think were your words. So, would it not have been apparent to Crown Law right from the beginning that this was a meritorious claim?
A. I just don't know enough about the 1994 starting of this case to answer that question. I can say though, that the Government's response when it looked at the record was to accept that the record showed the assaults and the problem. I just don't know enough about it to say was that material before everybody in 1994? I'm not saying it wasn't, I just can't answer it.
Q. If it is the case that the proof was there in the file, is there any reason that Crown Law could not have simply reached that conclusion from the very start of the process?
A. The conclusion that was reached was to say let's not - sorry, I don't mean to disrespect Ms McInroe by talking about a different kind of point in the process and I will come back to this question.

What happened later, is that the Government decided it would take a different approach, so it wouldn't address the matter through litigation. And I suppose all I can say is that, for whatever reason, and I'm not defending it as good reason, for whatever reason that didn't happen in the very first claim that was filed.

Would the material have shown that there was the same proof? I just can't answer it. I think I need to be able to answer it and perhaps that's something that we can come back to at some point. I mean, I don't know if the Inquiry has seen all of that record but I haven't. I'm not trying to duck that question. It's a good and hard question to be asked. I would rather look at the record and answer it.

Q. Certainly, when an independent or somewhat independent person, Sir Rodney Gallen, looked at Lake Alice and spoke to the claimants, he was left in no doubt that they were telling the truth. Again, it leads to the obvious question, if there are documents at the time and when this is looked at by an independent person there's a clear view that this is a meritorious claim, how could it be that that is not recognised for so long? Your answer may be the same.
A. I don't know. You know, it's right that that is questioned, how can it be? But I can't answer it.
Q. As you say, the government decided to take a different path with Lake Alice and we'll come back to this no doubt but just while we're here, it is perhaps worth looking at the advice that went up to Cabinet on Lake Alice in 2000. This is document tab ending in 31. This is a document from fifth May 2000. Just looking at the front page to orient ourselves, again this was before you came to Crown Law, so you're obviously having to work from the documents, like everyone else.

If we turn over to the fifth page, paragraphs 9 and 10, we see Cabinet being told about the background to Lake Alice. And yesterday you mentioned the Commission of Inquiry I think and the Ombudsman's report. And we see in paragraph 10 that in 1977 the Chief Ombudsman had identified serious defects at Lake Alice.

I don't mean to keep asking you the same question in different ways but if there had been serious defects identified in 1977, should that not have been taken into account by Crown Law in the mid-1990s when Ms McInroe's claim was filed? There had been known concerns about Lake Alice since the 1970s.
A. I can't disagree with that proposition.
Q. If we go over the page to paragraph 15, there was a summary of the facts given to Cabinet. I need to be very conscious as we put things on the screen that some of our sight

impaired people need things to be read out but sometimes I'll do that in a summary way, if I may.

But Cabinet has told in 2000 that the file material collated indicated a series of facts that would not be difficult to prove and there are a series of deficiencies at Lake Alice that are set out. The legal basis not clear, people who didn't have mental disorders but rather had behavioural problems, limited control, those sorts of things. And I take it that these are the facts that again could have been available to the Crown in the mid '90s had proper inquiry been made?

A. I presume so because, as this paper records, as you touched on, there was a 1977 Commission of Inquiry, so assume from that there would have been sufficient factual findings.

Q. If we turn over to paragraphs 37 and 38, a key factor it seems in the advice that went to government in 2000 was that the government might want to take a moral view, rather than a strictly legal view.

If we look at paragraph 37, it says, "The Government may also wish to consider whether, given the circumstances, there is a moral obligation to redress the situation, regardless of the fact that the law is unclear"?

A. Mm.

Q. And in 38 it's noted, advisers, whether legal, policy, advisers read the statements, they had a reaction that morally and ethically there should be an alternative to litigation that should be pursued.

That exercise of asking when a claim comes in, whether there might be a moral or ethical obligation to resolve, clearly wasn't done by Crown Law in 1994?

A. I agree that wasn't done.

Q. Is that something that's done now?

A. Yes, I think so. I don't mean to say "think so". Yes, that is done, in that what is routinely done, as any piece of

litigation comes in, is an assessment of what does this tell us? How do we need to respond to it?

And invariably, that will be done in concert with our colleagues in the Department that relevantly holds the matter.

And if there are points at which either the record slows or someone knows or somehow we already know that what is said is either proven or true or that on the basis the law gives them relief, that is the assessment that we make at the beginning. It might be put in a, sort of, legalistic frame but litigation planning is about what does it tell us, what do we know, what are the next steps? That sort of engagement that we have with our colleagues and departments which provides them an opportunity to say our records show this or yes, we know about that from last year and so on.

So, that question about regardless of the form should we be doing something different, either accepting facts or engaging in settlement negotiations direct, that should and does happen.

Q. Is it now done in part explicitly with that broader question of what would be the right moral response, putting aside the strict legal position?

A. No, I would say the first engagement with these questions will also be about what result will the law deliver? And it might be that the question as to whether or not regardless of the result the law delivers, is there some other answer that is wanted to be pursued, will come up in those engagements with the Department more likely because it is, Crown Law's role is to say this is what the law is or is likely to be, in engaging with the instructing department, to use that slightly shorthand phrase, about how they want to now address this question. So, both of those things come into the mix but they don't necessarily come out of the Crown Law Office.

Q. We'll come back to that question, I'm sure. If we can just go back in the document to paragraphs 19-21?

CHAIR: Before you do, Mr Mount, do you mind just having that open again? The second paragraph that was shown up, sorry I should have intervened a little bit earlier. This is about the advisers who formed the view that alternative litigation should be avoided on the basis of morally and ethically. I'm just interested to know, in in your experience, how common is that in response to a civil claim, in your experience? Is that an unusual thing to encounter?

A. It's not unusual to think, not just in the face of litigation but about this as the law, what it would provide or allow for, and then another question might be, and should that be the step that's taken? In that, I'm more thinking about - I'm not thinking about historical claims litigation there. I'm just thinking about in a general way that is not an unusual thing to be surfaced.

CHAIR: To weigh up the moral and ethical or -

A. That question about should you, rather than must you or can you, that is not an unusual in my experience matter to be raised.

In the face of a litigation action, you know a claim being brought, as I say, I think the Crown Law Office's function is to say this is what the law tells us about this case. But it is also very common to see within the wider Crown, sometimes in Crown Law but more in discussions with the wider Crown, an enthusiasm or a tendency to think, well, should we defend that or should we try and settle that?

I'm not certain that it would be put on an ethics basis but that's its underlying thinking, bringing that to historical claims. I mean, you've seen the Cabinet papers coming more to this from meritorious to sort of moral, that is very much now reflected in the thinking there.

CHAIR: It just struck me as something that might be unusual but you say it's not - is it unusual - you say it's unusual now, do you think it's unusual in the past?

A. I think we've got more attuned to the idea that there is a bigger question than what might the law deliver?

CHAIR: Thank you. Sorry to interrupt, Mr Mount.

MR MOUNT:

Q. We were going back to paragraphs 19-21 and there's a reference under the heading to "Technical Defences" to four defences that would be open to the Crown, the Limitation Act, immunity under the Mental Health Act at the time, ACC and vicarious liability principles.

I take it, you've been pretty clear that you don't agree that the label "technical defences" is fair?

A. That's right, yes.

Q. But for better or worse, that is how they were described to Cabinet in 2000?

A. Mm.

Q. And it was pointed out that a question the Government would have to grapple with was whether, if it went down a negotiation or ADR, Alternative Dispute Resolution Process, the Crown would not rely on those technical defences. In the way the Government thinks, is that often a fork in the road, if you like? If you head down the legal route, then these defences will be regarded as not technical but just the rules of the game? But if you go down the ADR route, put aside the technical defences and we'll just look at what's right, or is that oversimplifying?

A. I can't say what the Government thinks, that is too amorphous a concept to respond to. But I can say that in practice, well if I bring it particularly to historical claims because that is where we see the most obvious choice or I think you said fork in the road, that in informal processes, I think it is what this document is saying. In

an ADR process, you still have these defences but they're not barriers to informally resolving the matter. And then, as this says, if you go to Court, then that needs to be determined as to whether or not those defences are taken up. Although interestingly, Accident Compensation isn't a defence. So, it's interesting it's said to be a defence at all in paragraph 19, it isn't a defence, it's part of the legal framework that a Court has to deal with. But anyway, that's a slightly separate point.

So, it is showing at paragraph 21 that familiar ADR, we won't stand on the bars that we might choose to stand on in litigation. And of course, in historical claims we've seen the government strategy since about 2003 or 2004 forming that conclusion in court, defend if that is the appropriate step.

Q. We'll come back to this fork in the road, if you like, and the way that the Lake Alice case was overall dealt with. I am particularly wanting to focus on Ms McInroe's case at the moment.

And just while they are on the screen, if we go through the list of steps that Crown Law took in Ms McInroe's case.

One of them was to ask the Court to strike out her claim, ask the Court to dismiss her claim, based on those differences, correct, the Limitation Act, the Mental Health Act and whether or not we call them defence but also based on ACC. So, that is a thing that Crown Law did?

A. Is that a question, sorry? I know there was a strike out application. I am not familiar with its detail.

Q. Would you take it from me that it was on the basis of the Limitation Act -

A. Was ACC, was that part of it? Were these pre - 1974?

Q. We are coming up to the break, I can show you.

A. Sorry, I don't mean to be difficult, I just haven't seen the document.

Q. But perhaps if we look at the overall response of Crown Law. The very first thing that Crown Law did not do was to make an early acknowledgment of the permits of her case. So, there was not that early assessment by the Office to identify this as a case that ought to be settled; is that fair to say?
A. I'm going to have to take it from you if that is the case. One thing I would say to that is, assuming that the Crown Law Office, as it doesn't today, wasn't even then acting on its own, it would have been taking some - it would have been working with others, presumably the Ministry of Health, to come to that view. So, I don't know, and I would have to examine the file as to whether there was any advice about the exposure or the merits. And I see that in that Cabinet Paper that you took me to just before, there is advice coming from both the health stream and the legal stream, as I read it, about the factual merits.
Q. Six-years later, of course?
A. Yeah, my point is I don't know if that same advice is on the file.

MR MOUNT: All right. I can see that it's time for a morning adjournment, if that's suitable to the Commissioners?

CHAIR: Yes, it is, if that suits you, that's fine. We will take 15 minutes.

Hearing adjourned from 11.31 a.m. until 11.45 a.m.

CHAIR: Yes, Mr Mount.

MR MOUNT:

Q. I just want to make sure that we haven't lost the sense of the chronology for the McInroe case. We know it was filed in 1994, then take it from me, Madam Solicitor, if you're in doubt, that it was the late '90s, about '99, that a group claim was filed by Mr Cameron on behalf of a large number of Lake Alice survivors, and it was the group claim that was the main focus of the Cabinet advice in 2000 that we were looking at.

A. Yes.

Q. What Ms McInroe explained to us in her evidence, was that she was not aware of the parallel settlement process that came out of that 2000 Cabinet advice where the group claim was settled first; do you remember that being part of her evidence?

A. Mm.

Q. And, indeed, one of her complaints is that she was kept in the dark about the group claim and, whereas Sir Robert Chambers, her lawyer, had always said to Ms McInroe that she should try to settle first because of the seriousness of her claim, she was dismayed to find that there had been a settlement with the group before a settlement with her; do you remember all of that evidence?

A. I do, I mean I remember the evidence, yes.

Q. And that fed in, no doubt, to her evidence which was at paragraph 97 of her statement where she talked about prolonged trauma caused by strategic intentional delay and compensation protection tactics from the Crown, which she described as appalling and indefensible; if you remember her evidence on that?

A. Mm.

Q. Now, I think you said you haven't had an opportunity to go back over the file for the McInroe litigation; is that right?

A. I haven't done that, yes. But can I clarify one point? Just before the break, we were talking about would the Crown Law Office have taken a sort of holistic view to this file, and I was just looking back at my own evidence in the break and it reminded me to just repeat that in those early days, I think referred to it as it was ordinary just to get the file, just to start working on it, as what did the law tell us. I think one of your propositions was, would that have been what Crown Law did when Ms McInroe's claim was filed? And I think it's probably yes, that would have been a very legally focused question about what does the law tell us here and advice to the Ministry, I'm assuming of Health, I think that's probably the right assumption, about what we saw the law to be.

Q. And so just to put it squarely, we always come along to these Inquiries with perfect hindsight vision. With that vision and what we now know about the strong merits of the claim, did the process miscarry in some way if that initial assessment by the Crown of the claim missed the strong moral case to settle swiftly?

A. It feels to me that the point at which the process can be criticised for having misfired, is the point at which Government took a different solution to a different set of people without involving Ms McInroe in that. That feels to me like a point at which the process misfires, yeah.

Q. Which is the point we had a moment ago?

A. Yes.

Q. Are you not willing to entertain the idea that there was a failure right out of the blocks when the strength of Ms McInroe's claim was apparently missed by those handling her file in the mid '90s?

A. No, I can accept too, that that was a failure or an opportunity missed to do something different with it, yes.

Q. What Ms McInroe described was I think what you would say are essentially the orthodox steps of civil litigation, an

application to strike out and the Crown very much wanting to take up the defences that were labelled technical defences in the Cabinet Paper, accepting that you dispute that label.

Is it possible to defend those ordinary orthodox litigation steps in a case factually as strong as this one?

A. With the benefit from today, no. And I said yesterday, I don't want to defend everything as if everything has been fine. And you mentioned 2020 vision earlier, I mean with the hindsight, rather than the year, and I think as long as we can learn from that, maybe that's too late and too light a point to make. I have no objection to learning things and doing them differently. So, I can accept that if from 1970s we understood, we the broader system understood that there was a problem, why was that not brought to bear in either the instructions to Crown Law or the Crown's view of this case?

Q. And why do you think that was?

A. I don't know. In today's language, we might say a failure to be survivor focused. It might have been just the orthodoxy of here comes a claim, this is what we do with claims.

Q. There are many more specific criticisms Ms McInroe made very articulately about the process. I think I can leave many of them to the counsel who will address the Commissioners in closing but thinking about how the world could be better, can we think about an alternative way that the case could have been handled, beginning of course with the recognition that this was a case that needed to be prioritised and progressed without delay? I take it that's a reasonable ulterior option?

A. Yes, and the delays, they're unexplainable.

Q. An early assessment of merits, another obvious step that could be taken. And, in fairness to the Crown, for a case like this, expert advice might well be needed from an expert

psychiatrist to understand the basis of the claim; I'm sure you would agree?
A. Yes, I mean, and that is a feature of today, that there are other professional experts involved, yes.
Q. And with hindsight, that could have been dealt with much faster and more sensitively than it was dealt with? You will remember Ms McInroe's evidence that she was required to attend at the Mason Clinic in Auckland?
A. Yes.
Q. A forensic psychiatric facility, and the level of distress that caused her?
A. And I readily agree that could have been done differently.
Q. In a case like this where you have a litigant claimant for whom this litigation so clearly would be personally important to them, would it be possible for Crown Law to provide regular updates to the claimant about the progress of their claim?
A. Well, regular progress updates should be to the lawyer in the first instance, as you know.
Q. Through the lawyer, yes.
A. You can't communicate directly with the plaintiff. Yes, it is possible to provide updates.
Q. Ms McInroe described I think being left for long periods of time, sometimes years.
A. Mm.
Q. Even after attending a mediation, which she described vividly being an extremely difficult situation, she was seated face-to-face with Dr Leeks. And then there was simply no update after that for a very long time. Would it be possible for the Crown to identify cases like this as requiring systematic and regular updates through counsel so people are not left in the dark?
A. I would say not only is it possible, we should do that.
Q. Those regular updates, if made systematic, could even be triggers for Crown Law, I suppose, to check in with the

conduct of the case within the Office if there were a monthly update, something like that, presumably that could help Crown Law to notice that discovery hasn't been provided or a Statement of Defence is late, things which occurred in that case?

A. Yes, although the case management process would deliver that too.

Q. Should help, yes.

A. Defence being late, you should expect a call from the registry. You know, these things, I don't know why, maybe they just didn't happen in Ms McInroe's - in the time of her case but today's case management gives plenty of those pointers to things need to be done.

Q. Would it be possible for Crown Law to develop a more sensitive approach to intimate personal items like a diary which Ms McInroe had to turn over to Crown Law and you will remember her evidence about how distressing it was to have it returned with post-it notes all over it, no idea who had read it, why, over what period of time. Would it be possible to have a protocol in place to limit the number of people who deal with sensitive items like that and to be much more transparent about how those items are dealt with?

A. Your question is, is it possible? Yes, of course it's possible. And I was going to respond in a similar way to say that it is not only possible but it should be expected that everybody, whether it's Crown's lawyers or whether it's the Crown's other employees and departments, are sensitive to the fact that they have got someone's lives in their hands. And while the litigation is a slightly more sterile process, we should not lose sight of the fact that we've got people's lives in our hands.

As to a protocol, maybe that's the answer. Anyway, a protocol is a bit hard to agree to now because we don't know what its terms are.

Q. It is an idea worth considering?

A. But as a proposition, that is a sensitivity that should be expected of Crown's lawyers and all Crown employees.
Q. We will come back to Lake Alice and the comments of the United Nations before the end of this process but in Ms McInroe's claim it would have become clear at some stage, perhaps early on, that there could be a criminal element to Dr Leeks' conduct. Would it be a good idea for the Crown to have a process where it would support a claimant in a situation like that to make a Police complaint and to make sure that the criminal law works as it should?
A. I'm pausing because this is a point of great contention. A current great point of contention as between the Crown and Cooper Legal in respect of many survivors. So, can you unpick further what that might look like because, as I said yesterday, there's great anxiety about civil claims - there is today great anxiety about civil claims revealing criminal conduct that might not be dealt with or might be dealt with improperly in the civil claim, in periling any criminal investigation. So, that is something we are highly conscious of. Sorry, can I ask you to ask your question again?
Q. Of course. Could the Crown have a way to offer support to claimants so that those who choose to make a Police complaint or to trigger a criminal process, those who choose to do that of their own will, know that they will be supported through that by the Crown in its overall sense?
A. Sorry to be pausing again, I'm finding the question too big because the Crown in its big emanation supports victims, supports people making complaints to the Police, supports victims through processes of either bringing a complaint or being a witness in Court. So, the Crown proper, the victims' rights act and so on. There is a measure of support around people to bring allegations to the Police. But are you asking me in the civil litigation process, is

there a way for people to be supported in that? Is that where you are sort of headed on this question?

Q. Yes and I hate repeating saying we will come back to the topic because we will in relation to Mr Wiffin but the relationship between civil and criminal processes. So far as Ms McInroe is concerned, obviously her experience was a very personal and very sensitive one?

A. Yes.

Q. One where turning up to the front counter of a Police Station somewhere might not be an obvious thing to do but Crown Law has a very close relationship with the Police and a close relationship with other agencies. Could Crown Law thoughtfully identify cases where it could offer to a claimant a pathway to make a criminal complaint in a sensitive way so that they have a pathway that enables them to consider that realistically?

A. In the case that we're talking about, in the matter we're talking about, as you've put it yourself, Ms McInroe was represented by some of our finest jurists. It would have been, I think it would have been a strange step for the Crown's lawyers to say do you need help to go to the Police? I think that risks being condescending. So, I'm concerned that, I mean, your proposition is a reasonable one, if people want to go to the Police shouldn't they be able to, and I agree that they should. When represented people are bringing civil litigation claims, is it the Crown's lawyers, I feel like it would be misinterpreted as a very condescending thing to say, "Do you know you can go to the Police?" That might be coloured by my own experience of this highly contentious point between Cooper Legal and the Crown about how do we get these allegations to the Police? I think you're pointing out a different view, why not help those who want to go to the Police, go to the Police. And to that end, it is possible, indeed desirable, for the Crown side, and I say it like that because it isn't just lawyers

who make these decisions, it is also in large measure ministries and departments who indicate which way things should go and which way things should go. But it is, of course, possible for that to be something that is said to the plaintiff's lawyer, "We're concerned here" or "We've got three of these, this matter should be dealt with by Police before the civil process".

But, as I say, I'm a bit tentative about that, given its controversy.

Q. A model that exists are this Inquiry, is that survivors who talked to the Royal Commission about their experience in the civil sense are made aware that there is a specific Police liaison process, so that survivors who choose to go to the Police have a pathway open to them.

The intention of that is to give survivors options, to make sure that those who choose to do that can do so as easily as possible, and the Royal Commission will co-operate to the extent it can with any decision by a survivor to go to the Police.

The impression I had from Ms McInroe's evidence, that's a million miles away from her experience with Crown Law. That there was no connection between the civil litigation process identifying her as someone who might have a good reason to go through a Police process as well, and certainly no support for that.

And so, the question is just whether the Crown could think about better ways to connect those two systems?

A. Well, as I've already addressed and I think others will have, we are neck deep in trying to work out a way to do that with the survivors who have currently got claims, trying to work out a way that will be agreed to for some things to be put through the criminal process or for at least Police to look at that. But that did not happen in Ms McInroe's case, I agree with you that it didn't happen.

Q. If, as you said yesterday, the abuse at Lake Alice was there to be seen on the file, it must have been either obvious or open to those dealing with the file to realise early on there could be many others with legitimate claims. To your knowledge, was there ever a proactive effort by the Crown to find the other Lake Alice survivors and to make sure they would be aware of their rights?
A. I don't know enough to answer that question. I thought that there had been because there were two rounds, if that's the right word, of Gallen J's process. I thought there had been but I'm not sure, I'm not certain.
CHAIR: Just to be clear, Mr Mount, were you talking about the later process or were you talking at the time that Ms McInroe filed her claim?
MR MOUNT: Yes, I was thinking about the '90s, before the group settlement process.
Q. It certainly doesn't seem there was any proactive step taken in the '90s, was there?
A. I don't know. I was answering the question in relation to the process that followed, yes.
Q. Just stepping back for a moment, the overall management of the McInroe claim does seem to have fallen short in a whole series of ways; is that fair to say?
A. Yes.
Q. There was an apology to Ms McInroe which we have as a document 96070 are the last numbers. It's up on the screen now. You can probably zoom in a bit to make it a bit easier to read.
It is a very short apology, two paragraphs. I won't read it out but, in your view, did this apology sufficiently meet the deficiencies that we've talked about Crown Law's management of the case?
A. No. I heard Ms McInroe's response to this apology and I obviously have looked at the apology. As an apology, it is woefully inadequate. It indicates that the apology is being

given because it has to be and it doesn't say what it is that is regretted, nor express any empathy or regret, actual regret, for what is said to be accepted as failings from the Crown Law Office. So, as an apology, I agree with Ms McInroe, it is inadequate, extremely inadequate.

Q. Putting together that large list of deficiencies, to your knowledge did Crown Law ever go through a process of self-examination over this file, an internal review, anything of that sort?

A. Not to my knowledge, and I would say at the time not as common practice either. Whereas, today's practice is to debrief, how did that go, what did we learn? That's more of an end step process in litigation.

Q. I appreciate that much of the McInroe case was before you were at Crown Law and it may be difficult for you to answer but how could it be that the case that has gone off the rails in this way did not result in some thoughtful self-examination by Crown Law?

A. Well, I think that, in a broad sense, it has happened because of what happened next in the Lake Alice. I mean, this isn't a Crown Law led proposal. But that examination of the Crown's side treatment and conduct and responses, the evolution that the Inquiry has heard about that I've described, is coming from learning from and listening to the criticisms that have been made.

Q. There hasn't been a systematic attempt to understand what went wrong with McInroe though, has there?

A. No, I don't think there has.

Q. And without this Royal Commission, the chances are there never would have been a systematic review?

A. That's true, yes.

Q. Even with this Royal Commission, there hasn't been a systematic review. Can people be confident that Crown Law looking ahead will implement a more deliberate process of

review when it's identified the cases have fallen short of a standard that ought to be expected?

A. People should be confident that Crown Law listens to criticism and will review its own conduct in light of criticism. One thing I think this Inquiry, or at least the Crown's evidence in this Inquiry is showing, is that we don't always agree with the criticisms that are levelled at different parts of the process. It's difficult to review in that context.

But this Inquiry is the system saying we want what has happened in the past to be examined so that we learn, not just how to deal with redress, but how to stop damaging our kids in care. I mean, this is the systemic review of what this country has done for too many years and it will include the litigation process.

Q. Would it help though for Crown Law itself to have a more systematic approach to review so that it doesn't depend on a Royal Commission of Inquiry coming along?

A. Well, as I mentioned, the discipline of reviewing litigation does occur. There isn't a process by which people who are dissatisfied with the outcome of litigation can bring their grievance with the law to bear back at the Crown Law Office and I don't think that the system works like that either. I think the place for that - this is an example. We can think of different examples where people say we are satisfied with the way in which a legal process will deliver us what it will deliver us. The place to say that to is the elected Government. They are the ones who are able to change both how things are dealt with and/or promote changes to policy or law.

Q. With the McInroe case though, the specific criticisms went directly to the handling of the case by Crown Law?

A. Yes.

Q. And those criticisms were made publicly and vocally and articulately. Yet, it seems that there hasn't been still

any process at Crown Law to try and face up to those internally and say, well, what have we learnt? That seems like a deficiency?

A. I disagree strongly with that proposition. As I said already to the Inquiry, I am here willingly and not subpoenaed to appear in front of this Inquiry. I am in charge of the Crown Law Office, I am in charge of the Crown's litigation. I have been entirely open with this Inquiry. We will learn from this Inquiry. That is the method by which we will review it because it will be too easy to say to you, "Yeah, we'll review that file". Much harder to say, "Somebody else look and tell us what might we have done differently and how can we learn".

Q. If we turn to the second example that we will work through, Keith Wiffin's case.

A. Yes.

Q. I think you said that you had a particular role with Mr Wiffin's file?

A. Yes.

Q. What was that role?

A. I was the Crown Counsel, I might have been a Team Manager by then, but I was the lawyer representing the Department, the Crown, in that case.

Q. His claim was filed in April 2006 and the Crown offer to settle claim in your letter of April 2009, so we're talking about a three-year period, if that sounds right?

A. Yes.

Q. The claim itself was clearly serious, allegations of sexual offending against an 11-year-old boy, together with physical abuse of an 11-year-old boy. I just want to make sure I understand the framework that was in place by the time Crown Law came to offer to settle.

By the time of that settlement offer in April 2009, I think the applicable legal strategy was the 2008 Crown Litigation Strategy; if that sounds right?

A. That is probably right. The 2009 strategy probably wasn't very different from the 2008, in any event, so yes, that will be right.
Q. We might just put it up. This is CAB ending in four and if we go to page 12 of the document. In fact, if we go to page two of the document, I'm sorry. The bullet points at the top half of the page, we're told there was a three-pronged strategy that had been recommended to Cabinet in 2008.
The first, we've heard this before of course, agencies seek to resolve early and directly. And secondly, settlement will be considered for any meritorious claim. That was the applicable framework at the time?
A. Yes.
Q. And I think in your statement you talk about this framework in paragraph 9.2 of your main brief. We should be able to put it on the screen, it's on page 20. Apparently we can't put this on the screen but you will have a copy of your brief with you, I think?
A. Yes.
Q. You will have paragraph 9.2 of your brief where you talk about this Litigation Strategy and the second point, as you said in your brief, that you can see on the screen, was that settlement would be considered for any meritorious claim.
But in your brief, you went on to say in brackets "that is putting to one side available defences and investigating allegations to a standard less than absolute proof."
Was that correct, that was the 2008 strategy?
A. Yes.
Q. So, it's a focus on meritorious claims, putting to one side available defences. And certainly -
A. Putting aside available defences in an attempt to settling the claim, yes.
Q. In an attempt to settle.
A. Yes.

Q. And certainly, the concept of meritorious claim becomes very important at that stage and understanding what is a meritorious claim. After your 2009 letter, the April letter, the Sir Rodney Gallen did a review of the MSD process and he certainly focused on this concept of a meritorious claim and expressed some views about that which we can look at. This is the document CAB ending 14. You will see on the front page, this is a November 2009 review by Sir Rodney.

And if we go through to page four of the document, from paragraph 14 he again refers to that same three-pronged approach we have just seen and it's the endeavour to settle meritorious claims.

Down at the bottom of the page, paragraph 20, he goes through the judicial process of trying to interpret what could Cabinet have meant by meritorious claims. And he offered the view in 2009, that clearly, as he perceived it, there was a degree of sympathy towards claimants whose allegations had basis of fact. And if we go across the page to the next page, perhaps if we just zoom in on the page overall top half, we can see in 21 he's going through that process that the Judge might. In paragraph 21, he says there's a significant factor which points to a conclusion it was the intention of the government that claims where appropriate should be met with a degree of sympathy.

And he talks about Crown Law advice and limitation and so on.

But at the end of 21 he says, "Nevertheless, reference was made to the settlement of meritorious claims".

And in 22 he says that he thinks the direction to settle meritorious claims can only be interpreted as a direction that the overall justice of the claim, having regard to the circumstances, needed to be taken into account.

Was that a reasonable interpretation by Sir Rodney of what that 2008 strategy was getting at with the direction to settle meritorious claims?

A. As I think I said yesterday, the idea of meritorious, which did shift over time, but I think it was what I would say in relation to what Sir Rodney is picking up on, is a view that this informal settlement process will result or should result in some response to the survivor, reflecting both their needs and what happened to them, but that it wasn't - this is my own addition, not what I think Rodney is saying, it isn't a proxy for compensatory damages in the court. So, the decision was not to put aside all of those matters and try and be a proxy for what the court would say if it had determined the matter. It was an informal process in which the individual's needs were to be attempted to from the Crown side, met in a settlement offer, sorry in a settlement process.

Q. When we look at 23, we see Sir Rodney's view that, "In determining whether a claim is meritorious, it is a question of fact" and he says has to take into account fairness, including those against whom allegations are being made, so fairness to the accused staff member as well. But he's very much emphasising the factual Inquiry and references to moral entitlement in paragraph 23, as contrasted with legal rights.

So, perhaps echoes there of the Lake Alice view, that we look at the morality, we don't strictly look at the legal rights when deciding something is a meritorious claim.

Perhaps if we go over the page to 29, he says in his second sentence, "The acceptance by the Cabinet Policy Committee that meritorious claims might be considered is at least a suggestion that at the political level the justice of the situation might prevail over legalities" and he goes on to say MSD's Committee has been influenced by that view.

Is that a reasonable interpretation by Sir Rodney of the 2008 direction to settle meritorious claims?
A. That was his approach, that was his view of it and it is a reasonable one, yes. I mean, it's his view that then fed into MSD's revision of its informal process.
Q. So, if that is right, at the time that the settlement offer is made to Mr Wiffin in 2009, is it fair to say that the question should be or rather that his claim should have been treated as a meritorious claim if it had factual merit, putting to one side the Limitation Act, ACC, any of those legal questions?
A. As I recall, and I don't have it open yet in front of me, the letter to Cooper Legal about Mr Wiffin's claim that had the settlement proposal in it, indicated that there were matters of fact that were to be contested, so it wasn't a case that was agreed or accepted.
Q. Just coming back to the framework though, is it correct that under the policy in place at the time, Mr Wiffin's claim should have been treated as meritorious if there was factual substance to it, putting aside the legal defences?
A. Well, apart from what I know about Mr Wiffin's claim and how that was viewed at MSD, I accept your point that the framework was where things should, in the justice office, be settled that don't stand on defences.
Q. Yes. And the way that was expressed in the policy was, and indeed in your own brief, we will have this category of meritorious claims, right?
A. Mm.
Q. And we know a meritorious claim is one where there's factual substance to it, putting to one side the Limitation Act and those sorts of things?
A. Yes, sorry, yes.
Q. So, going back to the claim, the sexual abuse component of Mr Wiffin's claim was an allegation that a man called Alan Moncreif-Wright had sexually abused him?

A. Yes.
Q. There was a physical abuse component to the claim and that was a series of allegations that two staff members at Epuni, Mr Chandler and Mr Weinberg, had physically assaulted him. What I want to test with you, and we will do it carefully, maybe even painstakingly through the documents, I want to test whether Mr Wiffin's claim should have been identified as a meritorious claim promptly after it was filed by reference to what was known by the Crown, certainly within the first year and a half or so after the claim was filed. But at a general level, would you agree with the proposition this was clearly a meritorious claim?
A. Well, I do agree with that because of the fact that MSD wanted to settle the claim. They viewed it as a meritorious claim.
Q. Indeed, Mr Young gave evidence, as you know?
A. Mm.
Q. And what he told us, among other things, we have the transcript 18, this is in volume 11, page 750, we will put this on the screen, page 59 of transcript 18, from line 12, Mr Young's evidence was that "the Senior Advisor" looking at his claim "I don't think disputed in any significant way Mr Wiffin's account". So, we know from internally within MSD, that there was a senior advisor allocated, she reviewed it and she didn't dispute Mr Wiffin's account.

When did you first become aware of that? That a senior advisor at MSD considered Mr Wiffin's claim or didn't dispute his claim?
A. Well, it's hard to now remember, so I only can go from the record, but the record in respect of the things that I did shows that I was instructed that there had been an investigation and that some of the allegations would be contested. So, they don't fit together, those two bits of the evidence.

Q. How could it be that a Senior Advisor at MSD forms the view that she doesn't dispute Mr Wiffin's account, but you don't know that?
A. I don't know how that can be because, as you know, lawyers take their instructions from the person or the Agency that is doing the process, the investigation. So, there's been a failure there. As I say, these two things, they can't sit together.
Q. Mr Young's evidence went even a little bit further, so if we go to page 76 of the transcript file, a couple of pages on, 752 of the bundle, lines 13-14, there's even stronger pursue, that is the senior advisor's view, was that the abuse was likely, "likely occurred as Mr Wiffin described".

It certainly was expressed to us in this Inquiry under oath there's an affirmative decision by MSD that, yes, it's likely that Mr Wiffin was sexually abused by an employee of the Crown. Are you saying that you did not have that view communicated to you?
A. I can only go from the record because I cannot remember but the record doesn't refer to the sexual assault. The record that I am referring to refers to the physical assaults. It said we've investigated, you might need to bring up, I'm sure you're coming to that letter, it says something to the effect of this matter has been investigated, some matters will be disputed. So, some physical allegations were not accepted as true.

That letter also says setting aside whether or not the sexual assaults occurred and then addresses the limitation question about the claim in the Court. So, that letter doesn't say either way on the sexual assaults what the Ministry knew.

If the Ministry had said "We accept that that did happen, we would like to settle with Mr Wiffin", I imagine that's why they were instructing us to make a settlement offer.

Q. Would you accept that from the outside it is bewildering to be told on the one hand that a Senior Advisor forms a view that it's likely it was correct that there was an 11-year-old boy sexually abused but the Senior Lawyer dealing with the file doesn't have that clearly communicated by any process?
A. Yes. I mean, as Garth's own evidence says, he was dissatisfied with that process. So, where that went, I don't know what happened. I can't see into that process to see how that happened. And as I understand, Garth Young's evidence to then say he used Justice Gallen's process as an opportunity to, within the Ministry, review that conclusion. Because these feel like questions to me for the Ministry about where did it - if it's gone wrong, where did it go wrong, because I can't see into that process.
Q. Yes. My question for you really is, how could it be that you didn't know, as you're handling the file for the Crown, that there's a view been MSD? That seems like a system question. How could the lawyer not know that this is a view of MSD?
A. Well, the process that has been described variously to the Inquiry shows that as these processes developed, the informal processes did develop within the Agencies with a more traditional instruction to Crown Law about how to respond. And I think that that is shown, when I think about the evidence that is before the Inquiry on Mr Wiffin's file, by that drafted settlement offer going back to MSD to say, what do you think? Here's the draft, I say, what do you think? And to answer your question, how is it that the Ministry didn't say, hang on, that's not what we think; I don't know the answer.
Q. I don't want to labour the point, but we have another insight into MSD's analysis of this, albeit after the fact. A memo to the Deputy Chief Executive in July 2010. This is MSD2569, page 538 of the bundle.

This is an internal MSD document. It's probably one that you didn't see at the time, unless you do recall seeing it?
A. I may well have but I don't now recall.
Q. And we know, of course, if we turn over to page two, paragraph 12 of the memo gives the summary of Mr Wiffin's claim. If we have a look at 12, "as we know there are a number of allegations but the most significant is the one of sexual assault by Mr Wright"?
A. Yes.
Q. Paragraph 14, even by 2010, allegations haven't been put to Mr Wright but if we go across the page to paragraph 16, we can see the factors which MSD is saying by this stage, this is what they think, perhaps an offer should be made. So, a credible account of events from Mr Wiffin, was at Epuni at the same time as Mr Wright, Mr Wright has convictions for sexual assault a year after Mr Wiffin was in the home, and Mr Wiffin was an 11-year-old who was vulnerable by virtue of age and development and so on, and also MSD's assessment of Epuni as a place and also Mr Wright.

So, all of those factors, when MSD takes a harder look at the case, if we go to paragraph 18, lead MSD to say, "On balance, it is more likely than not that Mr Wiffin was sexually assaulted".

My question is, all of those factors were there to be assessed certainly within the first year, year and a half of Mr Wiffin's claim?
A. Yes.
Q. There's nothing new in any of that. From your perspective as the lawyer running the case, was there ever a point where someone, either at Crown Law or MSD, said, "Actually, this is a meritorious claim measured against the Crown policy and so we need to pull it out of the regular litigation mode and deal with it as a meritorious claim"?
A. I don't recall the detail and I can only go off what I see in the record but the fact that there were engagements,

direct engagements with Mr Wiffin with MSD, perhaps even more than one direct meeting, I think possibly two meetings, and the fact that his claim was being investigated and a settlement offer was being made, suggests that the Ministry did form a view that it was meritorious but it seemed to, only in 2010, form the view that now is here on the screen, that actually this case is more like these other cases for which a comparable settlement offer would be different. That appears to be a delay or a failed process that doesn't right itself until possibly too late but certainly until 2010.

Q. I don't of course suggest that you were the only lawyer working on this, but it was your case from the perspective of you being the Senior Lawyer dealing with this?

A. I was the Senior Lawyer, yes.

Q. Can you tell us at what point in the management of the case does it first get identified as a meritorious case? We don't need to know dates and times, but we have a three-year lifetime from filed to your letter. At what point roughly in those three years does the light bulb go off that this is a meritorious case, this is an 11-year-old who, with hindsight, more likely than not was sexually assaulted, by the Crown?

A. To directly answer your question, I don't know, I don't know when that moment came. Because these processes are separate, I don't know how I could have known either.

Q. Could you have known with a simple examination of the facts?

A. Do you mean could I have known?

Q. Could the Crown have known?

A. I'm not sure.

Q. Okay. We'll step through it carefully.

A. Mm.

Q. We focused of course on the sexual allegation. There was also a physical dimension to the abuse, and that's Mr Chandler and Mr Weinberg. And you will recall from the

allegation that it was said that Mr Wiffin had been slapped and punched by these two employees of Epuni, that he was beaten by other boys and the staff members essentially let that happen, that he was emotionally and verbally abused by staff, so those were the core allegations against Chandler and Weinberg.

As we know, both Mr Chandler and Mr Weinberg gave evidence for the Crown in the White case and I just want to look at the findings that were made by the Judge about those two staff, if I may.

This is document Witness ending 9016, in current volumes, it's volume ten. It is the White judgment, November 2007, so this has come out within 18 months of Mr Wiffin's claim being filed.

If we turn over to page 303 of the bundle, paragraph 214, we see the findings of the High Court Judge, this is page 75 of the pdf, I think.

So, if we maybe zoom in on the top half of the document. 214, I'll try to summarise this for those who have sight impairment.

The Judge says that he heard a number of witnesses and their accounts of the institution's culture, that is the culture at Epuni, were remarkably similar.

215, we see it was a deeply troubled institution by 1972. The staff turnover was high.

Down at 216, towards the bottom of 216 we see that house masters and attendants were insufficiently supervised and too few in number.

Go across the page to 218, the Judge again refers to the fact that he's heard a lot of witnesses who were former residents at Epuni, as well as these two individuals, Mr Chandler and Mr Weinberg, the Judge says he accepts much of the evidence of the former residents.

In particular halfway through that paragraph you will see the Judge finds these residents did not collude to make up their evidence.

And the bottom half of that paragraph, just where the cursor is at the moment, the Judge says that he preferred the evidence of the former residents in many respects to that of Messrs Weinberg and Chandler and another. So, a direct credibility finding that the residents could be preferred over Chandler and Weinberg.

If we go down to the next paragraph, at the bottom of this page, second half of that paragraph, "The evidence established that house masters were not in the habit of reporting their own or their colleagues' infringements of procedures, so often these things wouldn't be written down. Much of the violence was covert".

The Judge talks about staff violence that took the form of slaps, cuffs to the head, knees to the side, kicks to the bottom that might not leave visible marks and there was a powerful no no-narking culture, so the boys knew they would get in trouble if they complained.

Across the page, there's reference to the kingpin culture. Top of the page, "The kingpin enforced his authority by favours and intimidation. He was generally the largest boy in the institution at the time and his followers imposed their will on new boys..."

Across the page, at 224, up the top of the page, we see that "Paul White got an initiation beating and was regularly subjected to violence and bullying". On that occasion, sorry of Earl's initiation beating, Mr Chandler was there and did intervene to stop that.

But at 225, we see that house masters must have been aware of initiation beatings and it's more likely than not that Mr Chandler did see these beatings.

226-227, the Judge accepted Mr Weinberg had dragged Paul by the ears, so direct findings against both Chandler and

Weinberg, and also that Mr Chandler had slapped Earl and slapped and punched as well.

And then at 227, we see that the plaintiffs witnessed similar violence against other boys, and also derogatory or abusive language of a sort that conveyed the message that the boys were useless or had no prospects.

So, in terms of Mr Wiffin's allegations against those same two staff of the Crown, Chandler and Weinberg, there was certainly material by late 2007 that could have allowed the Crown to identify this as a claim with substance; is that fair to say?

A. Yes.

Q. With due diligence by the Crown, should it have been you had a pile of meritorious claims but should it have been squarely identified as a meritorious claim early on in the process, certainly by the end of 2007?

A. It could have been and should have been, yes, on the basis of those findings. But whether it was, is a question I am not sure I know the answer to, although I wonder whether we were still in a position of - actually possibly still the position we are in today - of that distance where lawyers were still thinking about what's the legal framework and the question about what about the factual framework wasn't being thought about by those lawyers. I am not saying that was the right thing, I'm just trying to think about that was the time. And those factual questions were being decided elsewhere. Now, that's a very - that is a too separate way to think about them. Even in 2008-2009, those matters should have been able to come together in an analysis, yep.

Q. I want to start going through now some of the other pieces of information that would have fed into that factual analysis had it been done carefully.

And the first is CRL ending 27711. This is an email November 2006, so about six months after Mr Wiffin's claim was filed, from Mr Young at MSD to someone at Crown Law. Mr

Young is reporting on an interview with someone but talks specifically about Mr Moncreif-Wright having "slipped up" and sexually abused some boys.

So, we can see from the file that within six months of Mr Wiffin's claim being filed, Crown Law is told that Moncreif-Wright, it appears, had sexually abused boys at Epuni?

A. Mm.

Q. Do you know whether you knew that when reviewing Mr Wiffin's file or when you first learnt of that fact?

A. Well, I can say I should have known because we had the material. I mean, this material is about preparing for the White trial.

Q. Correct.

A. But we had the material, we had the information. Whether I did know, I actually don't know the answer to that but that doesn't sort of matter because I should have known. Institutionally, we knew this detail at the time, yes.

Q. Yes. And there really isn't any good reason why that information would not be available to Crown Law?

A. No.

MR MOUNT: That may be a convenient moment.

CHAIR: Yes, I think it will. We will take the lunch adjournment and come back again at 2.15.

Hearing adjourned from 1.00 p.m. until 2.15 p.m.

MR MOUNT:

Q. We were talking about whether Mr Wiffin's claim should have been identified as a meritorious claim in light of information that was on Crown Law's broader file, Mr Wiffin's file.

A. Mm-Mmm.

Q. I just want to take a step back for a moment, if I may, and go to your brief at para 2.8 where you talk about the first steps when a litigation file comes in. So, if we go to your brief, 2.8, you say that the starting point when a new file claim comes in, is to consider it and advise the relevant department on the law and on any likely liability so they can decide how to respond.

And, clearly, Crown Law must advise on the law?

A. Yes.

Q. Thinking about that period for Mr Wiffin's claim, 2006-2009, tell us about the process to understand the facts, as opposed to the law? Was that something done right at the start of the claim? How did it work?

A. I'm pausing because I'm just trying to remember. It probably would be quite similar in that respect about facts and law as to the current process, which would include collating material about the file, going back to Agency files to look for information that was relevant, of course, through the discovery process that occurs, and in that way a narrative of the facts comes together. These days, we would expect there to be other material that was also immediately at issue, what we know about institutions and so on. I don't know that, I mean I don't remember, I don't know if that was quite so defined as it is today, historical claims. So,

understanding of the facts and the law would be iterative, I think, still then.

Q. You've identified in 2.8 that an early step is to prepare a Statement of Defence, and you explained to the Commissioners earlier how that works, a plaintiff will say these 25 things happened, the defendant has to decide out of those 25 which ones do we accept are correct, in which case the plaintiff doesn't have to prove them.

That's a very early process where the Crown has to decide what are we going to agree is correct.

I'm wanting to understand how seriously Crown Law took the obligation to think about the facts from the start of the claim coming in during this period?

A. When you say how seriously do you think about the facts, it would be a matter of passing the claim to the Agency that knows and asking them how they would respond. They might say we don't know yet, we don't know enough, in which case there is a form of pleading that allows that to be said. So, I consider that could be taking that seriously.

Q. It relates of course to the evidence given to the Commissioners that MSD's internal view at some point during this process was that Mr Wiffin's allegations were more than likely true, and I don't mean to go over and over the same question, but when there is such a clear systemic requirement for a pleading, how could it be missed during that 3 year period that MSD's senior advisor thought Mr Wiffin was more than likely correct in what he was saying? I am just trying to understand how that occurred.

A. I don't know how that happens. Maybe one way, in this case, I have been reflecting on this over the break, maybe one way is that the process of investigating the claims got too separated from the process of processing or proceeding in the litigation stream because this was a case that was heading for trial, so that preparation for trial was also continuing. Those things perhaps became separated. I know

that Mr Young in giving evidence to this Inquiry said that that realisation came too late and the Ministry went back to the issue with Mr Wiffin. So, at some point wrongly, and in process terms a failure, those things seem to have become separated.

Q. We'll come back now to what Crown Law knew about Mr Wright, to understand the dots that were there to be joined, even if they weren't. If we can have MSD ending in 2353, page 197 of the bundle. An email internally within Crown Law from one Crown Law lawyer to a group of other lawyers, plus some MSD staff. In this email in July of 2007, so about a year and a bit after Mr Wiffin's claim was filed, the lawyers were reporting a discussion with an assistant manager at Epuni at the time. The second paragraph, there's reference specifically to Alan Wright who we know to be Alan Moncreif-Wright.

A. Mm.

Q. Again, we have on Crown Law's internal filing system a record that Crown Law had been told in '07 about Mr Wright sexually offending against boys at Epuni in the early 1970s.

Did you know about that at the time?

A. Well, I can only answer it the way I did before. Yes, institutionally we knew about that at the time. I now don't recall if I saw this note but I accept the criticism that institutionally we knew something about Mr Wright that we weren't applying to Mr Wiffin. That's not trying to excuse myself, I just don't recall.

Q. If we go to another document a few days later, July 2007, this is MSC ending in 634 which is on page 453 of the bundle.

If we come over to page 3, this is the 10th of July 2007?

A. Yes.

Q. And it's a fax to Crown Law from the Ministry of Justice. If we turn over to the next page, do we see that it is a

list of the criminal and traffic history for Alan Moncreif-Wright?

A. Yes.

Q. So, up until July of 2007, Crown Law has been told in two discussions with former staff members about Moncreif-Wright's sexual offending at Epuni, against Epuni boys, in the 1970s and then a few days later, in July 2007, the criminal and traffic history comes through to Crown Law. And scrolling down, we see the reference at the bottom to five sexual offences committed in 1970s with convictions entered in 1972.

In case there could have been any doubt from what former staff had remembered, by this time we have on the Crown Law file conclusive evidence of this offending in the 1970s?

A. Yes.

Q. Do you have any memory of seeing the conviction list or knowing about that?

A. I don't recall seeing it myself but I can only accept the proposition that you're putting, that it was known, it was known to the lawyers in the Crown Law Office, including myself, but I just don't remember it, that's why I'm giving that answer like that.

Q. There was more information available to MSD at the time, and if you can't recall being aware of what was on Crown Law's files I think I can predict what your answer might be about this but to be complete, Mr Wesley-Smith who at that stage was a journalist began asking questions about this topic in 2017 or thereabouts and Mr Young from MSD prepared some notes about what Mr Wesley-Smith might want to know about. And we have those notes as MSD ending in 2374. For those who are working on the hard copy bundles, pages 773-774.

CHAIR: What did you say the date was of this document?

MR MOUNT: This is a 2017 document.

CHAIR: Oh right.

MR MOUNT: It is referring to knowledge in 2007.

CHAIR: Thank you.

MR MOUNT:

Q. If we go down to the bottom half of the page, we can see these are notes about what was known about Mr Moncreif-Wright, talking about his staff file and so on.

If we go over the page to the next page up the top, the paragraph beginning, "In a 2007 interview of the manager of Epuni", there's recorded the statement, "I seem to suspect there may have been something happen there so he was transferred to us at Epuni".

Now, the significance of this, of course, is that we can see from the previous page what Mr Howe is talking about, is the transfer from Hamilton Boys' Home to Epuni in the early 1970s. Am I correct that the clear suggestion of this document, was that the manager at Epuni suspected something happened at Hamilton so that Moncreif-Wright was transferred to Epuni?

A. That's what that record shows, yes.

Q. And the suggestion being that this was known about in 2007. Now, the document is not clear about the something that happened at Hamilton, so we don't know that, but we see in the next paragraph that an historic abuse claimant did say that he was sexually abused by a Mr Wright in the Hamilton Boys' Home and that the claim was accepted by MSD?

A. Yes, that was a 2013 revelation, yes.

Q. Yes. So, as at 2007, what MSD appears to have known through its manager, former manager, Mr Howe, was a suspicion that there may have been something about Hamilton which led to a transfer to Epuni.

When was the first time that you became aware of that possibility that there had been something at Hamilton leading to a transfer to Epuni?

A. I don't know, until I read this document I don't know that I had ever understood that to be an issue but that's not to

say I didn't know or should have known. I just want to make a point that, I've said to the Inquiry I will come because I'm responsible for litigation and I take responsibility for the Crown's litigation steps, whether they were on the file that I ran or not. I'm not trying to duck when I say I can't remember. I just can't remember.

But also, I am trying to give evidence about how the Crown has and does conduct itself, rather than evidence of fact because I don't remember, it is too long ago.

So, I'm not ducking responsibility but trying to explain why I say I don't remember because I am responsible, now in this role in particular.

Q. Perhaps if I stay at that level of principle for a moment. If in 2007 MSD was alerted to a possibility of the transfer of someone from one boys' home to another potentially because of sexual misconduct at one and the offender is transferred to another home, clearly that would be an extremely serious possibility?

A. Yes, and knowing what we know now about transfers of people who were sexually assaulting children in homes and in faith-based institutions, that should be an alarm bell. I agree with you.

Q. Would it be your expectation now that any alarm bell like that would be acted on and pursued so that the Crown could understand if that in fact happened?

A. Yes, now and then. I mean, I'm not trying to excuse failings in a case where they are there to be identified. That should have been an alarm bell.

Q. There are no signs that we have seen that this possibility was in fact investigated by MSD at the time or since. I take it you are not aware of any?

A. I'm not and I'm thinking of Mr Garth Young's evidence to this Inquiry, as the point at which it is revealed, I suppose, that it seems that even Mr Young wasn't aware of what the investigator had uncovered and realises that an

error was made after Justice Gallen goes through the process.

Q. Do we end up at, at least this position, that on the face of it, and we've only got a very second-hand report but on the face of it, this is something that should have been investigated in 2007 to establish if, in fact, an offender had been transferred from one home to another?

A. Yes.

Q. We'll move now to November 2007, and the document witness 80011, page 226 of the hard copy bundle. We may not need to dwell on the document but it's a letter addressed to you dated the 8th of November 2007 from Cooper Legal asking for, second paragraph, "staff records and any other information MSD holds about staff members". We don't need to go there but one of the staff members in the letter is Alan Moncreif-Wright?

A. Yes.

Q. And we've seen from the documents we've just been through that certainly by that stage, November 2007, both MSD and indeed Crown Law had quite a lot of relevant information about Alan David Moncreif-Wright?

A. Yes. The answer to this request is in this material too, isn't it?

Q. It is, yes. The relevant information held at that time includes the conviction history obviously but also the two interviews with staff where it's said that the sexual offending on the criminal history was against the Epuni boys at the time.

So, on the face of it, that's extremely relevant information for Cooper Legal to be told in November 2007?

A. Yes.

Q. We can go to the response, it's witness 80012 at page 391, for those on hard copy. We'll just bring that up. It's a reply dated 20 February 2008, so three months or so after the request, from Mr Young to Cooper Legal.

And if we turn over to page 3 and zoom in on the bottom half of the page, Mr Young replies, "We have identified Alan David Moncreif-Wright. We have a staff file and staff cards. There's nothing in the file that relates to Mr Wiffin. Nor is there any information regarding allegations of physical or sexual abuse against Mr Moncreif-Wright".

I realise this is not your letter and I realise we can pass the language very carefully but before we get to that, the fundamentally clear response to the response from Cooper Legal, the information about Mr Moncreif-Wright's convictions, should have been disclosed?

A. Yes.

Q. And why wasn't it?

A. I don't know, I can't answer. It should have been. The information was available and the request was for that material. So, as an answer it is wrong or at least incomplete in a significant way, Mm.

Q. Mr Young said the same thing, he had no explanation. Is it appropriate for Crown Law to take some responsibility for what is a clear failure?

A. I'm happy to take responsibility but I'd rather it was specified as to what that was because otherwise, I think it's too easy just to say yes. I think it's important that we understand what it is that Crown Law should take responsibility for. So, I leave Mr Young with that letter.

Q. Right.

A. But it's clear that the two bits of litigation in our office weren't brought together with what we knew.

Q. And so, when Cooper Legal asked for information about Alan Moncreif-Wright and got a response essentially saying that there's nothing in the file that relates to him, the failure is that there is some failure to join the dots to identify the information held by Crown Law and to ensure that was disclosed?

A. Well actually and held by MSD.
Q. And MSD, correct.
A. Both agencies held that information and it wasn't provided.
Q. If we move forward now to May 2008, there's a request from Mr Wiffin to meet?
A. Yes.
Q. And this is document CRL ending in 6115, and the hard copy page 393. If we read from the bottom, again an email, it's a little hard to read but four lines down, the subject is an "ADR Meeting", and this is an email sent to Mr Young from Cooper Legal and it says, "Hi Garth, Keith Wiffin would like the opportunity to meet with you to try and resolve his claim and is offering to come to the office to do that".

Mr Young then, we can see in the line above, forwards that request to you and to someone else saying, "Are you happy to meet Mr Wiffin?" and then if we go to the top of the page we see your reply. But perhaps before we get to your reply, here we have in May 2008 a claimant asking to meet with a view to resolving their claim?
A. Yes.
Q. And I think we've agreed as a matter of fact, it was a meritorious claim?
A. Yes.
Q. And by that stage, May 2008, there was more than enough information available to both the Ministry and Crown Law to know it was a meritorious claim. Thinking about Crown Law's obligation to settle cases that are meritorious because, of course, Cabinet was told at about this time that the Litigation Strategy is to settle meritorious cases, a request for an ADR meeting should have been met with an enthusiastic response from Crown Law; is it fair to say?
A. It is quite unusual for the Crown lawyer to meet the individual claimant. I think I mentioned this yesterday, did I, at some point, that I've been to two or three such meetings.

Q. Yes.
A. It is quite unusual, it is quite an unusual sort of role for the lawyer to meet an individual. So, I think I quibble with your that it should be met with an - it should be met with an enthusiasm that if ADR works, let's try that, but I disagree that the individual Crown lawyers should attend such occasions. And, in fact, sorry can I go on with this? Yes, Cabinet says settle meritorious claims and if they can't settle and go to Court, then they should be defended. And I think what this case tells us, is that those lines were not very far apart. That we were preparing for trial in this process. Perhaps an even stronger reason why the strong lawyers shouldn't attend an ADR meeting, it actually might be too hard to take off the "I'm preparing for trial and defending this with what is required" to attend to the settlement probability.
Q. Perhaps if we put aside the word "enthusiastically" and just focus on Cabinet's direction to settle meritorious cases and what's factually available about Mr Wiffin's case, structurally a request from Mr Wiffin to meet and resolve should have been made with a realisation within Crown Law that the policy would require a genuine attempt to meet Mr Wiffin and resolve the case?
A. Yes, from the Crown side.
Q. From the Crown side?
A. Yes, indeed.
Q. To your point about the mindset of the lawyers preparing for trial and how the lawyers should think about this, I hear what you say but if the lawyers are preparing for trial, surely that is a time when the lawyers' heads are firmly grounded in the facts and so perhaps of all times, that might be a time when the lawyers could be expected to issue instructions to others in the office or to engage with the Department and say, "Mr Wiffin wants to meet. From what we

know about the file, he should be met and we should be looking to settle this because it's meritorious"?
A. Yes, I think Mr Wiffin was asking to meet with Mr Young who was wanting a lawyer to accompany him but I agree with your proposition, that it would be better if that had happened.
Q. Just looking at your response at the top of the screen which you can see, there are two points effectively. One most lawyers can understand which is a concern about workload. But secondly, there's a concern about strategy and, as you expressed it to Mr Young, a concern about whether really what's happening here is that Sonja Cooper Law is trying to continue a funding stream?
A. Mm.
Q. Given what you now know, I take it that you'd accept that that was not what was going on? This was a genuine request by Mr Wiffin, he wanted to settle his claim?
A. Yes.
Q. Can you talk the Commissioners through the thought process back in May 2008 where not the first response but the second response is, "What is Sonja Cooper up to here?"
A. Yes.
Q. How did that happen?
A. I don't know that I can talk you through the thought process with this distance but I can respond to that email which to take it at its face is asking do these meetings actually work? Or, this is not to justify this comment but to explain it, in the course of getting ready for these formal engagements, is something else happening here or do these ADRs work? I think that is what the words say. I don't specifically remember, you know, the thought process of sending off an email in response to another email some 12 hours or not, 12 hours since or maybe 24 since it was sent, just responding to my colleague do they work or is there something else afoot? I think that was indicating in the course of preparing for formal steps being taken in the

Court, that it might not have been a genuine offer to meet, which I've already just accepted it will have been. I've seen and heard from Mr Wiffin in this Inquiry, that certainly was his intention.

Q. One of the requirements in the Australian Model Litigant Policy you looked at earlier, is an obligation to ensure that Crown representatives participate fully and effectively in ADR, and a positive obligation to consider settlement, which I accept is there to be found to some degree in their general values.

The question is, would an explicit requirement to participate fully and effectively in ADR be helpful in a moment like this when you have a plaintiff asking for some form of ADR? Do you think an explicit requirement might be appropriate?

A. Possibly. I think the requirement to engage in informal settlement processes was real at the time and here is a failure to pick that up with the enthusiasm that you put to me we should have but I don't think having a separate written instruction is the answer. I mean, I just don't think that's - the suggestion was already there in the Crown's Litigation Strategy.

Q. We will come back to the relationship with Cooper Legal but while we've got this on the screen, am I right that there is something of a flavour here of suspicion or almost cynicism, in fact that's your own word?

A. As it's called, yes.

Q. About this really being Cooper Legal up to something? Can you give us an insight into what the relationship was at that point and how that might have affected judgement calls?

A. Yes. Just a small point of clarification, I think the law firm's name changed from Sonja Cooper Law to Cooper Legal which is why the full name is written there, it's about the firm.

I think yesterday I was clear, I hope I was, there was and is, perhaps was more than is, frustration with what we saw as a flood of claims being brought to the Court, that the law as it was and the defences that were available stood in the way of. That's not to resile from the point that Mr Mount has got me to, that there was material available that should have been used in this case but I think it is an example of frustration about what is going to happen with all of these claims in the Court that we could see are not going to realistically make it either numerically, like in actual content, sorry an actual number through the Court, but also in substance in terms of the ACC, limitation and so on that I've already addressed.

Q. Mr Wiffin talked about the meeting that eventually did happen I think a couple of months later in his statement which is document Witness 80001, page 6 of his statement, the hard copy is on page 684, paras 23 and 24.

You will see in paragraph 24 his impression was that someone from Crown Law was there, didn't say anything the whole time and effectively said, "I am only here because someone is sick" but that Mr Wiffin's hopes were raised by the meeting. I take it, there's no reason to doubt that Mr Wiffin went into this with a genuine hope that he was participating in an attempt to settle his grievance with the Crown?

A. Yes, I don't doubt that.

Q. If we can take that box down for a second.

If we look at paragraph 25 perhaps, Mr Wiffin explained he got a letter the next day, at the end of the paragraph, he tried to be positive, he had an expectation that the claim would be settled.

So, from Mr Wiffin's perspective, he has this meeting and he's optimistic that there will be settlement. What is happening back at Crown Law at that stage, in terms of a possible settlement, do you know?

A. No. I mean, I think what is happening at Crown Law is we are on the litigation track preparing possibly for a Limitation Act hearing. I am not sure of timing but that was one of the things that was being prepared for in the litigation stream, was an early hearing on the limitation defence.
Q. Just take that down and move over to document CRL 46103, page 439 of the bundle. So, we see this is in fact before the meeting, we see an internal memo within Crown Law referring to Mr Wiffin's claim. Certainly at that stage, if we look at the background paragraph, there is by that stage a joining of the dots within Crown Law that Mr Wright is a convicted sex offender. By this point, the penny has dropped, is it fair to say? That's a claim about a convicted sex offender.
There's nothing on the face of this memorandum to suggest that at this point those dots hadn't been joined. It's been approached as a meritorious claim that ought to be settled according to the policy; is that fair to say?
A. I don't see this memo as being that. Sorry, I might have misunderstood your question. This memo, are you saying does it recognise the meritorious claim and suggest that it should settle?
Q. That's right, that's not in the memo.
A. Oh, yes.
Q. There is reference to Mr Wright's convictions for sexual offending. So, by this stage, surely in Crown Law there's a realisation or ought to be a realisation that this is a meritorious case to settle?
A. There is a factual basis that it could settle on, yes.
Q. And when we look at this memo, instead of the case being presented in that way, here is a meritorious case and we've had a request for settlement. Instead of that, what we see when we look down the bottom half of the document, the proposal is first that the meeting with Mr Wiffin is delayed so that discovery can be assessed for limitation. So, really

specific consideration about that limitation defence. And secondly, a letter to Cooper Legal, really to put the onus back on Cooper Legal to explain why the case should be treated differently from White.

And so, the question is, at this stage is it fair to say that Crown Law really hasn't grappled with the meritorious nature of the claim?

A. Well, I think what this indicates or what many of these documents is indicating, is Crown Law's approach was preparing for steps in the litigation. I don't recall now when in time but there was a limitation hearing and this case was being progressed to trial but that is not to say that the Crown Agencies were not, at the same time, reviewing the material and thinking about settlement. In fact, that is what Mr Young's evidence I think tells us, that that was being examined so in another part of the Crown. Yes, this shows Crown Law preparing for trial. Also trial law, some other litigation hearing, yes.

Q. And if we go to MSD ending in 2399, the next page of the hard copy bundle, page 430, if we zoom in on the middle of the page, we have the Ministry recording its understanding of the meeting with Crown Counsel, not you. So, we can see the way it appears that the case is being thought about at that stage. The first piece of advice is that the limitations aspect is described as hopeless. And then we have some strategy advice.

And it's really the third point that I want to ask about. Do you see in paragraph 3, from line 2, "Make it clear that the basis of the meeting will not be with a view to settling the claim". On the face of it, would you agree that that is directly contrary to the Cabinet directions at that stage, to settle meritorious claims?

A. Yes because those directions invite everybody, including Crown lawyers, to try and settle claims where that's possible.

Q. And then the last two lines we see coming back to the idea that any letter needs to be carefully worded so that any other or agreement cannot be used to seek funding for an ADR process. On the face of it, is that Crown Law essentially wanting to make sure that the claimant can't have any legal, funded legal advice, to help settle the claim?
A. I don't actually know what that's saying. That's sort of parenthetical from the writer, oh yes, from a lawyer.
Q. I am assuming SJ is referring to Cooper Legal in some form?
A. Probably - yes, probably initials of one of her lawyers. I mean, I can only read like you can what that says, it does appear to be saying we need to be careful that this is not seen as an ADR process.
Q. And further, that we need to write our letters carefully so that Mr Wiffin can't have a funded lawyer assisting him in that process?
A. It doesn't say that but it is open to that, yes.
Q. It is a possible inference. If there's another interpretation, please say. Again, I come back to the question, how could it be that this is the understanding within the Crown when we have an explicit policy to settle meritorious cases when, on the face of it, it looks as if Crown Law is very much wanting to almost undermine a possible settlement of the case?
A. Well, as I've said, it's not consistent with the instructions that we had from government.
Q. Ms Aldred quite properly has asked me to highlight that when we looked at the Crown Litigation Strategy, that was a document dated the 16th of May 2008. So, when we looked material year at the statement "settlement will be considered for any meritorious claims", that was a 16 May 2008 document, so in fact only 10 days before this email. And then I imagine the formal Cabinet Policy Committee decision would have been a few days after that, I think Ms Aldred tells me 21 May.

But is it fair to say that the Cabinet policy document talking about settling meritorious claims didn't just emerge on the 16th of May but would have been the result of earlier work and so on within Crown Law? So, by mid 2008, is it fair to say that, at least in terms of Cabinet, Crown Law's advice is that settlement should be considered for meritorious cases?

A. Yes, have I said something different? I thought I had said that.

Q. I think you have and I think Ms Aldred just wanted me to point out that the actual Cabinet document was only 10 days before this. So, I think the point Ms Aldred would make is the policy to settle meritorious cases is hot off the press?

A. And your proposition is that financially it's not so different from earlier emanations, and to that I would say that's true although, as I think I addressed earlier, what was meritorious did move over time from is it meritorious because it's likely to achieve surmounting all the hurdles or is it morally or factually meritorious? And I'd say at this stage of the period, of sort of two decades, we're probably closer to what does the law tell us about whether it's likely to be successful or not?

Q. You can take that document down. A new aspect of the case to discuss, I don't know that we need this document on the screen, but we can see from correspondence between Crown Law and Mr Young that by August 2008 there's an address and phone number for Mr Moncreif-Wright?

A. Mm.

Q. But yet, no steps are taken to speak to him?

A. Yes.

Q. And I think you might have already said that you don't have an explanation for that?

A. That's yesterday, I addressed that sequence yesterday. Yes, that it was not an answer but an explanation, no a description of the facts that the file shows us, yes,

because the Police say, yes, you can talk to him and still he wasn't spoken to.
Q. Yes, that comes later but certainly, the Police do say that.
A. Mm.
Q. When Mr Wiffin gave evidence, he talked about eventually meeting himself with Mr Moncreif-Wright?
A. Mm.
Q. In a restorative justice process, and he talked about a 30 page document signed by Mr Moncreif-Wright, and what Mr Wiffin said was it was clear to him that no-one from the Ministry or any Government Agency had talked to Moncreif-Wright. No-one will ever know because Mr Moncreif-Wright is now deceased but quite apart from Mr Wiffin's case, is it fair to say that another reason to talk to Moncreif-Wright could be the possibility of other victims or other offending by him?
A. Yes.
Q. Was that lens ever applied?
A. I don't think it was, not by Crown Law. Whether the Police thought about it, and I don't know the answer to that, I can only speak for my office on that question. To my knowledge, that was not - sorry, it was considered, in fact. It was said to Mr Wiffin, "If you go to the Police, you might need to stay your civil claim and if we talk to him we might muck things up", we didn't say it like that "for any criminal process". And, as I said yesterday, the Police said, "No, please go ahead" and it didn't go ahead. So, I was wrong to say no thought was given to it but it was never done.
Q. To your knowledge, was that frame of reference ever used, the thought that not only do we have a meritorious case here from one claimant but there might be others out there?
A. Mm.
Q. And we have a broader responsibility perhaps to know more about Moncreif-Wright and what he was doing in Crown homes?
A. Do you mean by other people, other than Mr Wright?

Q. Yes, other than Mr Wiffin, yes.
A. Oh, sorry, yes. Well, I won't have the details but there are other historical cases where one set of allegations that the Ministry thinks either, yes, we know that's true or, yes, we think that's more likely true, does lead to them dealing with a number of cases in a similar vein. So, that does happen or has happened. I don't know the details to say how many or how often but that certainly has been a feature that I have been aware of, of not doing this thing that we've just talked about with Mr Wiffin and Mr Wright but actually collecting that information and using it for more than one.

And, of course, in the, we've already mentioned it, the difficulty of the Police referrals but it's that same better realisation that we have information that's credible, what do we do in order to make sure we protect current tamariki in care.

Q. I need to put this squarely because it has been raised by Mr Wiffin. You'll understand from his perspective that he has told the Commissioners of his struggle to understand why no-one ever spoke to Moncreif-Wright from Crown Law or MSD. And there is a clear inference from his evidence that he suspects that there was a tactical reason, that either MSD or Crown Law or both didn't speak to him because of a concern about the answer he might give.
A. Mm.
Q. What do you say to that?
A. Well, I say several things. It was incredibly brave of Mr Wiffin to take the matters into his own hands the way he did and to pursue his own justice with Mr Wright. Good for him and the Ministry or the Crown should have helped him do that and it didn't.

The second point to answer to that, is I don't believe there was an animus or a malevolent practice, rather poor practice that led to his outcome but I understand why

Mr Wiffin takes a different perspective, borne of his experience.

Q. You have said a few times that this was a case on a trial track, I think, if I've got your words right.

A. I might have said that, although now you say that it makes it sound like the more formal case management trial track and I'm not sure we had that in those days, but it was on its way to a hearing and/or trial, yes.

Q. A different phrase might be it was in a litigation mode?

A. Yes.

Q. Do you think there's anything about that litigation mode that can lead to a mindset that, as a feature of our adversarial system, thinking more broadly than any one case, can put blinkers on to Legal Teams dealing with a case?

A. Yes, absolutely there's a feature and a trap in the discipline of litigation and the closer one gets to the hearing, the more sure one is of one's case. Whether that's a matter with a tort, a damages claim, or whether it's a judicial review or appeal, that is a classic and recognised problem.

Q. Might that be one of the reasons that in Australia the Model Litigant Policy is written the way it is and might that idea also in some way sit underneath what Miriam Dean QC and David Cochrane said in 2008 which is that the Crown Law Office needs to avoid this win at all costs idea? Might that be part of that thinking?

A. It might be, Mm.

Q. To some extent, is there a cultural aspect to this, that the adversarial litigation process leaves lawyers open to the danger of tunnel vision and seeing things in win/lose terms and that there needs to be a very deliberate creation of a culture within a Crown legal office to make sure that no-one dealing with cases of this sort falls into that trap?

A. Yes, and we do have processes to try and make sure that we don't fall into that trap. Planning, speaking about that

with legal teams and others in agencies, often difficult or seemingly intractable issues will be elevated to more senior lawyers for review or more senior other officials for review. In Historic Claims, there's a now Chief Executive Governance Board that sits to think about these issues as and when they need to be elevated to them but to think through some of those hard issues. So, not only do I agree with you, I say we've taken steps to put in place processes to ameliorate against that risk.

Q. I want to move on now to a January 2009 letter which I suspect you will have looked at before, CRL ending 46017, page 439 of the written bundle. We're now about 8 months after Mr Wiffin had asked to meet to settle. We're about 6 months after the meeting happened. And Mr Wiffin hasn't had any formal offer from the Crown as to how the case might be settled but we're at the point in January 2009 where there's a letter from you to the solicitors at MSD to update them on where you're at?

A. Yes, I'd have to seek instruction but, yes, that is your letter.

Q. If we turn over to the top of page 2, in terms of Mr Wiffin's case, you report that there's no apparent mental illness or disability that would justify the disability argument?

A. Yes.

Q. And so, in paragraph 6, you ask or you tell the Ministry that you consider it ought to instruct Crown Law to take more proactive and aggressive steps on the claim, with a view to having it dismissed without having to go to trial?

A. Yes.

Q. Could you explain to the Commissioners how it could be that 7 months after Mr Wiffin has asked to resolve a meritorious claim, you are explicitly seeking instructions to take, in your words, aggressive steps to have the case dismissed?

A. Well, I think it's the same answer that I've given Mr Mount before now, which is that this case was being worked on as a matter being prepared for trial. And, accepting the criticisms of those two formal processes of informal settlement and trial should have come together better and didn't, this is a further example of that.

To answer his question about my language, I think I made the point yesterday that that idea that one might take a passive approach in litigation, as opposed to an aggressive, I see I've used both the words, proactive and aggressive, meaning let's not - well, the suggestion was we had previously said let's wait until trial, let's not take the limitation question on these matters first, let's go to trial. I would describe that as a more passive approach. And here I'm saying I think you should talk about taking a more proactive or not passive approach and have limitation dealt with first.

So, I can see it as a frame of litigation steps.

CHAIR: It would be a king hit if you succeeded on the Limitation Act, that would be the end of it?

A. Of the proceeding.

CHAIR: Of the proceedings?

A. Yes. In that litigation steps frame, it is thinking about do we go to trial when our assessment of the law is that that one step will answer the claim, Mm.

MR MOUNT:

Q. Would you accept that there is a difference between active as the opposite of passive and aggressive, so that an active step obviously is taking an action of some sort but there is something about taking aggressive steps which could be interpreted as moving into a zone that could legitimately be queried from a model litigant perspective?

A. I see that it could be interpreted that way but I'm confident because I wrote those words that I didn't mean aggressive in any sort of malevolent way. I mean, not this

passive, the sentence itself makes sense of that "with a view of having it dismissed without having to go to a substantive trial" and to take a more forward leaning, I could call it all sorts of things. I am confident I didn't mean malevolent perspective on it.

Q. If we go over the page to paragraphs 11 and 12, perhaps zooming in on those two paragraphs and just looking at them. Is it fair to say there was a fair dose of strategy in thinking at that time?

A. Strategy being a plan? Yes.

Q. And more broadly, looking at 12, you say, "We may be able to create further momentum in the developing case law on limitation in a way that is advantageous to the Ministry and its broader attempts to resolve historical abuse claims".

So, is part of the thinking here that really for the Crown here's a chance to create some good case law for the Ministry to try and resolve these cases?

A. Yes, the opportunity - well, as it says, the opportunity is the limitation case law is actually still pretty small in these cases and this was an opportunity to have further matters tested on limitation, yes.

Q. We looked earlier at Sir Rodney Gallen's review of these cases which occurred a little later in the same year of 2009.

CHAIR: Mr Mount, are you going to leave that document now?

MR MOUNT: I might, so please ask if you have a question now.

CHAIR: Yes, I am not sure if you're going to come to it, if you are, it's paragraph 11 that I'm interested in. When we're talking about strategy, strategic advantages includes not just ways to resolve historical abuse claims that you refer to in 12 but also the public examination of a wide range of

potentially difficult issues relating to Kohitere Boys' Home?

A. Yes.

CHAIR: So, this was a strategy designed to hide the potentially difficult issues?

A. Well, I see why you put that to me. At a similar time, the Ministry was undertaking research into Kohitere Home which led to, I think I mentioned this already yesterday, which did lead to some settlements of those. And so, it was more about let's not have those matters aired until we are ready to know what it says. I think that would have been the simultaneous nature of that Kohitere research project would have been in my mind.

CHAIR: You're saying that was going on at the time you wrote this?

A. At about that time, as I recall.

CHAIR: Because another interpretation, I'm bound to say, you can see what the other interpretation is, isn't it?

A. Yes.

CHAIR: There's some very embarrassing things that we know about this place and we don't want them aired?

A. Yes.

CHAIR: Do you wish to comment on that?

A. Only to say, as I did, because it's saying, you know, the advantages to delay or prevent those trials for the time being, get that Kohitere research sorted. But I have to accept that it is open to the different perspective that is saying keep that door shut.

CHAIR: Because it doesn't refer, does it, to the other work that's being done, the examinations?

A. No.

CHAIR: Thank you.

MR MOUNT:

Q. If we can come to CAB 14, which is Sir Rodney Gallen's report later in the same year, 2009. He, on page 5, in paragraphs 30-32, sorry next page, articulates a different way of thinking about limitation. And I'll give you a moment to read that.
A. Yes.
Q. I'll take a risk and try to summarise what Sir Rodney eloquently says in those paragraphs. He said along the lines that you could take a broader view of disability in sexual abuse cases like this, wider than the Courts even, and look at the reality that decades ago community attitudes were such that it just wasn't realistic to expect victims of sexual abuse to turn to the Courts. And it's a view that Sir Rodney explained in even more detail further on in the document and with an eye on the clock I won't take you to it now but you might look at it over the break, and I'm thinking in particular of paragraph 160, if you have the hard copy there.
A. I do, yes.
Q. Accepting that in these paragraphs and paragraph 160 Sir Rodney was essentially saying you could take a view that is broader than the Courts have but which might have some merit to it when you're in the settlement zone. Would it have been appropriate in seeking instructions from MSD in 2009 to at least float that kind of a view about limitation, so far as it would apply to Mr Wiffin?
A. Well, Sir Rodney was having a much more compassionate response to the Limitation Act and the reasonable discoverability aspect of the law as it stood and stands. No, I should say as it stood. But, as he points out, that's actually a matter of policy. I mean, it is still for lawyers to say this is how the law applies to these facts and for agencies and/or government to say as a matter of policy we want to shift that, a matter of legislative policy in this case. And, as I might have already touched on, that did lead

to further thinking about the Limitation Act and the provisions of the 2010 Act which do deliver something of what Sir Rodney was getting at, allowing the Court the discretion to set aside such a defence in respect of a child who's been abused physically and sexually.

CHAIR: We will take the afternoon adjournment for 15 minutes, thank you.

Hearing adjourned from 3.30 p.m. until 3.45 p.m.

MR MOUNT:

Q. We were talking about Sir Rodney's broader view of limitation in a settlement context, not in a legalistic or Court context. It would presumably have been open in January 2009 in your letter to MSD to raise with them not only the strategic reasons to take more aggressive steps to have Mr Wiffin's claim dismissed but also to raise with them a broader view of limitation and a possible settlement?

A. Yes, it would have been open to me to do that, yes.

Q. In hindsight, was there perhaps some degree of tunnel vision that flowed from the litigation mode the case was in by then?

A. My own? Yes, I think that's right, in that I saw my role as preparing the matter for trial and so, it is easy to criticise that now, I mean perhaps even at the time, for not thinking across the border to the Agency about how it might think about things differently.

Q. When Mr Howden gave evidence on behalf of Legal Aid, he said, if I remember correctly, that the Crown's approach to limitation defences was a significant factor for Legal Aid in its decisions about funding.

I assume you weren't aware of the way that Legal Aid was thinking about funding at that stage or were you?

A. Do you mean - no, I was not. I mean, I knew they were funding claims that we thought wouldn't survive, not just

limitation but also ACC and other legal barriers but we didn't know why or I didn't know why they were funding them.

Q. Thinking about that time, early 2009, was there a strategic fear that if the Crown was too generous, I don't know if that's the right word, but too generous with these claims, the floodgates would open and the Crown would be met with very high liability?

A. There's two things in that to address. One is that by this time, 2009, we were seeing a lot of claims, so was the Crown sort of fearful of a flood, not really that it was seeing it, it was seeing the many, many hundreds of claims coming. But I don't agree that there was a view that if the settlements were generous that would - is your question if the settlements were too generous, would that lead to a further encouragement? There is something of that flavour in some of the Cabinet Papers, about trying to not compensate but I am not sure it is written quite like this in the papers but this idea that settling claims is trying to settle the individual's grievance and recognise and acknowledge their experience but not to, sort of, copy or mimic what a trial Court might give if you could get over all of the hurdles because then that would encourage a different way of coming at the Crown for considerable financial compensation. So, there is a flavour of that through the material, yes, through the Cabinet Papers.

Q. We will come back to that particular point. We'll move on to March 2009 and document CRL46254. Again, an email, go to the bottom half first. By March 2009, you will remember from Mr Wiffin's evidence that he talked about the result of the White case weighing heavily with him, do you remember?

A. Mm.

Q. And he did talk about his mental health suffering by that stage. Your email on the 9th of March to Mr Young and some of the other lawyers involved in the case is asking for essentially an update on Mr Wiffin's case.

And the third paragraph, in particular, suggests that news Mr Wiffin's struggles had reached you you're asking Mr Young, if I've got this right, how tenacious Mr Young thought that Mr Wiffin would be and whether Mr Wiffin might settle or give up.

One interpretation of that might be that the Crown has seen a potential that a vulnerable plaintiff could be persuaded to give up or settle on what's described as a services basis, in part based on his mental health. Is that a fair interpretation of what's being said there?

A. I would say that paragraph is recognising, through the litigation process, that Mr Wiffin is suffering on account of the processes that he's been put through, and so asking MSD how are you progressing with the merits of his case, as it says at the top paragraph, because I notice this, is there a likelihood that he will settle on a services basis? I think that's actually a concern being expressed about what I could see in the plaintiff or in Mr Wiffin's material, about saying can we settle? How are you progressing? I don't think it is trying to take advantage of that, rather recognising it and asking the other side of the question, how are you getting on with exploring settlement options?

Q. If we scroll up to Mr Young's response, last paragraph beginning, "Like you", he says that he got the sense Mr Wiffin was pursuing, from a sense of obligation, and saying he's not sure about how Mr Wiffin might respond. But he goes on to say the main vulnerability would be around Moncreif-Wright.

Your comment about Mr Moncreif-Wright at that stage being seen as a vulnerability by MSD -

A. That's Mr Young's comment but yes.

Q. Sorry, I am inviting your comment on that framing, that Moncreif-Wright is seen as a vulnerability at that stage. Is that a rather tactical approach that, thinking about the

settlement, really Moncreif-Wright is the main vulnerability, so that's how he should be thought about?
A. Well, I think seeing - I don't really know what the writer was thinking but the context of that email seems to be to say Fiona, I don't know who that is actually, perhaps she is the senior person we talked about earlier but from Fiona's reading it refers to the file and social work practice, which reminds me not about this case in particular but about generally the claims had a lot of allegations in them and social work practice reviews was a comprehensive part of what MSD did when it was considering understanding the file and the individual person's grievance.

And so, he's saying there's not much there that makes us concerned that the social work practices are a problem. And, in that context, I think he's saying our vulnerability, the part where we're not strong, is Mr Wright.
Q. If we move over to document Witness 80018 which is on page 446 of the bundle, this is Cooper Legal's offer letter. You will see on the page we have on the screen, Ms Cooper points out it's been 9 months since the attempt to settle at ADR and no response. For starters, that's obviously not acceptable, is it?
A. Not necessarily unacceptable that there was no response but that there has been no, there's been nothing. Sorry, I mean not necessarily unacceptable there's no substantive answer because that can take time but there was no update, that's not good enough practice. Yes, I would agree with that.
Q. And then Ms Cooper goes through her analysis of the strength of Mr Wiffin's claim and she points out at the bottom of the page that many of Mr Wiffin's allegations are similar to those in the White case, which by that stage we've got the factual findings we went through carefully earlier. And then across the page, top of page 2, there's reference to the sexual abuse by Mr Wright, his convictions, and it's said in the next paragraph that there may be about 15 similar fact

witnesses to be called by Cooper Legal and Mr Wiffin would be an exemplary witness, articulate and intelligent. At the bottom of that page, Ms Cooper points out with a bold heading "Meritorious Claim" the statement that meritorious claims would be settled, so it is said by Crown Law. And so, there is a suggestion as to what the appropriate settlement sum should be.

In hindsight, do you find much to disagree with in that letter?

A. Well, in relation to the first paragraph, I agree that 9 months after a meeting with a survivor was too long. I understand Mr Young to have made the same point.

The fourth paragraph sets out Mr Wiffin's main complaint at a certain family home and at Epuni, and my comment to that goes back to the point I made earlier, that as I understood or as the file records our instructions, some of those allegations had been investigated and were not agreed to. I'm unable to agree or disagree with many of these points put by Ms Cooper, I don't have reason to disagree with them but they are her interpretation.

We disagreed about the level, sorry the application of the Accident Compensation bar. So, when she says it applies to a period before the ACC legislation came into force, I don't agree as a matter of law that that is right because, as I think is accepted, the ACC bar was in 2005, extended pre-1974 events.

I would disagree that exemplary damages are also available on the basis of the review that I've just referred to about the social work practices, so that idea that there is some conduct that's so reprehensible that the wrongdoer is to be punished. To be clear, that's a vicarious liability comment about exemplary damages. I disagree with that.

We disagreed on the analysis about the limitation defence. We didn't have the same view of the law and the facts.

And then she repeats, sorry doesn't repeat, says in the second to last paragraph, she notes that the meritorious claims will settle undertaking - not undertaking but commitment.

The sum that she asserts would be an appropriate settlement doesn't appear to be one that the Ministry agreed with even when it realises its error and goes back to the matter and sets Mr Wiffin's settlement amongst several others of the same nature, the Ministry disagreed with that quantum.

And only to point out the point that I've been making, that this matter was already timetabled for trial, so we were certainly on that path.

Q. Just for a moment focusing on the meritorious claim aspect, if we go back to your statement to this Royal Commission, paragraph 9.2(b), I know we've been over this many times but the way you put it to the Commissioners was the 2008 strategy would look for settlement. Putting to one side available defences, applying that standard from your own statement, would mean I think that we would forget about the Limitation Act and any other defences. Through that lens, was this not a settlement offer in March 2009 that should have led to a constructive discussion with Mr Wiffin about the terms of any settlement?

A. It certainly should have been something that was considered, yes. I'm not certain that the next step would be a discussion with Mr Wiffin but, yes, the -

Q. Through his lawyer?

A. But, yes, it was an offer that was to be considered, yes.

Q. As you say, even if we strip away everything else and just look at the money figure, the two numbers were not that far apart and could have resulted in a constructive discussion?

A. Sorry, what were the two numbers? What were the two numbers?

Q. The number you referenced was the ultimate settlement that MSD arrived at.

A. Yes.
Q. I shouldn't use the word settlement because it wasn't a settlement.
A. No, quite right.
Q. And I think it's fair to say that the figure from MSD related only to Mr Moncreif-Wright, not the other aspects of the claim; if I've got that right?
A. I would have to now, I would have to look again. I'm not certain.
Q. So would I. The point is just that the difference in terms of where MSD ultimately got to and what Ms Cooper was suggesting in the scheme of things was not enormous; is that fair to say?
A. It's nearly double what was ultimately arrived at, this figure, so -
Q. More than double.
A. I'm not sure that I can agree with that.
Q. If we turn over to document MSC ending 336, this is an email to you from Crown Counsel a few days later, after Ms Cooper Legal's letter. And you will see the date. In terms of the hard copy, page 450, if you have that?
A. I do.
Q. Rather than there appearing to be any serious consideration within Crown Law to the settlement offer that has come in, what instead we see is that there's a note from one of the lawyers working on the file focusing on people who might be witnesses in Mr Wiffin's case. And you will have seen in Ms Cooper Legal's letter, that she talked about a large number of similar fact witnesses that Mr Wiffin might call. So, the chances are this is probably referring to some of those witnesses, I think.
   And the second paragraph, I am sure this is a document you've looked at in preparing for today.
A. Mm.

Q. But it's a reference by Crown Counsel to a suggestion in "the "robust" camp of model litigant but might be worth consideration in any event". As an aside, this might tell us something about whether a model litigant policy by itself is the answer but the suggestion, if we take down that box, the suggestion from Crown Counsel to you was that there was a number of good candidates for leave hearings that should be filed in the next few months, "We don't need to lie down and allow her to call good witnesses that we know will damage us when their own cases are weak".

CHAIR: Can I be clear what we think we mean by "leave hearings", leave for what?

A. Limitation Act hearings, that's what I understand is being referred to there.

CHAIR: These are preliminary hearings, on the basis that the cases would go, if they were successful, the cases would be dismissed? Would not proceed to full trial?

A. If the defence was successful, yes, if the defence was successful, yes.

MR MOUNT:

Q. On the face of it, does this suggest that instead of a constructive review within Crown Law about settlement, we are seeing a tactical approach, thinking about how to put the Crown in the strongest position to fight Mr Wiffin?

A. I would see this email as being a more junior lawyer than the lawyer who was leading the file, which was me, so Associate Crown Counsel, a more junior lawyer floating with the more senior people in the team some ideas; is this a good idea or not? And she is acknowledging that this might be a bit, as she says, robust, so she's clearly questioning, is this a good idea? So, I see that as being a useful indicator of understanding the model litigant values, whatever the right words are for it, and saying, oh, this is a litigation strategy but is it something we should do? I

actually quite, you know, I see why you're taking me to it and I don't know what the response to it is or was, although less than a month later a settlement offer is made, and we know it missed the mark and it wasn't accepted, but it suggests that those ideas weren't picked up. So, that's sort of how I view that now and in the benefit of what we are trying to learn here at this Inquiry, see it as quite a useful indicator that Crown Law even then had a culture of saying, oh, we could but should we? Can I invite you while we're there to look at the next document? No, sorry, you take me where you want me to go.

Q. No, that's fine, happy to look at the next document, page 451?

A. Yes because it's something similar about -

Q. Just pause for a moment. CRL ending 4694. Zoom in on the top half of the page. Please go on.

A. It's something of the same character, in that it has parts to it that are not very flash for the Crown, that email, but again it's asking how do we learn from what we know? What do we know about Epuni and Hokio? What do we do next? And I can't step aside from the fact that that, like Sally McKechnie's email, has some aspects to it that now we look at it and think, oh. For me I'm wanting to emphasise that it is showing there was a time and a place for reflection and it is a bit unvarnished because, of course, as I've already mentioned, it's the in private communications on a litigation file which would not usually see the light of day.

Q. Understood. While we're looking at that email on the screen, the 19 March email, looking at the last paragraph, there is quite a focus on Ms Cooper being described as her allegations and her evidence. Again, I'm wondering, is there something about the litigation mindset where there's a focus on the opposing lawyer, the heat of the battle, who can prove what in that environment? Where actually, the

underlying reality of the 11 year old boy abused by a convicted sex offender in the care of the state is completely lost?

A. Yes, I accept that and I think I said it yesterday, that we need to be more survivor focused. We have become so. We might not be as survivor focused as we should be or we may never be as survivor focused as survivors would want but that does happen in litigation, that lawyers lose sight of the people's lives that they are talking about. I don't say that to defend it, I just say that that is a reality.

CHAIR: Ms Jagose, I feel bound to put this to you. You said before that the letter from Ms McKechnie, which was an April 2009 letter, I believe, came from a more junior lawyer?

A. Yes.

CHAIR: It was suggestions and, what did you say, just a suggestion by a junior, it was not picked up, just ideas about what we could do. What concerns me about that piece of evidence from you, is that I note that this letter that we're looking at currently, CRL194, predates the McKechnie letter or does it? Because it's about Sally's download?

MR MOUNT: I can help here. They're actually successive days. Ms McKechnie was 18 March and this one was 19 March.

CHAIR: This follows Ms McKechnie's?

MR MOUNT: Yes.

A. It comes the following day.

CHAIR: Having established that, this appears, at least to me, that you are picking up or Ms Schmidt is picking up the idea of a more robust approach, if we can call it that, and again questioning. But it doesn't look like there was any suggestion of saying, no, that's completely wrong, inappropriate, we should follow another line of thought?

A. I agree with you that it doesn't show those latter things. It's a bit hard to put them side by side because they don't speak to each other.

I take it from the subject heading of the one that's on the screen now, that in fact the reference to Sally was a reference to a junior lawyer in the White litigation, and I take it that it is about a series of what did we learn there that we need to know for future cases? I am not sure they're speaking to each other, those two emails, or they're not speaking to each other. They are not responding, if I am making myself clear.

CHAIR: I must put it to you, it doesn't seem to me that this is just idle chat, what if, what if. It does feel as though it's becoming more of a concretised strategy?

A. Yes, I don't want to step away that the earlier email, 18 March, is being put up, we could do these things. We don't know what happened. We know those things didn't happen because within the next month a settlement offer was made and we know what happened next. Mr Wiffin walked away from the whole thing, so much had we misfired with that settlement offer.

So, we just can't tell now. I agree with you though that there is no other thing here to say that is not an appropriate idea.

CHAIR: That's right. That's really what I had in my mind, thank you.

MR MOUNT:

Q. Okay. We can take that document down now. I think I did promise you that this would be a painstaking walk through the documents. We might not need to put the next one up on the screen but if you in your hard copy bundle turn over to 453, we are another couple of weeks on, 1st April 2009?

A. Yes.

Q. This is your letter to Cooper Legal where in paragraph 9 you address the conviction history of Mr Moncreif-Wright. And what you said in paragraph 9 was that this is a publically available document and so, it's not necessary to discover it but the Ministry was "happy to provide it to you" and that is the point in April 2009 when the convictions are disclosed to Cooper Legal.

Was it good enough that a document sitting on Crown Law's file for nearly 2 years is only provided to Mr Wiffin this late?

A. No. I mean, I'm saying is shortly because I think I've already answered that question, that I can't explain why that failing occurred, it's not acceptable.

Q. Now, again, this is not something we need to put on the screen but the next thing that happens is the drafting of the reply to Cooper Legal's settlement offer. But if you in your hard copy bundle turn over to 475, I think you've got a draft letter being exchanged at that point?

A. Yes.

Q. Do you have any recollection about what your own views were of the settlement proposal going back to Cooper Legal?

A. Well, I can only recall what I can see on that page which is quite plain, asking is it enough?

Q. So, if we go now to the 9 April letter to Cooper Legal, it's Witness 80022, page 477. This is your letter to Cooper Legal of, as I say, the 9th of April. We've talked a little about this letter without actually having it on the screen yet.

So, this is Crown Law's response to Ms Cooper's letter?

A. This is MSD's response to the settlement offer.

Q. MSD's response, correct, to Mr Wiffin's offer?

A. Yes.

Q. And you've already said that you would write such a letter differently today, so that has been heard.

A. In its tone, recognising that a person about whom we are writing, that there is a person about whom we are writing, yes, as to tone I would write that letter differently.
Q. The words we see in paragraph 2 are that the settlement offer is rejected and, of course, I can understand from a legal perspective it's important to say that.
Paragraph 3, the language "denied and defended" is language that clearly resonated with Mr Wiffin. Is that some of the language that you would change now?
A. It might be more about putting it in a different perspective perhaps because the language of allegations are denied, I mean that is, as we know, just the way that lawyers say, accepted or denied and so on. Maybe, it's hard to say now, 12, so many years later, how I would write the letter differently. What I anticipated when I said that in my evidence is to perhaps frame the letter in a way that is more acknowledging of the person, rather than not saying what the Ministry's perspective is on the matters of factual allegations that are to be denied. I mean, that is also a matter that I wouldn't want to end up being so subtle in a letter that it wasn't clear that the litigation would be met in the way that it would have, had we got to trial, that is so confronting for survivors, that matters are denied. So, I would say there needs to be a balance in the letter to be clear but to be more empathic in its approach to the person.
Q. So, perhaps if you could tell the Commissioners how would you write such a letter now?
A. I thought that I had just answered that question. Do you want me to literally rewrite the letter?
Q. No.
A. No. I'm saying I would put it in a more empathic framing but I wouldn't want to make it so subtle that it's not clear the position that the Ministry was preparing to take in litigation. It would be irresponsible.

Q. Is it your view now that the real deficiency with this letter was the language, the framing, or was the problem with this letter the substance of it?
A. Well, with the benefit of the Ministry's determination that it made an error in its assessment, therefore an error in its instruction to us on what basis to offer to settle, I can agree that the content was in error too because it relied on the Ministry's error.

So, if we had our time again and the Ministry's second look at this was at issue, this letter would be different. It would be making the offer that was ultimately made.

Q. There seems to be a real disconnect between the Ministry and Crown Law at this point. You will have heard evidence from Mr Young, if we go to transcript 18, page 750 of the hard copy, I think it will be page 59, yes, of the electronic document, from line 5, where Mr Young talked about his unease about the claim and having very mixed feelings about the proposed settlement offer.

Mr Young saying for whatever reason, the views held by MSD didn't translate into an offer. I take it, you were unaware of those views held within the Ministry?
A. Yes, and your starting of this question was there was a disconnect between the Ministry and the Crown office, and I resist that description because this letter was sent in draft. You know, this was written on instruction, sent on draft back to the Ministry and approved to send. So, there was no disconnect in that literal way. This is a letter sent on instruction. But I do see Mr Young's evidence, I have seen his evidence and we have it there, saying that somehow within the Ministry there was some, I don't know what, disconnect, that meant that that settlement offer was sent. So, I can accept there has been a disconnect but I don't want it to be said that I am agreeing that we sent a letter without instruction.

Q. I am not suggesting that, of course. If we turn over to page 318 of the transcript, page 77 I think of the electronic file, and look at the bottom. This is Mr Young's evidence to this Royal Commission and he says from about line 28, "If I'm brutally honest, the legal impediments got in the way of our team's moral judgement and acceptance of Mr Wiffin's claim" and he said he held himself partly responsible for not being more assertive and taking a different approach. A real suggestion there that the legal impediments, whatever they were, got in the way of MSD's internal moral judgement, what do you say about that?
A. I am not sure that I can say anything more than that I see that that is Mr Young's view and that he regrets, and knowing Mr Young as I have done for years, he will feel that regret hard, that he didn't do more.
Q. There seems to be more than a hint of a suggestion there that the legal impediments might be indicating that Crown Law took a particular view and that Crown Law's view of the legal impediments prevailed; does that seem fair to you?
A. Well, I accept that Crown Law's view of the law will be authoritative - not authoritative - weighty in relation to how the matter is looked at as a matter of law and I can't really comment then on how that was dealt with within the Ministry.
Q. And standing back from Mr Wiffin's claim now and knowing what you know now, having it all laid out step-by-step, what is your view about whether the legal impediments got in the way of a more moral response to Mr Wiffin?
A. Isn't the answer to that also in the documents, in the Ministry's assessment of accepting that it made the wrong decision and should have made a more substantive offer and apology, which it then goes on to do? I mean, yes, the Crown Law Office offers legal advice about the legal position and defends matters in Court according to law and instruction, and I'm responsible for that. But to this Inquiry, the

answer that has been given, that I don't see that I can take it any further, is that the Ministry accepted, after Justice Gallen looked at the material, that it had erred in its assessment and its approach to settlement.

Q. Do you think that Crown Law's approach to the case in any way contributed to the instructions you got from MSD in a negative way? In other words, was Crown Law taking too narrow a view of the case which now, with the benefit of hindsight, was a deficiency within the office?

A. Well, I can accept that Crown Law's view about the law was persuasive to the Ministry about what the law would be and found to be at trial. I still think that the position on the law was correct and so the deficiency I think that you are inviting me to comment on is the translation between that sort of - that track of litigation and thinking differently about this claim and resolution, and I've already said it in this session, I think, that what we can see is the two paths not meeting or perhaps meeting in a way where one factor overbore the other. So, I can see that but, as I say, that seems to be the Ministry's own assessment of saying as it did to Mr Wiffin, our assessment was wrong and it led us to make an offer that you turned down.

Q. As you say, there was a reassessment of the case the following year, 2010. It was reviewed and ultimately between June and August there was a view signed off by the Chief Executive of MSD that Mr Wiffin should receive an ex gratia payment?

A. Yes.

Q. We've heard that Sir Rodney Gallen's review was part of the reason for that. You will have heard Mr Wiffin's evidence that his belief is that a media interview with Mr Vaughan was also a factor?

A. Yes.

Q. Do you know anything about that? Can you shed any light on that?

A. Well, I know that that - I only know that that was Mr Wiffin's view and that I think Mr Young's, maybe it was someone else in MSD's view that it was Sir Rodney's review. Perhaps they were both a combination to reviewing it, I don't know.
Q. This is a very technical question I'll ask you now, and forgive me for that. I just want to ask about the ACC position as it applied to Mr Wiffin because, of course, his assault by Mr Moncreif-Wright was before 1974, and so before the ACC regime came into force. But, as you know perhaps better than anyone, the position with ACC cover for pre-1974 injuries is a very complicated area; have I got that right?
A. Yes.
Q. Am I right that one interpretation of the law is that cover bites or takes effect at the point for these older cases when someone seeks or receives treatment under ACC?
A. I would want to look at the legislation because it has an expression in it that I now can't bring to mind that relates to the question you're asking me.
Q. Yes. We might not dive into all of those complexities this evening, it's something you should certainly feel free to check overnight. But I'm wanting to try to short circuit this slightly and perhaps you just might want to reflect on it overnight but I think it's clear from the file that when Mr Wiffin made his claim, he had not had any ACC claim or counselling?
A. Yes, I think one of the documents we've been to today says that.
Q. It says that, yes. And I think we know from the file that Mr Wiffin only had access to ACC counselling after his response to the White trial and the difficulties that you referred to in that earlier email exchange that we've seen. What I might ask you about tomorrow is whether on one interpretation of the law, Mr Wiffin's claim would not have been ACC barred until that point around the time of the

White trial where he sought counselling. You may have an answer straight away or that might be the sort of technical question -

A. We might come back to it. I would now make the point that there is a distinction to be made between when you have cover and when you seek and obtain an entitlement. That's a general proposition though because I don't know and I'm not even sure that by tomorrow I will have an analysis of how the legislation and which one applied to Mr Wiffin's case in 2009.

There was another point to make about ACC. But in the litigation process, that is how the parties reveal to each other, as you know, the way in which each party sees the case. And so, when the defence of limitation is put, then the plaintiff has an opportunity to reply - I mean, this is all in documents filed by lawyers - to reply to say why you're wrong about that defence. As I recall, Mr Wiffin's reply was to say the events were pre-1974. That alone was not an answer.

Q. Not a complete answer, no.

A. No. And so, I think one of the letters that you might have taken me to from Ms Cooper says the same thing. Mr Wiffin's settlement offer from Ms Cooper says the same thing, it was pre 1 April 1974.

Q. That's not the end of the matter?

A. No.

Q. All right. We don't need to go into the nitty-gritty at this point but is it at least possible that, on the correct interpretation, the ACC bar did not apply to Mr Wiffin's claim initially but was triggered only when he later sought counselling?

A. I really don't know. It might be possible but I don't actually know the answer. When you say we don't need to go into it, will you be questioning me tomorrow on this question?

Q. No, I think we might have done enough on this. It is ultimately a question of law that the Commissioners can simply look at and if there is a need to come back to Crown Law, we can.
A. Sure.
CHAIR: Is the point you're making, Mr Mount, that there was a possible defence sitting there somewhere that was arguable?
MR MOUNT: Yes, and perhaps if I put this as a proposition to the Solicitor-General.
CHAIR: Yes.
MR MOUNT:
Q. Whatever the right or wrong answer is about ACC applicability, the phrase "technical defence" which is used by many, and was used in the Cabinet Paper we saw earlier today, might be thought to capture the very fine legal technicalities that can arise with, for example, ACC cover. And I understand, I don't think you need to repeat your view that these are not technical defences, these are the law, if I've got your position correctly, and there's nothing technical about the law, the law is just the law; is that essentially your position?
A. When I say not technical, they are substantive and have got policy basis for why that is the law but yes.
Q. Perhaps if I can approach it this way. Can we think about a counterfactual for Mr Wiffin as to how his claim could have been handled over that 3 year period. It comes in, in 2006 and there is a prompt factual analysis of its fact all merits entirely possible, I take it. And presumably, that factual analysis would have very rapidly joined the dots about Mr Moncreif-Wright and his convictions for offending against boys at Epuni in the 1970s and, indeed, by that stage he had further convictions for sexual offending, I think we saw on the criminal history, if I've got that right?

A. Yes but that one we went to had three and two charges.
Q. I think even some further convictions in the 1990s too.
A. Oh, okay.
Q. There would also have been, at least by 2007 after the White trial, some joining of the dots about Chandler and Weinberg, if I've got that right?
A. Yes.
Q. And maybe even some follow-up of the Hamilton Boys' Home connection, depending on the interpretation of the document we saw earlier today. On an application of the 2008 Litigation Strategy, certainly by mid 2008, May or thereabouts, Mr Wiffin's claim would have been identified as meritorious and one where the Limitation Act or other legal defences could be put to one side; have I got that right? And on receiving a request from Mr Wiffin of an ADR meeting that would have resulted in a genuine engagement with Mr Wiffin about how the case could be resolved to his satisfaction.

And I know you don't like the language of negotiations but would you accept that some process of dialogue with Mr Wiffin would have been appropriate and that there would be nothing improper about that dialogue? A negotiation wouldn't have to be improper, I take it you'd accept?
A. Yes, that's right.
Q. And given what we now know about the claim, is it not likely that Mr Wiffin's case would have been settled perhaps by mid to late 2008, something like that, within a reasonably fair timeframe from it being filed; does that now look likely?
A. Well, with the benefit of hindsight, I can agree with you that having connected, as the Crown side should have, the Mr Wright information that we had in a timely way with an ADR meeting, it could have been an outcome, the one you're describing. It should have been even.
Q. Now, I know these questions might feel slightly sustained but having got to that point, please feel free to address

the Commissioners, or indeed Mr Wiffin who is here, with your best understanding now as to all things considered how could it be that we didn't get to that resolution of his case?

A. I think I've addressed some of the failures to connect vital information. I think I have already addressed the focus that was brought in the litigation stream that might have blinded lawyers to thinking about the broader picture. But I think the critical thing is that the Chief Executive of the Ministry and Mr Young at the time, and Mr Young in this Inquiry, recognise and apologise for that error.

Q. Do you take the view that there is anything that Crown Law ought to apologise for in the way that the case was handled?

A. Yes, the Crown Law Office can and should apologise to Mr Wiffin. If he's here, it can be done that way, it can be done another way, for having information on its file that was relevant and not produced in a timely way. I share that responsibility absolutely.

Q. Any other matters?

A. Not specifically that I can think of are ones that we haven't already addressed, yeah, no. Can I say one thing just to the Commissioners? I am happy to leave it to the Commission to make a recommendation on this point. I've said a couple of times, I think in my evidence, I feel like it's too easy to sit here and say, oh yes. I do think that meaningful engagements, I think the engagements that Mr Mount is putting to me should be meaningful. I do invite the Inquiry to recommend, if it wishes, any further steps that should be taken.

CHAIR: Do you mean in relation to this particular claim?

A. Yes.

CHAIR: All right, thank you.

MR MOUNT:

Q. Mr Wiffin of course when he gave evidence did address his response to the settlement letter. It may be appropriate to replay, if we can, the evidence from 21 September, page 31 of the transcript. (Evidence replayed).

I wonder if you have a specific response to that concern that overall the Crown's focus was on defeating Mr Wiffin's claim in pursuit of a broader agenda, rather than on the merits?

A. I have watched Mr Wiffin's evidence already, so I've seen that now for the second time, and I recognise and acknowledge his pain and the anger that he has or had and perhaps still has for how his claim was dealt with. And I need to emphasise that the Crown's legal position is something that the lawyers for the Crown need to be conscious of, advise on and defend, if that is the instruction given. And I accept that that is a brutal process for survivors to go through. I have said that in this forum and in other forum before now but that is the one that - that is the only formal process that we have for resolving these claims. And when people come into them, I see it and I understand it, that that is not the resolution. And when claims the way that Mr Wiffin's did, it feels, I hear him say it feels like an offence to him. I see it differently because that is what the legal process requires.

Now, that is not to say it can't change and be better. That's not to say that informal processes shouldn't have a different result. But it's hard to step away from that in our system you end up - when you end up in Court, it's because you disagree with each other and you need somebody else to determine the answer, and that itself is bruising and hard.

CHAIR: Isn't it the case that there is, in fact, a mandated alternative, and that's in the Crown Litigation Strategy?

A. That's right, to go through an informal process within agencies. It's now more sophisticated.

CHAIR: I am talking about 2008-2009.

A. Yes, that was more agencies to try and settle the claims. I'm not sure that they had then established their, what we now recognise as the Historic Claims alternative processes. So, as I've said, accepted to Mr Mount, that maybe those processes of the legal strategy and the informal processes got too tangled. They are quite separate now and I'm not sure of the time at which those formally came into place.

COMMISSIONER ERUETI: It does seem, doesn't it, that ADR process, that first prong, wasn't really seen as very much in its formative stages, so that what they have, as we're seeing, is this dominant second prong, if you like, strong culture, proactive litigation mode. And we don't see this informal settlement process, it seems to not develop until some time later, a few years later?

A. Yes, I can see that too.

COMMISSIONER ALOFIVAE: Ms Jagose, given the brutality of Court processes, was it a philosophy or perhaps thought in the Crown Law Office to keep pushing it back to the agencies to essentially attempt to settle because once it hits your office, it sounds like it's game on?

A. No, I wouldn't describe it that way because, in fact, it almost inevitably starts in our office. If a Statement of Claim is filed, it tends to come, it might go to the Agency but it tends to go to the Crown Law Office.

So, that isn't the decisive point at which the litigation steps take place. And so, we do work closely with our Agency colleagues, in Historic Claims in particular. Today is very different from the description that we've just had of the process and I agree that the processes were not as distinct

as they are now and that perhaps the litigation view drove the Ministry's assessment of its informal process.

But now, the same step might taken, the Statement of Claim is filed, where Crown Law has very little to do, it doesn't just inevitably march on to litigation. The informal process is better defined. As I have been through, claims are either not filed or able to be case managed in a way that Cooper Legal primarily is putting forward the matters that she wants the Court to deal with. That's not entirely the case but in terms of getting onto a track for trial, that is how that works now.

I think we are seeing the difference between two very different strands and the development of those two strands that probably were still quite influenced by the litigation mode.

COMMISSIONER ALOFIVAE: Thank you.

MR MOUNT:

Q. Last month when Cooper Legal gave evidence, they were asked about the Wiffin case, of course, and said on the 1st of October, transcript page 503, "I don't think Keith Wiffin's claim is an outlier. It's terribly representative of how claimants are treated". Do you have a comment on that?

A. I'm almost not the right person to ask that question of because I don't see the hundreds of claims that the Ministries see and deal with. And many of them settle, some of them don't. So, if I can think about the ones that Crown Law does deal with, those are the ones where things have become either stuck, in that it's intractable and Court seems to be the only answer.

To that end, while there might be the same level or greater level of empathy for the individual, it won't be obvious because the steps then are Court steps.

So, I think I would say to the question, that needs sort of a wider scope of answer, people to answer that question, about whether this is representative or not. I would say not

generally because now we are not pursuing many cases to trial. I think I said the next ones are scheduled for April or some mid next year point. And otherwise, matters are being resolved informally.

CHAIR: Were you referring to it being an outlier or were Cooper Legal referring to it being an outlier in terms of the Court process or in terms of the factual basis upon which Mr Wiffin's claim was made?

MR MOUNT: It was perhaps not entirely clear from the transcript. We can pull it up, it's transcript 503, page 26, it's page 746 of the hard copy bundles, about line 10. It seems the particular factors were long delay and information.

CHAIR: It's what Ms Jagose has just referred to, which is the process through the legal system.

MR MOUNT: Yes.

CHAIR: Rather than the substance of his claim.

MR MOUNT: Yes, that's right, the process was the point.

CHAIR: The process?

MR MOUNT: Yes.

Q. And just having that clip in front of you, does that help you at all in terms of the answer you might give?

A. Only to say it seems that from page 503 what is said to be representative are delays and that information is withheld. I'm not aware of current criticisms of information being withheld, other than the approach to privacy and redactions. That is a matter which is still - it is a different matter I think from the one that we're talking about with Mr Wiffin where material is on the file that was relevant and not produced.

But I do accept that there continue to be delays, in part because processes take time to go through investigating and looking at and going back to files. The Ministries have put

in more and more resource to make that go faster. I am not the person to answer now about what the delays are.

MR MOUNT: Madam Chair, I am about to move on to the White case now, that might be a suitable time.

CHAIR: You are not going to do that in 30 seconds, are you, Mr Mount?

MR MOUNT: No.

CHAIR: In that case, we will draw the proceedings to a close and invite the karakia.

(Closing waiata and karakia)

Hearing concluded at 5.05 p.m.

ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

Under	The Inquiries Act 2013
In the matter	of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith--based Institutions
Royal Commission:	Judge Coral Shaw (Chair) Dr Andrew Erueti Ms Sandra Alofivae
Counsel:	Mr Simon Mount, Ms Hanne Janes, Mr Andrew Molloy, Mr Tom Powell and Ms Danielle Kelly
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	4 November 2020

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TRANSCRIPT OF PROCEEDINGS

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(Opening waiata and karakia)

CHAIR: Ata mārie, tēnā koutou katoa. Tēnā koe, Mr Mount and tēnā koe, Ms Jagose.

A. Tēnā koutou.

MR MOUNT: Tēnā koutou katoa. Madam Solicitor, tēnā koe.

A. Morena.

Q. I want to start, if I may, on something of a positive note. We are conscious that the survivor group is diverse, but it certainly includes very large numbers of victims and survivors of sexual abuse. And, certainly, over recent years, the law and the legal system have improved in their understanding and treatment of victims and survivors of sexual abuse.

A. Yes.

Q. Particularly, if I may say, in that part of the Crown that deals with criminal prosecutions.

I want to highlight one area of current practice which has been very much informed by research and better understanding of the topic or the experience of childhood sexual abuse.

I want to do that from the perspective of best practice, as it is now understood, so we can contrast what we now know with the way certain things were treated in the White case, if that makes sense.

The topic is delayed reporting by victims of sexual abuse. As you know, in Australia there was a Royal Commission into Institutional Responses to Child Sexual Abuse and one of the research reports that they produced, I clearly won't go through the whole document, but we can perhaps put the Executive Summary on the screen, it's document MSC ending 1082, page 4 I think of the document, it's page 953 of the written bundle.

Page 19, we'll come through, this is a 2016 report, page 19 of the document has an executive summary. In the first paragraph, we see the research finding that "many children and young people do not tell anyone about the abuse until decades later, long after they reach adulthood"; do you see that?

A. Yes.

Q. And then in the second paragraph we see, three lines down, "Delayed reporting is particularly common in cases of institutional child sexual abuse; for example, including a staff member at a boarding school or a residential care facility"?

A. Yes.

Q. That is now well understood. We won't need to pull up all these pages on the screen, so we can take that down, but will you take it from me that other findings include that delay is typical, rather than an aberrant, feature of child sexual abuse?

A. Yes.

Q. And a 2005 study found that only about a third of victims disclosed abuse during childhood and studies from the '90s have shown that boys and adolescent males are less likely than females to disclose abuse at the time. And for nearly half of the men, it took at least 20 years for them to discuss their abuse, compared with 25% of women?

A. Yes.

Q. So, there's a much better understanding of child sexual abuse. Although, in fact, those findings go back to studies from the '90s.

The way in which we responded as a system, as you know, includes now the very commonplace leading of what's called counterintuitive evidence in criminal trials?

A. Yes.

Q. And the Law Commission looked at this last year in a report, we won't dwell on it but it's MSC 1080 and if we go to page 13 of that document.

CHAIR: This is the Law Commission's review of the Evidence Act?

MR MOUNT: This is the Law Commission's report, yes.

Q. I will make sure that we've got the right page, it's page 1056 of the written record. You can see the phrase, "The research has highlighted a number of misconceptions that jurors might have about sexual and family violence cases".

And so, the law has recognised that some of the lessons learned from research are not well understood by the general population. And if we go across the page, we can see that among those, if we zoom in towards the top half of the page, the third bullet point, "One of the misconceptions is that a "real rape" victim would report the offending immediately, refuse to associate with the offender and react with visible distress"?

A. Yes, a myth.

Q. That's one of the myths, exactly.

A. Mm.

Q. Which needs to be addressed by this counterintuitive evidence?

A. Yes.

Q. And your own guidelines last year is part of the development of law requiring criminal prosecutors in all cases to consider whether in cases like this there should be expert evidence called, so that these myths can be addressed.

As I say, this is relatively recent for the legal system, probably over the last 10 years or so that we have really understood the need to grapple with these research learnings.

I need to contrast it with the way that the White trial was approached and if we could have document CRL25506.

Perhaps if we zoom in on the top half of the page, this is an exchange between Crown Counsel and the senior external lawyer running the White trial fairly shortly before the trial itself, discussing possible lines of attack on cross-examination and you will see lines of attack described as being no reference to reports of physical or sexual abuse; if it did happen, none of it was reported which seems pretty incredible; the third -

CHAIR: Mr Mount, can we be clear who this is from and to and the context in which it is being written?

MR MOUNT: Yes, of course. It's from Crown Counsel to the senior external lawyer who is running the trial. So, Mr Mathieson was Crown Counsel, the Senior Crown Law Office lawyer, Ms McDonald, was the external PC if I've got that right?

A. Yes, that's right.

Q. And in terms of the timing, I think this is just before the trial started, if I've got that right or fairly shortly before the trial started?

A. Fairly shortly, yes, I would agree with that.

Q. So, the third point was a number of opportunities to raise problems and if the institutions were as bad as they claim, noting that that might be met by a no-narking cultural response. A suggestion that there were good staff to whom the victims of sexual abuse could have confided. And then if we go further down the page, we see reference to the suggestion that, the second point on the screen now, this was covert and transactional, boys voluntarily went to the home and got rewards. Not a situation where someone came into the dorms at night and abused him.

In light of what we know now about delayed reporting and about the way in which sexual abuse victims behave, do you have a comment on these lines of cross-examination suggested?

A. Well, they are revealing the very reason why the legal profession has had to re-educate or educate itself about the myths about sexual abuse because this email is rife with them. In particular, the comment that, and it's there on the screen now, about it would have been simple enough for the boys to avoid him, the sex offender, if they'd wanted to, demonstrates an absolute failing to understand the nature of sexual abuse of children, of children in particular.

COMMISSIONER ERUETI: Can I also add too, I am not sure about that Australian report about the extent to which it looked at Aboriginal communities in Australia. I know there have been some concerns about that Inquiry, about the extent to which those sorts of issues were covered but of course in this instance too, we're talking about minorities, gender minorities, but also indigenous children and the barriers to reporting in that context too, right?

MR MOUNT: Indeed, and if you have a response to that aspect, by all means?

A. Well, doubtless, there are other barriers in our system where we have systemic racism throughout our systems, that that will impact more adversely on our Māori, in this context children, but people generally. I'm not as familiar with the report as Commissioner Erueti might be, just to comment more significantly than that.

COMMISSIONER ERUETI: I am not sure whether that report actually does address indigenous, the barriers, challenges for reporting by indigenous communities in Australia, but just to make the point that of course we accept that when you talk about the re-education of the profession, violence against women, for example, but also of course you would include in that also the barriers of reporting of Māori, Pasifika and other minorities?

A. Yes, and the whakamā, the shame that goes with that, which is a real preventer for people coming forward, yes.

COMMISSIONER ERUETI: Yes, and poverty and structural racism, yes, thank you.

MR MOUNT:

Q. I think I said at the start there would be some policy questions that we would have to come back to in a different forum. This may be one of those. I do see from the contents page, there is some reference to indigenous status, there was a very large study, no doubt that's something we will need to return to. But the point which I think is endorsed and embraced by the Solicitor-General, that this is something we do need to face up to in New Zealand and understand better?

A. And as you said, Mr Mount, if I may, it is the Criminal Court system that is making changes incrementally and some might say not fast enough for survivors, but focused on victims, focused on how such evidence is given. Our civil system, which isn't used to, hasn't kind of been established or set up to hear, especially since 1974, and ACC covering injury from sexual crimes, the civil system hasn't kept up, hasn't had to keep up like the criminal system has had to.

Q. Yes. Just to see how this played out in the White trial briefly, if we can go to the judgment which was Crown bundle tab 30, page 291 of the hard copy, page I think 30 of the pdf, page 63 I'm sorry. Paragraph 186, if we can zoom in on 186, we see right at the bottom of the screen, "The defendant denied Paul's and Earl's claims of sexual abuse, contending that there was an opportunity to complain and that complaints were invariably taken seriously". So, very clearly the line was run by the Crown at that trial, well if you were abused you didn't complain?

A. Can I make a comment about the context there? Not trying to defend that, except comment that in the context the wider case was also about the defendant, the Crown being

vicariously liable for not dealing with those abuses that happened. Just to put it slightly in context, it is also about addressing whether the Crown could have or should have, thinking about exemplary damages that were claimed, that would have been a necessary part for the Court to understand what is the level of wrongdoing on the Crown here. So, that would have been a relevant point. I don't want to put that any higher or stronger, but just to put it in its context of the overall litigation.

Q. Just to put a human face on this, Earl White when he came to give evidence to the Commissioners specifically described the experience of this line of cross-examination. Madam Registrar has clip 3, it is a relatively short clip. (Video played).

The other document that displays, if you like, the danger of this type of thinking, is MSD 2569, which is a document we briefly went to yesterday, it is an internal MSD document. If we can pull up page 3, paragraph 17. This was the memo within MSD, it's on page 538 of the bundle for you.

A. 540, I think.

Q. Yes, 540, correct, paragraph 17 is on 540. If you go over a couple of pages, this was the internal document in 2010 when MSD had re-opened Mr Wiffin's claim and there was a report through the Chief Executive to say we need to reassess and pay Mr Wiffin's claim.

Yesterday we went to para 16 which talked about the reasons that Mr Wiffin should be believed, but we see in paragraph 17, and this was Mr Young's work, a counterpoint where he said that these factors should mitigate against the correctness of Mr Wiffin's claim. And, essentially, what Mr Young was saying, was that Mr Wiffin had plenty of opportunities to disclose the abuse and didn't.

And, of course, in Mr Wiffin's case, we have Mr Moncreif-Wright pleading guilty in a Criminal Court, so we know beyond any doubt that Mr Wiffin was abused.

And paragraph 17, I'd like your comment, goes to show the danger of what the Law Commission describes as the myths about sexual abuse entering the thinking because at a very senior level within MSD advice is going up to say, well, Mr Wiffin might not be telling the truth because he never complained.

And I invite your comment as to whether now what could be done to ensure that that type of thinking has no place in our public-sector analysis of sexual abuse?

A. What can be done is, as we've just sort of had the exchange about the legal profession learning these myths too and being educated about them, Judges being educated about them, that we are educating ourselves about them.

What this document doesn't have or should or could have had after 2017 was why Mr Young said, I just note to be fair to him, he says "it could be considered to mitigate against" and then goes on to say "but actually we think it's more likely than not this might happen".

Q. Correct.

A. So, he doesn't actually fall into the hole that those bullet points might have encouraged him to fall into.

Q. Correct.

A. He didn't say after that -

Q. "Therefore we reject the claim", no.

A. And he didn't say "but all of those are not reasons to suspect" because we know that sexual abuse is something that is not reported, under reported and so on.

CHAIR: Just slow down.

A. I beg your pardon.

MR MOUNT:

Q. You can take that down now.

CHAIR: That got deflected, that was such an interesting question and you explained Mr Young's context, but the question was - what is being done now

to ensure that these myths aren't perpetuated in the public service. You talked about Judges.

A. And the legal profession and the comment that we need to make sure we are educating ourselves throughout and particularly, I didn't say this, particularly agencies that are dealing with children, young people in care or actually anybody in the State's care and/or control needs to understand these myths too.

CHAIR: So, it is all levels?

A. Yes.

CHAIR: It is not just the Judges or the lawyers, it's people feeding the information through and caring for the children?

A. Yes.

MR MOUNT:

Q. Might there be opportunities too for a closer engagement, perhaps this is already happening, you can tell me, between our senior agencies, including Crown Law, and the universities where we have people who dedicate their lives to understanding this work, the research and so on? Tell me if there already are those associations.

A. I just don't know enough about the whole of system of government to answer that question, so I'm not sure. There may well be those engagements, but I am not aware of them. Certainly, in my own office, of course being the source of those guidelines from the Solicitor-General for conduct of sexual crimes, these are matters that are discussed within the office about how we make sure we are educated about things that are coming before the Courts and that we are dealing with before the Courts.

Q. Thank you. Staying with the White trial, yesterday we saw the document from the Dean and Cochrane Review of Crown Law which talked about the perception outside Crown Law that there could at times be a win at all costs approach.

I want to put some other things that happened in White to you for your comment because they could be seen to perhaps fall into that category.

First, just by way of general approach to the trial, if we go back to the judgment, this was Crown bundle tab 30, and it's paragraph 27 of the judgment which I think should be on page 10.

We see that overall the judgment said, "Very little about the claims is formally admitted, somewhat surprisingly", the Judge said, "because much of the case is squarely based on contemporary records of the Child Welfare Branch".

Would you accept as a general proposition that the Crown's stance in the White case was not to admit even things which were based on the Crown's own documents?

A. I can see that's the Judge's criticism and he's in a much better place than I am today to make that point.

Q. On the face of it, it doesn't sit comfortably with the model litigant obligation, either in New Zealand or Australia; is that fair?

A. Are you referring to the obligation which I think is in both places, that matters that are agreed are not -

Q. Contested?

A. Contested. Well, I'm struggling to comment particularly on the White case because I wasn't intimately involved in it, but the Judge was and he is making that criticism, so that does appear to be the case.

Q. Yes. If we can come through to CRL26158, this is an email from one of the Crown Law team involved in the White trial through to the senior counsel on the trial and to some people at MSD.

Perhaps if we zoom in on the top half of the email first. We can see that this lawyer had been asked to speak to some former managers of MSD around the time of the allegations and to prepare a draft statement for that senior manager.

A. Mm.

Q. If we go to the bottom half of the email, we can see the 1, 2, 3 points. Is it fair to say that when this senior manager was spoken to, there were deficiencies identified in training, inspections and National Office oversight? So, in terms of training, the comment was that institutions were stretched and didn't want to lose staff for periods of time to let them do a training course. In terms of inspections, there was no formal inspection procedure. And in terms of National Office oversight, National Office worked with and trusted the judgment of the managers, a problematic assertion that was said given the documents stating National Office's lack of faith and particular person's abilities.

So, on the face of it, when Crown Law has spoken to this former senior manager, deficiencies have been identified in areas which could be described as systemic deficiencies in the way that the particular home was being run at the time; is that fair?

A. I'm not sure it's quite fair because, in fact, it is said that one of the reasons that he was spoken to wasn't that he was a senior manager with any responsibility but rather, one of his features that haven't been spoken to is that he wasn't dead. He wasn't a senior, he wasn’t - until the late '70s was he an assistant. So, I'm taking issue of your description of him as a senior manager at the relevant time.

Q. Okay.

A. So, he was spoken to because of his presence, rather than because he was the right witness to speak to these issues. As this note points out in the second to last, is it third to last paragraph, the point that this person has anyway - this person is reporting others' views, that he's not saying anything that assists us that somebody else couldn't say. And that somebody else, Mr Doolan, as the top of the note says, is the right person to speak from a senior management perspective. In fact, he's being identified as the wrong person to give that evidence.

Q. I see. Just dealing first with the point about seniority, if we go back up to the top half of the email, we see in the second paragraph there were two people spoken to, as you say.
A. Mm.
Q. Mr Doolan from the perspective of senior management in the early/mid '70s, this man, Manchester, from the perspective of senior management at National Office, the concept was he could speak from a senior management perspective. As you say, he was not in a management position with responsibility for institutions during the early to mid '70s but was chosen for reasons which included, and you can see the six there and the Commissioners can make what they will of those.

I think there's no need to quibble over whether the descriptor, a senior manager, is appropriate or not. But, certainly in the '70s, he was the Department's Chief Education Training Officer, so would you accept at least some level of seniority?
A. Yes.
Q. If we go to the bottom half of the email, and I am sure you will have anticipated that it's the response of Crown Law confronted with potentially unhelpful evidence that is worth exploring.

Those three points that have been identified all could be perceived as evidence of systemic deficiencies at the time?

The statement is drafted carefully around those issues, but it is noted that the witness would quickly say some of these unhelpful things under even the gentlest cross-examination. So, there's a risk identified to Crown Law that this man might give unhelpful evidence to the case?
A. Yes.
Q. And then it's the next paragraph, which I think you've already touched on, where the decision is taken not to call that witness. And if I understand what you are saying,

that's primarily because there's another witness who can do the job better.

But the question really is whether what's going on here in this email is that the team identifies potentially unhelpful evidence and makes it tactical decision not to call it and to use the words of the email "this will be just a target for the plaintiffs to aim at"?

A. Yes.

Q. Coming back to the model litigant notion of not looking at a case as a win/lose situation, but looking at the overall justice of a case, would it not be appropriate for the Crown as a litigant to call this evidence, even if it would be unhelpful?

A. Well, I disagree with the starting proposition of your sentence, which is that the model litigant policy is about not winning and losing, but about the justice of the case. Commentators, the Courts, the Law Commission on the Australian model litigation policy, make it quite clear that the Commonwealth lawyers, in our words the Crown's lawyers, may press their case hard, they may defend themselves. And it isn't as civil litigation is inquisitorial, it is adversarial, as of course I know you know, and that parties do bring their best evidence of the relevant points.

Now, this is not an email to say let's hide that evidence. This is an email to say there is a better person than Mr Manchester to give the evidence.

Q. Are you quite comfortable with the approach revealed in this email?

A. Well, I'm trying to explain what I read in the email from a perspective of a Crown lawyer who's defending a case. It sits in such a bigger context that I'm a bit hesitant to just say yes, fine, tick. We don't see everything else that goes around it. We don't see the evidence that is brought in the case that addresses the points that are raised here, nor how they were led or cross-examined on, perhaps

questioned by the Judge. It is too out of its context for me to comment on it.

CHAIR: May I just ask it in a more general way, because I accept that it's really difficult to talk about a case as old as this and when you weren't involved.

Where would you place the Crown's obligation in civil litigation to reveal, in fact, some of these things? Because in this one, just as an example, "there's too much scope for the plaintiffs to use this witness as a vehicle for highlighting systems that could have been in place but weren't and to demonstrate the fallibility of the general systems that were in place".

These are very material, aren't they?

A. Yes.

CHAIR: These are material things, but they are prejudicial to the Crown's case. So, my question at a higher level is, where does the obligation of the Crown in this adversarial system to reveal or put that on the table?

A. If there's material that the Crown has that is absolutely necessary for the matter to be resolved, or even if it's relevant, it shouldn't hide it. So, I think I'm answering your question at a level of abstraction, I appreciate, but the Crown must not hide relevant evidence.

But if more than one person can address matters of nearly four decades in the past in a better way for the defendant, the Crown, and that's not hiding it, that's putting it in its right context, perhaps having a bigger view of in this case the systems that were at play, that is an acceptable way to go about it.

It's such a level of abstraction, I appreciate my answer.

CHAIR: But I asked it at a high level as well and I think your answer at a high level is the Crown should not hide relevant evidence?

A. Absolutely not.

CHAIR: Yes, yes. And then the question of whether this was relevant to this case is something that we may never be able to answer, but I think the proposition at the high level is one that you have answered, so thank you for that.

A. Thank you.

MR MOUNT:

Q. We will, of course, be able to look further at this and establish but do you happen to know whether Mr Manchester's views about those systemic failings were made available to the plaintiffs for them to call that evidence if they wished?

A. I don't know, but I really doubt it. I mean, in that there is no property of a witness, Mr Manchester was also available to the plaintiffs, but I don't know.

Q. Right. If we come across the CRL22749, on the screen now, this is an email from the senior in-house lawyer at Crown Law to Ms McDonald, the senior external counsel on the case, probably about 6 months or so before trial.

It's primarily focused on the use of private investigators. And we see in the second big paragraph the view that the lives of the plaintiffs need to be thoroughly sifted through.

But if we look at the largest paragraph beginning with "The symposium", three lines down we see the sentence, "Our first approach will probably be that the witnesses are simply lying or could be while they might genuinely believe these events to happen, they are nonetheless false or exaggerated, highly exaggerated and extorted and looking to get expert evidence on that".

Those two ideas, "our first approach will be these witnesses are lying" and secondly "we need to thoroughly sift through their lives", from an outsider's perspective might look to confirm what survivors have said, which is

that the Crown starts from a presumption that they're lying; is that fair?

A. Well, I can see why it's a fair assessment of this case and at this time on that email, I can understand that perspective. I would resist the extrapolation to an interpretation of what the Crown is and does, but I can see why from that email that is said.

Q. Certainly, the criminal part of the Crown doesn't respond that way when people say they have been sexually assaulted. If you walk into a Police Station or a Crown Prosecutor's office to describe your experience of sexual abuse, you will not be met with folded arms, an attitude that says "prove it", we've learnt a lot.

Do you have a view about whether with its civil hat on the Crown should also adopt a less hostile attitude to those saying they have been sexually abused?

A. I mean, I've said already that the Crown hasn't been as survivor focused as it should have been, and here is a good example of that. I would say that today we are more survivor focused and yet, the civil litigation method and what it is aimed at, which is, if I use this case as an example, some $500,000 or $850,000 of compensatory damages for, not just that allocation, but a range of others, the defence is to prevent that conclusion being drawn by the Court because the facts and the law don't deliver that, the Crown says.

So, in some ways it's a mismatch between prosecuting, I don't mean that in the criminal sense, but bringing, in the civil courts, claims for compensatory damages which we already have in the civil sense the no fault, we don't doubt it, but that's the ACC regime which is one of the very barriers in the civil claims. That is my response to that, it needs to be seen in the -we have attempted, in this society I mean, not at the Crown Law Office, to fix that in the civil side by having a no-fault compensation scheme for

injury by accident and for injury that comes from sexual crimes.

Q. In this particular case, the plaintiff, Mr White, alleged sexual abuse by a man called Ansell, who at the time of trial already had convictions for sexual offending. It is a parallel to the Wiffin case, if I'm correct. With that background, that here with its civil hat and accepting the ACC system and all of that, is it appropriate for the Crown to start with what appears to be such an aggressive stance to someone claiming abuse by a man who at this stage is already known as a convicted abuser?

A. Well, again, I'm sorry, but I take issue with the way you're putting that question to me. This is not the Crown having an aggressive stance to the person. These are two lawyers talking about how should we go about this case. But I get your point, I think, that perhaps it would have been better for the Crown to say, "Let's rely on the fact that the law will never allow him to recover the damages he wants, regardless of whether this happened or not".

Q. Ms Janes has just reminded me of a document, we may not be able to pull it straight up, I may have to get it over the break, but I understand the Crown itself in 2002 had formed the view that the allegations against Ansell were likely correct. Does that change your answer about the appropriateness of what seems to be quite an aggressive start from the idea that the witnesses are simply lying?

A. If those things are true, I mean I don't know enough about it, but it does suggest that that's a pretty harsh starting point. But, to put that into some context too on the other side, outside of the litigation, there was a period in which the Department was attempting to settle these claims for not insignificant sums, although the parties never came to agreement on that, it never settled and it went to trial. So, there was another line going where a different approach was being taken.

CHAIR: Do you need to rely on that document? Would you like a moment to find it?

MR MOUNT: Yes, if I may just take a very brief moment.

CHAIR: Would you like us to adjourn?

MR MOUNT: I don't think we need to adjourn. What we might do, if we may, is go back to one of our clips, clip 5 Madam Registrar, this is Mr White describing the experience of being cross-examined. And in a way we might see it as the natural consequence of the decisions taken in this email, to take a very aggressive stance. (Video played).

Q. Do you have a comment on the ultimate impact on Mr White of that style of cross-examination- which he certainly described as having been very aggressive?

A. Well, I hear from that, I also attended to Mr White's evidence when he gave it from a remote, I was in Wellington, but it is it- clearly was and is a harrowing process for him.

Q. We are not unfortunately able to put this document on the screen, but over the break we will see if we can get it for you, but it does seem in 2002, in a letter sent by Crown Law to Child, Youth and Family, that the view was expressed that it was likely that the plaintiff would be able to prove on the balance of probabilities that the sexual abuse occurred.

So, as I say, I can show you that document but if the starting point in 2002 was a Crown Law view that this allegation of sexual abuse more than likely could be proved, how appropriate was it to take such a stance in cross-examining- a witness?

A. I don't think I can defend that. It doesn't sound appropriate. It's easy for me to say that, both from this distance and without having gone through the material. But putting those things together does not sound appropriate and

certainly the impact on Mr White shouldn't be, well I know the Commission won't forget it and we shouldn't either.

Q. You've explained the outcome of the State Services Commission Inquiry into private investigators when you spoke on Monday. If we can briefly look at CRL40542, I think it's 59. This is another aspect of the use of private investigators which we'll just go through very swiftly, if we may.

This was a 2007 letter from a private investigator to MSD identifying what he described as subjective reasons to make requests from various departments.

And if we can just quickly skim through. The suggestion of the investigator was that the plaintiffs would be looked at for their Work and Income records, their ACC records, over the page their Housing New Zealand records, down at the bottom of that second page Internal Affairs and Customs for their passports and travel, over the page Corrections data, Police data, across the page Bank of New Zealand financial records about lifestyle, income, financial status. Financial institutions, across the page Inland Revenue, insurance companies, their medical records. Very consistent with what Mr Mathieson's email described as a thorough sifting through of the plaintiffs' lives.

Do you have a comment on how appropriate it is for the Crown with all of its resources, faced with a civil claim which in 2002 internal advice said, yes, this person more than likely could prove they were sexually abused, how appropriate would it be to entertain such a thorough sifting through of the plaintiffs' life?

A. Well, I don't want to defend every step that was taken in the White case, but I do want to say that the case, I think I've already said it, that case and many hundreds of other cases aren't this pinpointed one allegation for which there is some information. It is also a very broad set of allegations, leading to compensatory damages claim for loss

of income, loss of opportunity, failure to educate leading to loss of financially secure life. And while I don't dispute any of that as the reality for the survivor, that does put into the frame of the case as pleaded a wider source of relevant material.

And so, it isn't to say that the sexual abuse allegation is met by this response. It is again just putting it into its context of the totality of the case as pleaded.

I also notice at the end of this document, it appears to be, and I can only say it from the document, that this is a comment that is made, sorry a letter that is made, to assist this person from MSD prepare an affidavit, presumably to the Court, presumably to explain why further discovery was being sought from the plaintiffs. I just want to make sure that's also understood in its context. It is not for the private investigator's own work, it is an affidavit going to the Court, I am assuming and the Court record will show or the Crown Law Office records will show that that's an affidavit asking the plaintiffs to discover all that material.

Q. How comfortable do you feel with the notion that a person more than likely abused by an employee of the State, choosing as is their right to bring litigation, might be met with such a thorough going over of all of these aspects of their life?

A. I feel like I just answered that comment in my last answer. Have I misunderstood the question or was my last answer inadequate because I was trying to say there, that the case puts into the issue a significantly larger breadth of material of relevance.

Q. Does that amount to feeling comfortable with the notion then?

A. It's very hard to say that out of just in this one or two documents out of what, as we know, is not a good thing, some 10 years of litigation. What I can say is that I'm - what I can say is that when these civil claims are brought, the

Crown is entitled to defend itself. Now, we must learn, and we must do that in a way that is as empathic as we can be to the individual whose life is at issue. But maybe it comes back to my general proposition, that the civil litigation model is not the answer for these claims. It's very easy for me to say that, I appreciate, but time and again we are up against it was the wrong forum. I am not critical of the plaintiffs and the survivors for using that forum. For a long time it's been the only one they had. But we can tell time and again it is the wrong forum.

COMMISSIONER ERUETI: It seems survivors will want to use that forum and have that choice, so the question I think is, is there a survivor informed approach to addressing these sorts of evidential questions?

A. Well, I think we can do better, yes. And perhaps to get to Mr Mount's point, sorry, we can make that a much less, can we work to make that a much less vulnerable situation for the person? But in the end when we disagree, and maybe more could have been done in that case to agree more, but in the end when you disagree and a third party has to conclude it, it will still require a testing of the evidence, even if that can be given in a way that is less confronting. As we know from criminal trials of sex crimes, evidence being given remotely or recorded and played or not having to confront the alleged offender and all these things that are making it easier, it is still hard to give that evidence. So, perhaps the answer is thinking harder about what can be agreed and what is truly at issue. It's easy to say that today with some 20 years of experience of how the Civil Court or the civil law applies to these cases perhaps than it was in the first ones.

COMMISSIONER ERUETI: It just seems easy to lose sight of the fact that the people we are working with here are survivors of sexual abuse.

A. Yes.

MR MOUNT: Madam Chair, may I approach the witness briefly?

CHAIR: Yes.

MR MOUNT: I have a hard copy of the document.

A. Thank you. We have it on the screen.

Q. It is on the screen now, too, but I am just giving the hard copy to the Solicitor-General so that she has the full document.

CHAIR: Is this the document we were referring to earlier?

MR MOUNT: It is the one I mentioned a few minutes ago.

Q. We can see December 2002, it was a draft and it's just I am wanting to make sure that the context is fully there in the evidence. It is a draft piece of advice from an Assistant Crown Counsel, which I think in terms of the tiers of Crown Counsel at the time that was a relatively junior position; is that right?

A. Yes.

Q. The paragraph I was referring to is paragraph 5, the last sentence, "In my opinion, it is likely the plaintiff would be able to prove on the balance of probabilities he did suffer the abuse".

But I think in fairness it does need to be said this was a draft by a relatively junior lawyer.

A. Yes.

Q. And I wanted to make sure you had the full opportunity to see that and tell us if it changes your answer at all?

A. I don't think it does. The I mean, I think the same issue applies, sorry the same answer applies. I don't know that I can take it further. It is a draft, but did it make it into the final? I don't know. Really, I don't think that matters. The point is, in 2002 that was said to be the position.

Q. Thank you. Still on the White case, one of the things you mentioned on Monday was the approach that the Crown took to name suppression.
A. Mm.
Q. And I think you were quite strong in your description of the approach that was taken. I think you described it as improper and indeed appalling, I think was one of the words you used on Monday to describe the approach that was taken. Just looking at the letter itself, this was a 12 March 2007 letter, which I think Ms Wills will be able to show you, there was just one other piece of that, that I wanted to ask you about. Looking at paragraph 4 of the letter, is it correct that the decision the Crown took -

CHAIR: Sorry, which letter are you referring to?

MR MOUNT: I am going too fast, I'm sorry.

CHAIR: Is there one to be shown to us?

MR MOUNT: No, this won't go on the screen. It is just a document to show Madam Solicitor.

Q. You will recall the evidence on Monday that the Crown elected to oppose name suppression for the White brothers. And it was in the statement of the Solicitor-General that it was said at the time in this letter, in this piece of advice, that, I will get the exact words "there's a public interest in complainants", this is paragraph 14 "not being subjected to the severe distress and humiliation that would accrue from publication of their name and publication would significantly discourage future complainants from coming forward". I don't think that is the right -
A. I think you want to point to paragraph 6.
Q. Paragraph 6, thank you. The particular statement quoted in the statement of the Solicitor-General, was that "important that the witnesses should not be protected from publication and instead should be called to publicly account for the allegations they are making and also felt that it would be likely to discourage other persons in the same position".

You will recall this very adverse comment from the Solicitor-General, I think you'd struggle to find a different reading of that, and haven't been able to?
A. Yes.
Q. So, on the face, what we are left with is a decision to oppose name suppression with an idea that those who have suffered sexual abuse should be made to be publicly called to account for allegations and it might discourage others in a similar position.
All I wanted to add was, looking at paragraph 4, it does seem clear that there was an element of strategy to that decision as well, wasn't there?
A. That is what paragraph 4 says, yes, "oppose as a matter of principle and for strategic reasons", yes.
Q. Putting all of those strands together, a decision to oppose name suppression, to cross-examine on why abuse hadn't been disclosed at the time, to adopt a presumption that the witnesses were lying, to at least entertain the idea of sifting through all aspects of the plaintiffs' lives, are we left with an overall impression of the White case, that it was very much a piece of litigation conducted aggressively by the Crown, with a strong sense of how that would be experienced and what the effect of that would be, not only on the White plaintiffs, but on other potential claimants?
A. Yes, I think that's a description of what is said and what is plain from the material about the case, yes.
Q. You did mention this piece of evidence on Monday, but if we could have clip 6, please. This was Mr Wiffin's response to the way that the White case was conducted. (Video played).
I think on Monday you sought to reassure Mr Wiffin that litigation is not treated as a game within the Crown Law Office. But we do see very clearly in the evidence given to the Commissioners the human impact of the way in which that case was conducted. It does appear that somewhere in the adversarial litigation process, and the way in which this

case was approached, the human impact and the underlying human reality of these cases was lost?

A. I think I've already said that that can be a side effect, that makes it seem like a small thing, but that can be a response to litigation. And, to expand on that, I think we should always, you know, it is part of the privilege and the burden of being the Crown that we should always remember that there are people at the centre of everything that we do. And it's easy, too easy to forget that. But also to think about this in its context, that has hundreds of these claims get filed, all with people at their centre, we did see a templated approach to the matters that, this is not to excuse the point you're making, that we have to remember people, but that made it easier and easier to see this as a series of cases without people in them.

Some of them were cookie cutter, to the point that claims were filed in the Court with square bracket gaps that said "insert name of institution here". So, the way that claims were brought too encouraged, not by the survivors, but in the legal process, encouraged that view that what we had here was something that was getting more and more divorced from the reality of the person.

Q. I want to move on to a slightly new topic, which is who was in the driver's seat of these cases once they were in litigation mode and what I imagine might be at times a slightly complex relationship between Crown Law and the Ministry. I don't think we need to put it up on the screen, but you may recall Mr Young's evidence from MSD where he described himself as a passenger?

A. I do remember him saying that, yes.

Q. And Mr MacPherson from MSD, a Deputy Chief Executive Senior Official, I think captured some of the complexity, this is page 748 if you would like to look on your hard copy from about line 7 or 10, he said, "Well, as well as Crown Law

acting for us on our instructions, but actually also advising us on what those instructions should be".

Can you give us your perspective on who really was in the driver's seat for these historic abuse cases? Was it really a situation where the Ministries were giving you instructions or was it more a situation of Crown Law making it very clear how the cases should be run and the Ministries largely accepting that?

A. To use your words "who was in the driver's seat", at a macro level, Cabinet was in the driver's seat. It said as early as 2004, the matters we've been through in some detail and I won't go back over them, except to emphasise right from those early days were instructing us, all officials, to settle claims that were meritorious and I've said already that that changed its meaning over time. Until about 2008 or 2009, it still meant settle claims where there is a risk that liability will be found, so it was still very legally framed. So, that broad-brush who was in the driver's seat is answered by saying it was successive governments deciding how broadly the claims should be run.

But the conduct of litigation is the responsibility of the Solicitor-General. So, the Solicitor-General is responsible for how individual cases, to use the examples that have been talked about this morning, how lawyers conduct themselves in Court, the Solicitor-General is responsible for those things.

And then to come to the point that I think Mr MacPherson was on, which is slightly murkier, yes, we take instruction from our Agency colleagues. We also advise those Agency colleagues about what the law is and what their likely liability will be and what their obligations are, in a way that might not make it a terribly bright line on some points about who gets to say what the answer is.

And I tried to give an example the other day that exposes this by saying, in this context Cabinet has said when

matters go to the Court defend matters as appropriate. ACC is just part of the framework and if limitation is an available defence, take that defence. Quite a lawful instruction that we follow.

However, if the facts of the case indicated that, for example, a limitation barrier didn't exist, we wouldn't accept an instruction to say argue it anyway and see what happens. So, that would be to say to the agency, you can't give us that instruction or if you do we won't follow it. So, if isn't as strict as the distinction between private citizens and their private sector lawyers. There is a blending of what is the law, says Crown Law, and also what might the law allow. And then questions should be asked about and then should the Crown act like this? Coming out of these claims a bit on that point, but it's frequently the case that the Crown Law Office's advice moves beyond what is just the law to something more of a mixed law and policy thinking about what is proper. That's my answer to your question and a slightly discursive one.

Q. It is a complex topic though, I understand.

A. Mm.

Q. If we look at a practical example of the way that complex relationship can play out, you will recall I think at least two instances after the White trial where the Ministry of Social Development was interested in either settling or making an ex gratia payment to the Whites.

And within Crown Law there was a very concerted effort to pushback against that?

A. Yes.

Q. So, for example, if we go to CRL25692, this was the first occasion, April 2009, perhaps if we can zoom in on the content of that. This is from Crown Counsel through to the Deputy Solicitor-General in April 2009. "A heads up we may need your intervention", this has been escalated within Crown Law. "Cooper Legal has suggested settlement. The

view of the team running the trial is that that would be a really bad idea because of the potential negative impact on the Crown's wider litigation strategy"?

But we see in the next paragraph that MSD at the Chief Executive level was interested in considering the proposal and the response within Crown Law was this will need to be escalated.

Can you comment on the way that this issue was approached from the perspective of really who ultimately would be driving these decisions?

A. Yes, and it's a good example, a good practical example of what I'm saying. So, here we have, in the context of there being a successful defence in the High Court, with a further appeal pending, a suggestion of settlement and our view, and I say "ours" in a way that includes me because I was now involved in this, I think there's other material here where I'm briefing the Solicitor-General on this point, our view was that the Crown's riding instructions, the government's instructions to us, were defend matters in the Court but actually, by now, 2009, it's trying to develop a more formal - no, that's the wrong word because I mean informal - but a more structured informal alternative. And we were concerned that going down one path and choosing the forum of litigation and that being determined in the Crown's favour, to then settle as if the High Court had found otherwise, would drive quite a wedge through what government wanted us to do, which was defend in the Courts if those cases are defendable, but encourage a different perspective to be brought about how redress happens, not through the civil litigation but through settlements, services, a more restorative, I think, alternative. And I think that is part of our function is to say to agencies, "You might want to do this, but you have to see it in the wider context of what the Crown is doing overall".

But I say and- here I see a lawyer appropriately elevating it to more senior levels in the office, knowing that it was being also elevated to more senior levels at the Ministry of Social Development, for that to be sort of talked out and potentially, it didn't happen in this case I don't think although, I am not sure if it did, for Ministers to become involved.

It is a good example too, so that was our perspective and I recall that the Solicitor-General and the Chief Executive did meet and talk about this issue. And, as we know, a settlement offer, well it wasn't settlement, an ex gratia- payment was made to the Whites. And it's an example of where the Solicitor's advice continued to be "I don't think it's a good idea", and the Ministry did it anyway.

So, again, it comes back to something of a murkiness about the answer, about who gets to call it.

But while it was in litigation in a global strategy from the government that defend where we can and try and encourage an alternative for resolution, I think it was a proper role for the Solicitor or the Crown Law Office to say a step like this will actually undermine what government has told us to do. And so, we see it being appropriately elevated. I can't remember if it got to Ministers, I don't think it did. But, in the end, like literally at the end, the Ministry prevailed in

CHAIR: Just to be clear on the facts here, this is at a point where the White trial has been heard and determined by the High Court, but the proceedings that were to be discontinued was an appeal; is that right?

A. Yes.

CHAIR: That was the plaintiff's appeal against the High Court judgment?

A. Yes.

CHAIR: And it was in that context that you had ongoing litigation that needed, in your view, to be continued according to the policy?

A. Well, not necessarily the litigation needed to be continued because this does say that we were open to it being discontinued and we would take no issue with that as to costs. But, rather, it did seem rather perverse to go down a process and to then pay a sum of money as if that process had had a different result.

CHAIR: I just wanted to make sure we had the factual line correct, that's right?

A. Mm.

MR MOUNT:

Q. In terms of the timeline, we are here April 2009, between the High Court and the Court of Appeal.

A. Mm.

Q. I think the issue popped up again a year later, if we can go to CRL25860. Here we are in June 2010, so we are now after the Court of Appeal and I think an application for leave to appeal to the Supreme Court has been filed and the issue popped up for a second time. This might be the one we were referred to, to your involvement briefing the Solicitor-General, just looking at that email?

A. Yes.

Q. If we go from the bottom of the page, just to understand the contours of this in 2010, MSD's perspective is recorded as being that what it has said publicly is it will act on the facts of each case, put questions of law to one side, and MSD's perspective is it's important to act consistently with that, to do the right thing, to be able to respond to any serious criticisms that have been levelled against the Crown. Their view was an ex gratia payment to the Whites would be consistent with that because regardless of findings on causation, delay and so on, there will be findings of

fact about physical and sexual assaults which they considered would justify ex gratia payments.

MSD's view was that doing that, what they regarded as doing the right thing, would not provide encouragement or little or no encouragement to others to pursue the litigation process but making a payment would demonstrate a commitment to address past wrongs.

So, that was MSD's position, we can see on the screen?

A. Mm.

Q. Certainly by this stage, mid-2010, that would seem consistent with the Crown Litigation Strategy advice to Cabinet, would it not, given that with findings of fact from the High Court, surely at least in part the case should be seen as a meritorious case with the actual findings of sexual abuse and so on?

A. But to what end are you asking me that question? Sorry, what is the question?

Q. MSD's proposal to make a payment, a partial payment if you like, to reflect the findings the High Court has made, yes, in fact you were sexually abused, you were physically assaulted, to do so, to make that payment would have been consistent with the Crown strategy to settle meritorious claims?

A. Well, not really because the Crown strategy was to settle meritorious claims so that they aren't litigated. I don't know that it can be applied later. And, in fact, I know we haven't gone there yet in this document, but the strategy as described, in fact I see reading this note from more than 10 years ago I say the same thing in this note that I just said to the Commissioners about what the strategy is, to encourage the informal resolution and not in the Courts. And the concern was that that would be undermining of the strategy, to indicate that if you continue with the litigation and you don't succeed, you still receive a compensatory payment did seem to undermine the strategy,

rather than be consistent with it, which I think is the point you're putting to me.

And in -

Q. I will have a couple more questions on this topic, but I think perhaps it may be an appropriate time to have the adjournment now.

CHAIR: Certainly.

Hearing adjourned from 11.30 a.m. until 11.45 a.m.

MR MOUNT:

Q. There is, I think, an important point here about how the Crown Litigation Strategy was interpreted and applied. It may be helpful to go back to CAB 4, the second page of that pdf, I think, where we had the three-pronged approach set out in bullet points. This is a 2008 document and if we go to the second page, and zoom in on the three bullet points. Familiar of course to everybody, I think this was still the applicable strategy at this stage.

You tell me but am I right that what you are saying is, in terms of the first two bullet points, they effectively apply for the cases that don't end up going to Court. But once you're on a Court track or once you are actually at a Court hearing, one and two are off the table?

A. No, that is isn't sorry-, that's not what I was saying or that's not what I meant because, of course, even cases that are in hearing should be able to be settled if that's where the parties get to. So, no, that's not what I meant.

What I was trying to say was that, I think it was proper for Crown Law to raise, in order for it to be addressed at a higher level than just the lawyers working on the file, that paying a settlement after a successful High Court judgment risked undermining the government's overall strategy of inviting people into a different process to resolve their

claims than litigation. It wasn't to say this didn't apply, but that it was going to undermine that.

Q. Through a different lens, was MSD not correct in saying the point we were looking at 2009-2010, really it's bullet point 2 that applies to the Whites, so far as the group of allegations that were proved is concerned, the sexual abuse and physical abuse proved in Court, they're really a bullet point 2 category, and so therefore consistently with the Crown Litigation Strategy as presented to Cabinet and signed off by Cabinet. For those proven allegations, the strategy says you should settle them?

A. I see, yes, and that's where MSD was coming from, saying this is the right thing to do, yes.

Q. Perhaps if we go back then to -

A. Just before we go off that page, just that second point, because meritorious changed its nature over time, this paper, and I don't think we need to go on to see it, but this paper does go on to point out that settlement here described as meritorious, here considered on its merits where there is a realistic prospect of liability or where legal risk assessment otherwise justifies a settlement. It's not on the point you're asking me, but I just want to be clear what that means in 2008.

CHAIR: Does it still mean that in 2010?

A. No, I think in 2009 we -

CHAIR: It changed?

A. We saw a real shift of that to including that moral basis coming much more strongly into the frame.

CHAIR: The reason I ask that is because, of course, the correspondence we've been referred to under the appeal?

A. That's right, yes.

CHAIR: Post-dated that, didn't it?

A. It does. I was only really making a point about this document.

CHAIR: Certainly, yes.
A. Yes, I accept that MSD's view, as we've gone through the material, this is the right thing.
MR MOUNT:
Q. And indeed, consistent with Cabinet's strategy by that time. If we go back to 25860, your advice through to the Solicitor-General in mid-2010, the second bullet point says, as you have said again, that in your view at the time an ex gratia- offer at this stage would work contrary to the strategy, but is that really correct given what we've just seen, that an ex gratia payment would in fact be consistent with the strategy?
A. Well, it is what I said at the time, that it was inconsistent because it doesn't encourage, as the government strategy intended to, the non-litigation option. It's been more likely to resolve claims, given all of the legal impediments in the other option. That's what I said at the time. And now I think you're saying to me do I still think that?
Q. Yes, I'm questioning whether the advice was really correct, when on the face of the 2008 strategy you were directed to settle meritorious claims. The Whites by this stage, at least in part, had meritorious claims because of their findings?
A. Yes.
Q. Including sexual abuse. You're saying to the Solicitor-General that form of payment would be contrary to the strategy and I'm just inviting you to reflect on that and say whether you still think that's right?
A. I can see your point, that it doesn't say, it doesn't point up that part of the strategy includes settling early for claims that are meritorious. Yeah, I can see that.
Q. Also, in that bullet point, it may have been unfortunate phrasing but "minor factual findings" perhaps doesn't sit comfortably with findings of sexual abuse for Mr White?

A. That's right, I agree with that, it's not minor to Mr White.
Q. Or to anybody?
A. Indeed, yes.
Q. This is potentially quite an important point in terms of the way that the Crown overall thought about these cases, given that this is something being escalated to the Solicitor-General. Does it tell us something about the mindset, if you like, of cases once they ended up in that litigation zone, that once a case was in the litigation zone the mindset was very much this is now a battle and the role that an adversarial litigation system is for one side to win and the other side to lose?
A. Actually, I think it reflects several different mindsets. One is that idea that we're operating to a greater strategy plan/instruction from government here and, you know, in my experience, governments would, I was going to say have our guts for garters, but perhaps that's a bit colloquial for the idea that officials would undermine that governments are trying to achieve in individual cases which would get their own precedent value. To me, it reflects a public service lawyer thinking, oh, how does that fit with what we know governments are trying to achieve here? It reflects something else too which is relevant to the exchange we've been having about who's in the driver's seat. And the next document in my bundle, which we maybe don't need to see, officials identify this as an issue and perhaps Crown Law has a very litigation focus, I am prepared to accept that given that's our function here in this case. So, we raise the issue with our colleague agencies, who raise it with their non-legal colleagues, who raise it with their seniors and in the same way Crown Law Office raises it with its senior.

So, it is- it reflects to me kind of that murk that we're talking about, about who is in the driver's seat. Actually, there's a highly collegial approach to working things out

and in the end, as we know, the Ministry of Social Development's view prevailed, in that payment was made. There wasn't a point at which the Solicitor-General's function to say, no, I call it about the law, this is just raising questions to be thought about at a more senior level than officials who were too junior to make those calls if, in my assessment we needed to think about it in the wider government's instruction to us.

To me, it reflects actually the reality of how things work and how they should work actually, that individuals working on files spot issues and raise them appropriately to be finally determined at the right point because it does flush out then, is this a legal matter that the Solicitor-General has the ultimate authority over? Oh no, we realise, no it's not actually, it is a matter where the Ministry of Social Development can do what it thinks is the right thing, it assesses is the right thing.

Q. I'll check if the Commissioners have other questions?

CHAIR: No, I think you've covered that.

MR MOUNT:

Q. We've seen in reasonably clear detail the impact of the trial process on Mr White and indeed Mr Wiffin. I realise it wasn't your case directly, although clearly you became part of a broader team later on?

A. Mm-Mmm.

Q. So, this is a hindsight question from your perspective, but might there have been other ways of resolving some of the legal questions without what I think was a 7 week High Court trial which was clearly an extremely difficult process for the Whites? And I'm thinking, for example, after the Canterbury earthquakes in 2010, there were a number of difficult legal questions that had to be resolved, but there was quite a degree of co-operation among various different agencies, a QC, private insurers and others, to package up legal questions that had to be resolved and take them to the

High Court for a declaratory judgment more than once, so that the law could be clarified and people could get on with the difficult business of making the decisions, making the payments and getting on with rebuilding.

A. Mm.

Q. Now, I realise these are not directly comparable, but that technique is only one identifying a declaratory judgment so that you don't have to put people through cross-examination- and all of the very difficult aspects of litigation.

I can see from the file that that consideration was given to the High Court Rules procedure of mini trials, and I think some other options were considered. With the great benefit of hindsight, might there have been better ways for the legal system to resolve some of these difficult questions without the misery of the White trial?

A. Yes, and they - we see it actually playing out immediately following the White trial, in a letter we've been to and we don't necessarily need to go back to it. I was the writer of a letter, it related to Mr Wiffin and two other people, and it was suggesting there that rather than waiting for these issues of law, Limitation Act to be dealt with at trial, shouldn't we deal with them early? Because if they are successful, then that is it. Another option might be judicial settlement conferences, which are very different, more informal, not determined by the Judge but an attempt to have the parties come together in a more, still legal but informal setting.

So, there are methods by which points of law can be tested. A slight difficulty here, which is not to say we should not try harder to find ways to test these matters, is that they are so integrally related to the individual and their experience, what happened to them. It is a bit hard to - so, your example, and I know you say it's not entirely on all fours and I agree, your example where you could test

some sort of dry point of law and then apply it to facts. It was hard to do in the abstract. Now we've had one or two, I think up to five matters in the High Court determined in the broad Historic Claims area, so we have something more of a method by which to determine better without trial what the likely results are.

So, yes, there are different ways that we could, either could have or could still now do these things.

Q. This I think may be one of those questions we should take off line to a separate process after this hearing because I am sure the Commissioners will be interested in some of these big picture questions, how could our system of litigation be improved, how could we better resolve them, but I think if you would be willing to participate through your office in that discussion, we would be grateful.

A. Yes, indeed we would be, yep. That presupposes that litigation is still in the picture and of course I'm bound to say, as I have done and I might say again in life, can't we take lawyers out of this picture? If we are to start at a different point and to start with a trauma-informed- model, the lawyers really, I mean, with all due respect naturally to lawyers -

COMMISSIONER ERUETI: You are surrounded by them.

A. Is that the right place to start? Anyway, that's an even bigger question we should take off line.

CHAIR: I am very sympathetic to that view, but remembering always that we have to acknowledge that there are survivors.

A. Yes.

CHAIR: People who for whatever reason do wish to take them -

A. And we should look in that frame a different way, I agree with that.

CHAIR: I think it's in that spirit that we would want to investigate, you know, the remote but absolute

possibility that people would still want to exercise that right. We need to find some framework that works.

A. Yes, and a question, if I may, a question there is to ask, yes, some survivors might still want to go through the civil litigation. It might be because for now that is really the only alternative, the only formalised alternative.

CHAIR: Yes.

MR MOUNT:

Q. Last topic in terms of the way that the cases were conducted is Legal Aid.

A. Yes.

Q. Which you've already addressed, I hope you don't need to repeat yourself too much, but this has been important for a number of claimants, I need to put it to you. The concern, as you know, is that faced with a flood of claims, at first the risk of a flood and then an actual flood, the concern is that the Crown may in some way have used its influence, soft or hard, over Legal Aid as a lever to try to do exactly what you said a moment ago, which is encourage cases out of Court and into a non-Court- forum.

And there does seem to be no doubt that from the Crown's perspective, there were too many of these cases, they didn't have legal merit for the most part, the Crown's view, they were very time consuming for the defendants, for the agencies and for Crown Law, very expensive, and so finding a way to reduce the flow of historic abuse cases would have been seen as a good thing from a Crown perspective.

Are you able to say that from everything you know, there was no influence brought to bear on Legal Aid, that with the benefit of hindsight was regrettable or inappropriate?

A. I would certainly accept that there was, that the way in which the cases turned out, there was influence it- influenced Legal Aid's decisions and so the Crown brought their attention comments that the Court made about

the funding of these claims, that was done overtly, not covertly, and that was just openly done, and so that was influential. Is that regrettable? It made sure that there was no I mean, I'm not absolutely certain- but I'm comfortable from what I know about how those Legal Aid discussions went, or those engagements with Legal Aid, I should say, that there was no improper stepping over of the boundaries and no improper knowledge given to the Crown by the Agency of the plaintiff's cases or claims.

It did seem that many hundreds and hundreds of cases had been given funding in a way that was a bit inexplicable given the pretty strong perspective about their legal success rates. And today we're in quite a different position. So, it became a very controversial question about what is the Crown doing pointing up to the Legal Services Agency what the Court is saying. So, we were careful to always be overt about that. Is it regrettable? I don't think it was improper, so I don't think it's regrettable for that reason. There was a time where Crown Law was anxious to make sure that the Agency was seeing settlement offers. I think I've already spoken about that, about making -

Q. You have, yes.

A. That was another, sort of I'm- trying to answer your question by addressing the points at which we have engagement with the Agency because implicit in your question is, I felt, is there some sort of under-hand leverage being applied and I don't think there was. The Agency is an independent functionary and should be making independent decisions and was, to my knowledge and understanding.

It was made to seem as if the Crown had its hands on everything to its advantage and I don't think that's right.

Q. Certainly, there was a need for great care, wasn't there, given the opportunity for perception of influence?

A. Yes.

Q. However, technically separate, the Ministry of Justice and the Legal Aid function sitting within the Ministry, there is that inherent closeness between those arms of the Crown.

One point that Mr Opie drew out in evidence last week with the Legal Services Agency, was an apparent asymmetry in two instances where it seems that information about the plaintiffs' strategy was provided through to Crown Law, but Crown Law had the opportunity to object to material from its files being provided to the claimants. I don't know whether you saw that evidence?

A. No. Was it no, I -didn't.

Q. It was when Mr Howden was being questioned and there was an email, I think we might come back to this because I'm not confident that it's in the bundle you've got, but it was part of the evidence the Commissioners heard and if you didn't see that evidence we may need to come back to it.

But the broad question is whether you are confident dealing with hindsight there are not any improper interactions between Crown Law and the Legal Services agencies, from your perspective?

A. From my perspective, at the time I didn't think they were improper. With the benefit of hindsight, it's hard for me to have a different view but perhaps I more strongly am of the view today that appearance and reality need to be the same. So, the reality of the independent decision-maker is critical and it has to be perceived that's the same and it is independent. And it might be that the perception was rightly or wrongly that we were too close and that is a problem for legitimacy and for transparency. For all sorts of reasons that is a problem.

Q. Again, Commissioners, I am not sure if you have other questions at this stage, but we may come back to that point.

CHAIR: I think we need to give the solicitor an opportunity to comment on Mr Howden's evidence and if

you need time to do that, come back to it. I don't think we should just leave it floating.

MR MOUNT: Certainly.

A. Thank you.

Q. Let's move to the broader policy issues now. Your statement at paragraph 2.18 makes the point that successive governments took policy decisions not to respond to the historic abuse cases as a group but rather, to build the alternative pathway of the informal processes.

And I think three topics arise which we'll work our way through. The first is whether the reference to successive government policy decisions rather downplays Crown Law's role in providing advice to the government about how it might approach this and whether policy questions are, in fact, often quite directly informed by Crown Law advice.

The second is whether the framing is right, a group approach or informal pathways.

Then thirdly the merits of particular policy questions. We will just work our way through those.

First, in terms of Crown Law's role in policy choices, if we could have document CRL8336. This is a memorandum from you to others in June 2004 after it appears the Attorney-General- at that stage, Ms Wilson, had indicated an interest in receiving advice about this topic, if you recall that document.

And if we look at the bottom half of the page, you have identified a number of questions that the Attorney-General might want answers to, including whether this is an appropriate matter for an Inquiry; whether the defences available to the Crown were appropriate; whether they're technical or not; whether floodgates was- a real issue. And across the page at 3.6, whether there were other ways in which the claims might be responded to, for example, amending legislation to allow the Health and Disability Commissioner to investigate.

Is this a good example perhaps of the way in which the Crown Law Office can be involved in briefing Ministers, particularly the Attorney-General, about the big picture and broad ways in which a topic like historic abuse could be addressed?

A. Is your question, is it a good example of that?

Q. Of how that can happen.

A. Yes.

Q. And there is no doubt that it is part of the role of Crown Law to give that type of broader policy advice; is that fair?

A. Well, I would call it legal advice, to manufacture policy decisions but I am not trying to get away from your proposition that Crown Law is and should be an influential part of government understanding its policy choices where they have legal implications.

Q. I think the Commissioners will be interested in your view about how broadly you would see the role of the Crown Law Office in these bigger picture questions. To put some focus on it, is the role of the Crown Law Office limited to reasonably narrow technical legal questions, what is liability, what is not liability, where might it be found, where might it not be found, what is the meaning of this piece of work or not? Or is it the role of Crown Law to give broader advice to the government about how it might respond to a social problem, how it might respond to a group of claims, looking broadly at the topic, rather than merely at legal analysis?

A. I've often talked on this topic, so I'm just wondering -

CHAIR: Which part of the speech?

A. Where to come in at the issue. So, government of Courts has all sorts of advisers depending on what it's doing and it has legal advisers right throughout the system, including in departments and then Crown Law.

I think there is no point having a whole lot of lawyers employed in government if you ask them what does this law mean or when something goes wrong you say can you help because the whole point of having lawyers for government, for institutions, should be about helping them see their risks and opportunities, along with other advice, I am not pretending we are the only advisor, but helping them see the limits of their obligations, the potential for opportunity, where their risks might lie, so that they can deliver what they promised to their electorate. And so, Crown Law's role isn't limited to what does section X mean or please help me, something has gone wrong. But it should be, and it is, being an influential part of the advice that governments get on issues.

MR MOUNT:

Q. Certainly, the government, this seems so obvious, but in the position to change the law as well as merely instruct you to apply existing law? For example, in your 2004 note, there's consideration to expanding the Health and Disability Commissioner in her jurisdiction. And we saw after the S case, that the government did change the law in response to that particular case. It's really just to make the obvious point that it is a very privileged position to be able to advise those who have the ultimate law-making power in New Zealand and the ability to take a very broad view of a particular topic?

A. I agree, it's a very privileged position.

Q. With historic abuse cases, I think I'm right that we see from the documents that there were various inter-Agency- groups, working groups and so on, within government, which is a normal response when topics arise, cutting across different agencies. And certainly, Crown Law was very closely involved in those? I think they may have chaired at least some of those groups, you might need to help me with which ones they were?

A. I might need help too.
Q. It's too lost in the midst of time, that's okay.
A. It might be there was a group, I think it was in 2009 perhaps, that Justice and Crown Law were together looking at a review of the Litigation Strategy. We might have yeah-, over time we have certainly been involved with other agencies, in order that, you know, we know some things about litigation and the law, agencies know other things that are relevant, and they need to come together before Ministers can make sense of them and understand what the policy choices, what are the resource implications of those choices and how do they pick them are.
Q. Again, this might seem self--evident, but the policy choices made by Ministers are often only as good as the advice they get, and obviously Crown Law has always had a very close involvement in the advice on historic abuse cases; if that's fair?
A. Yes, although in my experience Ministers aren't shy to say that's not good enough, go away and do it again, or you haven't addressed X or Y. They are not passive receivers of advice by any stretch.
Q. If we move to the second question, which is whether there was the right framing of the topic as this evolved. And, of course, we've seen that the issue did evolve?
A. Mm.
Q. We started with Lake Alice, there were psychiatric claims, they were broadened and so on. So, this is a longitudinal process. But if we can go back to CRL25899, we are back to the point we were at half an hour or so ago, with that discussion between Crown Law and MSD about the right thing to do in terms of settlement with the Whites after the Court of Appeal.

And so, we're looking here at correspondence between Mr Shanks from MSD and yourself, copying in the Deputy Solicitor-General. If we can zoom in on the top half of the

email, "I found our discussion really valuable". Four lines down, the way Mr Shanks expressed it, and these are his words, he said, "For Crown Law, the over-arching objective is proper management of legal risk to the Crown. For the Ministry, it is adhering to a principle-based approach."

Was Mr Shanks right that, in Crown Law's eyes, this really was a question about legal risk to the Crown?

A. He's right that that is one element of it, yes.

Q. Was that too narrow a lens?

A. I wouldn't have thought so. I mean, as long as that's not the only stream of advice that Ministers are receiving in order to set their policy choices, it's not too narrow. They do need to know what their legal risk profile is, and I'm speaking generally, and legal risk might also include failure to achieve other - you know, opportunities lost or opportunities to do something else. I mean, that whole document, it's just an email but that whole email expands on that point, I think, to say that that's why the Ministry has established the claims, I can't remember what CRRT stands for, Claims Resolution something.

Q. Response team.

A. You can see there, he's saying we see this as a way of taking it out of a legal frame and into a different frame, and perhaps in 2010 it's the early days of really shifting that. So, I don't think it is too narrow to say Crown Law thinks about legal risk.

Q. Forgive me for putting this perhaps a little bluntly, but there may be a perception by some that instead of the problem being perceived as a large number of people abused as children mostly, and seeking regress perhaps with human rights implications to that, but at the very least a large number of people with factually and perhaps morally legitimate grievances seeking resolution, instead of that being seen as the problem, instead what was seen as the

problem was risk to the Crown, financial exposure, civil liability; your comment on that perception?

A. Well, I think it's being too compartmentalised to say that was the reality. I mean, I have heard it, of course, that the criticism is children, people who were abused as children are being held out from getting justice by Crown Law. I'll put it bluntly back to you, that is how I hear the narrative. I think that misses a lot of the middle bit of that narrative, which is that the government/governments have attempted to deal with the absolute clash between those claimants wanting to use the civil litigation system for what they say they need to get justice and the fact that the civil litigation system doesn't offer it.

The reason I say it's too compartmentalised, is that it doesn't take account of the fact of a wider set of principles and ideas that have been through the years attempted, attached, put into the mix, whatever is the right word to make the compartment bigger, the Listening Assistance Service, there was a formal one called something slightly similar for former psychiatric patients, claims resolution something team, they are all about trying to provide something else. And so, it's too compartmentalised to just say Crown Law got in our way because the direction was when you head down that path if there are matters to be brought up in defence, bring them up and defend them.

Q. A very different issue but perhaps with some parallels and very well understood by many lawyers in our country might be the early response to Treaty of Waitangi grievances where many Māori said to the government vocally, "We have injustice, we have not been treated well or correctly and we ask for some legal recompense". And the early response from the Court, as we all know, is to say the law provides no remedy for you. And it took our country quite some time to frame the question more broadly. Is there any form of a

parallel, in terms of these historic abuse cases, do you think?

A. Yes, I think there's great parallels there where the law didn't deliver the answer, didn't or wouldn't deliver the answer. Thinking about the establishment of a specialist permanent Court of Inquiry in the Waitangi Tribunal which, as we have seen over the years, has made plenty of progress in historic or yes-, Historic Claims, I'll use that phrase, and is now looking at contemporary issues with that same model.

The decision to setup such an alternative has led to a very different approach and response and has enabled this country and society to move through a very hard part of our lives. The lack of parallel is obviously that we don't -there is nothing, there is no alternative. As I said on Monday, I think governments haven't established -they've established this Inquiry clearly, but nothing like the Waitangi Tribunal, nothing like other forms of dispute resolution that we can see in our system.

Q. We may come back to this but while we mention the Waitangi Tribunal, arguably one critical feature of its success lies in its independence; would you agree with that?

A. Sorry, I'm only pausing, not just to think about yes-, one of its features is its independence, yes, because I was thinking about other features that make it successful, a different mode of operating, much more inclined towards restoration of mana. I mean, a whole lot of different things that go into the mix of the Tribunal's successes but, I agree, independence being one.

Q. As well as Crown legal risk as a lens to see these cases as they grew in number, another possible framing, which appears from the documents, is that really the problem of definition here was that the government faced a problem of a flood of unmeritorious claims brought by lawyers who might even have, in some cases, a financial incentive to bring more and more

of the claims. For example, I don't think we need to put the documents up, but there was reference in a 2001 Cabinet Paper to the amount of money that went to the law firm representing the Lake Alice group claimants, it was quite a large sum of money and I think in that case was said to be on a contingency basis.

A. Mm.

Q. And we then see from further documents that the amount of Legal Aid paid to Cooper Legal was not infrequently mentioned. And you may have seen the handwritten note from the Private Secretary to one of the Ministers in the evidence where the Attorney-General was said to have an interest in the Limitation Act reform because of the amount of Legal Aid paid to Cooper Legal. I don't know if you saw that -document?

A. I recall that there was a handwritten note in the material. I might need to go to it, but I do - I have seen it. Here it comes.

Q. It's hard to read, I'll read it for the record, "The Attorney-General has indicated that he wishes to discuss this matter with you in the context of a discussion on limitation law. Ms Cooper apparently received over $2.8 million from Legal Aid in 18 months to the end of 2007 and over $1 million last year. Limitation reform could prevent this sort of cost to the Crown".

So, I think that appears to be an exchange recorded by a Private Secretary between the Attorney-General and Minister of Justice in or around 2009.

So, it does rather seem from the documents that there was very much a focus on how much money the lawyers are getting out of this. Do you think that the framing of the problem was distracted by a focus on the lawyers, to the extent that government's eye was taken off the ball of the claimants, many of them legitimate, who actually were bringing claims?

A. I've forgotten the beginning of your question, I'm sorry, but I think I'll answer it anyway, to say that that certainly was an aspect of the analysis. Government was concerned that it, in a global sense, was spending money on matters which, on its legal assessment, were not going to achieve what was wanted. So, the Court, the aid, the defences, all of those things, that was of concern. And that note, I don't know who wrote that note, but clearly the Attorney-General was also seized of that concern. Governments do want to make sure they spend their money where they get the best result for the policy choices they want to make.

Q. In hindsight, did that focus on how much money the lawyers are getting, did that distract from the underlying social problem in the way that perhaps inhibited the focus on broader reform options?

A. It's too big a question for me to answer actually because what you're getting at is a sort of whole reform with a different lens of social good and welfare and restoration of mana, all these concepts which is a too big a question for me to answer to miss that. But it puts me in mind of a slightly different but related point, which is the first example you gave me of the Lake Alice and the lawyers' fees there, as I recall it, that was a concern that the people themselves were not getting what it was that government said that they should get in settlement of their claims. So, that was an anxiety, sort of in the reverse way, that the contingency fee meant that the harm to the individual, the survivor, didn't get the bargain that- I don't mean it, that's the wrong word -didn't get the arrangement -

Q. The outcome?

A. - that they came to. As I recall in the Lake Alice settlements, there was a second, anyway we don't need to go into that, there was a complication in the second roundabout how to make sure that the person got the money in the hand

that they were offered. And so too, we've seen it in Historic Claims more lately and it comes back to the legal aid question, how can we make sure the individual gets what is being offered without losing some of that in the aid debt?

So, I don't want to say the focus on money has been wrong. In fact, often it was a focus to survivors, to the intended benefit of the survivor. But, as I say, your ultimate question is, did we look at the wrong thing and not see big social changes that could be made, is really a question I'm afraid for the Inquiry. It's too big for me to see from my position.

CHAIR: If I could just test you a little on that because that note, which we no longer have, did make it more concrete, in that it was related to how we could reform the Limitation Act to avoid the costs. So, this wasn't a general big question, this was looking at not how could we save money for the survivors, but how can we reform the Limitation Act to avoid the costs that were inherent? Do you want to comment on that?

A. Well, I can't, except to say that is what the note says, and I don't know whether that was a thinking about how do we harden the orders, how do we soften the orders? I really can't tell from that note what was intended or whether that went anywhere actually.

CHAIR: No, we don't know that.

A. I mean, the Limitation Act did change. In a way that's, to use my own slightly rough example, softened the barriers. Is that where that took us? The note is too out of its context.

CHAIR: Yes, and too speculative, but I was bound to point that out, that in this case it was not a note about Legal Aid depriving survivors, it was about

Legal Aid and its relationship to the Limitation Act. So, I just wanted to -

A. But it could have still gone, we can't say either way.

CHAIR: We can't say, no.

COMMISSIONER ALOFIVAE: Mr Mount, if I may. Ms Jagose, if I could take you back for a point of clarification around the policy and the law and the mana of the Solicitor-General's office and the role or perhaps the evolving role that you see your office playing in policy development.

So, it's very well for us to keep the law in its box and all lawyers irrespective of office, will endeavour to give the best advice. But around the weightier issues of truth, justice and mercy, in light of the historical claims, in light of the way matters were evolving over time, does your office take the view that you have the privilege of seeing so much that others don't get to see? You have the privilege of being able to speak to your colleagues, all at very senior levels, to actually be able to influence landscape change, transformative change, in this particular space? Do you see it as a role of your office or perhaps yourself as Madam Solicitor, to always be on the parapet looking down? Being able to be that trusted advisor, I suppose is what I'm looking for, to the Attorney-General about what is it that we're really -this is the reality for the people, this is the reality for a particular population that we're seeing that needs to be addressed. So, what is right over the legalities actually being the leading driver?

A. Well, you're describing what I would say is a great aspiration of mine and of our office to be that trusted advisor. To not just be, oh yeah, the law says X, but to be helping understand, in any context but let's just use this one that we're in, helping understand what options might be available. And that is an evolving role for the Office because the office has and can be relegated to the back room

of lawyers of old and my ambition is not for that to be the case. So, recognising absolutely an enormously privileged position to be able to influence how people are thinking or what they're even thinking about. So, I have to agree with you and I said at the beginning of my kōrero on Monday, I think it was, that I recognised the great privilege and the great burden of the office on me, but also in the office of the Crown Law Office that we have.

COMMISSIONER ALOFIVAE: So that, your office is not seen in the context of a David and Goliath situation where the survivor and the claimant, and we've seen this unfold in the examples being used throughout the hearings of different cases?

A. Mm.

COMMISSIONER ALOFIVAE: I guess what I'm really wanting to ask, the public, at what point can the public continue to feel the confidence that the highest office of the land understands the issues that are being shooted from ground up?

A. Well, I see that organs of the State will always seem like a Goliath compared to the individual, so again part of the privilege. Also, in this context I recognise, and I've heard it, that so many survivors have lost faith in parts of the State, like the Police, like the Courts, like public servants, and so I hope it is clear that my being here is part of setting that record straighter or perhaps starting a new phase where people can see there is an office older and there are people that work for government who understand and have been listening and now understand better what might be possible because we do hold that role.

COMMISSIONER ALOFIVAE: Thank you, Ms Jagose.

MR MOUNT:

Q. Continuing with the idea that perhaps the focus on the lawyers obscured the spectre of the underlying problem, there is no doubt from the papers that some very unfortunate

views developed about what Cooper Legal was doing. And I say that particularly because Mr MacPherson from MSD, when he gave evidence here on the 19th of October saw a memorandum within MSD, drafted by at the time the Deputy Chief Executive to the Leadership Team, which made a number of what he described as inappropriate and regrettable statements about Cooper Legal. I don't know if you saw that or remember that?

A. I did, both, yes.

Q. And we won't go through all of the statements but there are a number of statements in the files which bare out a terribly acrimonious relationship at times between Cooper Legal and the Crown; is that fair to say?

A. I am not sure I would be prepared to describe it as terribly acrimonious, although to be fair you did say at times. There were times of huge frustration, yes, on both sides, I'll warrant, about things that we thought the other one was doing that was either unfair or wrong or tricky.

Q. Did you have a chance to see that memorandum that Mr MacPherson described as inappropriate and regrettable?

A. I thought he described it just- a particular part of that memorandum in that way. I have seen that.

Q. Yes, that's true. Would you agree with him that those aspects, which were essentially quite serious allegations against Cooper Legal of improper conduct, would you agree with his characterisation?

A. Unethical conduct, I think was the particularly egregious phrase.

Q. That's right.

A. Yes, I agree that in a context where senior officials in a department are being told something, quite a significant allegation, without any ability for that person to even know that was being said, I can see why he apologised for that.

Q. Because, again, the policy concern is that senior officials, this was 2007, are thinking about these claims coming in.

At least one thread of that seems to be a concern that, well, lawyers are working out these claims. And so, really, our problem as the lawyers, we need to find a way to manage that, rather than a focus on the people involved. I think you've probably already answered the question, but that document was a very clear example of the danger of that distraction, if you would agree with that?

A. I think there is a danger of being distracted. For my own, can I respond for my own part, and I've worked with Cooper Legal and in particular Ms Cooper for many years, with her on the same matters, and we've always enjoyed a relationship that despite the frustrations we get to come back together to talk to each other about things, and together we did things like negotiated the first stop the clock agreement. That was not straightforward and there is material on the file that indicates that I was frustrated about that, but I continued to work with her in a way that in no small part has got us to where we are, not all on my own and lots of other people have worked this way. But, yes, you will see the frustration but also, I encourage a view to see actually over nearly two decades we have actually together been able to move a behemoth system to one that is more survivor focused. Indeed, I don't know whether Ms Cooper said this, it doesn't matter if she did, on the day the last government announced it would establish an Inquiry, I contacted Cooper Legal around spoke to Sonja to say "Good for you, the thing that you have said all along is happening". That was the nature of our relationship which is why I don't want to agree that it was however you described it earlier.

Q. Because we are in a public forum and these things have been traversed publicly, this may be an opportunity to square away any suggestion that there was unethical conduct or anything of that sort. I will just give you that opportunity.

A. By Crown Law?

Q. By Cooper Legal.
A. Well, I think that is an inappropriate comment to have made about Cooper Legal in a record through MSD. If it is thought that there is unethical conduct, whether it's Crown lawyers or others, there is a route for that process. And if that's what we think, that's what we should do. So, I'm not saying that there is unethical conduct going on, if that's what you're asking.
Q. Yes, I just wanted to give you that opportunity. In 2011, there was an exchange of correspondence between the then Chief Human Rights Commissioner and the Attorney-General about these cases. We will put up in just a moment MSC1091, page 915 of your bundle. The question I want to ask is a fairly simple one, at that stage, let me turn over to 516, just after the numbed paragraph 4, the paragraph beginning, "The need for". The view is expressed by the Attorney-General at that stage, in July 2011, that MSD was aimed at resolving all of the claims against it within a -3-5 year timeframe. The question is really, did the Crown underestimate during this period, nearly a decade ago, just how big a problem it was dealing with?
A. I think that letter underestimates it. I mean, the Attorney won't have made that up, that advice. I mean, that would have been advice that that was the timeframe that was thought to be realistic by the agencies. In fact, even the Crown health funding Agency's proposal to settle all of its claims against it, that did occur, but it didn't stop new ones coming. So, this letter underestimates what was going to be happening in the next few years, Mm.
Q. The exchange of correspondence was, of course, over a draft report by the Human Rights Commission at that time. We will come back to that when we talk about the topic of human rights a little later in the day.

CHAIR: May I ask, do you know from whom that advice came for this letter about the estimate of timeframes? Was that Crown Law or the Department?

A. I presume it would have been the Department. It might have come from Crown Law, but it would have been an assessment from the Department.

CHAIR: Thank you.

MR MOUNT:

Q. Through the paperwork, we can see that over nearly two decades now at various times there have been other models of settlement that have been mentioned and perhaps considered with different degrees of thoroughness. And some we've seen in the paperwork include the Gisborne cervical screening cases, Cave Creek, some Greenlane heart, I think it was the Greenlane Heart Library which generates some complaints, problems with asbestos in Crown properties, infected blood, Lake Alice, various different models, and of course an Inquiry. How seriously did the Crown grapple with the question of what form of non-Court model would be the right form? And I know this is another big question and it's 4 minutes until the lunch break, so we may not be able to deal with it today but focusing on either Court or non-Court is one framing but the deep thinking about what type of a non--Court option would be the right one; was that sufficiently grappled with, particularly with Crown Law's help, do you think?

A. No, I don't think it was sufficiently grappled with. That was a huge policy question. It was at one stage intended and sent off to the Law Commission which would have been a good place for that deep thinking to be done, away from the work being done, and that was withdrawn.

Q. Do you know why?

A. I don't remember why. I mean, I was present in the office at the time, but I don't remember why that was withdrawn.

Was it a change of government? Possibly, but I don't actually know.

Q. I don't think so.

COMMISSIONER ERUETI: Can I ask you about the Terms of Reference that went to the Law Commission?

A. Yes.

COMMISSIONER ERUETI: Do you recall the Terms of Reference and how ambitious they were or specific they were?

A. I don't remember, no. Do we have them?

MR MOUNT:

Q. We do have them, I will be able to pull them up in a moment, I think.

A. I don't remember. It probably would have been work done by the Ministry of Justice establishing those terms.

Q. That might be something to do at 2.15, after we come back from lunch, or perhaps even 2.00. We will come to that in a moment.

I just want to put up another comparator, just as another example for you. This is MSC1085, page 627 of your bundle. Again, this is from a very different context, this is thinking about the country's response after a natural disaster. An MB report from 2018, if we go across to page 33 of the pdf. In your bundle it's 659. It is an example of the type of policy thinking that could be done?

A. Yes.

Q. And what we see, if we zoom in on the bottom half of the page, is that having an accessible central organisation would be helpful for people in a natural disaster to provide access to information, helping people prepare for a Dispute Resolution Process, three lines down in the main paragraph, "The idea of a one stop shop so that people would have access to expert advice, to avoid frustrations of having to go to multiple agencies."

If we go over to the next page, there's reference to a central organisation providing access to information, to legal advice and to technical advice, and also being an access point for a mediation scheme for Tribunal.

If we go down to the bottom half of that page, it's pointed out there will be a wave of disputes after a natural disaster, but a specialist dispute resolution scheme would help to settle those disputes efficiently, could include advocacy and other support services, including funded legal advice and so on.

And at the bottom of the page, there's a parallel drawn with weathertight homes disputes, disputes of a very high importance, it is said. I just mention that too because I think you've already agreed that perhaps in hindsight we didn't as a country sufficiently grapple with a non-Court alternative but here,- we see the type of thinking that might be useful if we look ahead; would you agree with that?

A. Yes. I mean, that type of thinking shows quite an innovative way of thinking about what otherwise we would consider to be individual householder or insurance policyholder with their insurance company. A traditionally very one-to--one relationship, so innovative thinking which has not been done here. Some thinking has been done, as I've already described, but not the big thinking that might have happened had the Law Commission done its work. Sorry, that's not to criticise the Law -Commission.

Q. I know. Look, a big question before we break for lunch, but why do you think that this type of big thinking didn't happen for historic abuse cases?

A. There will be reasons to do with it not having the priority in government that survivors will say it should have had. Those voices not being heard sufficiently by those who get to make the choice to do something different.

MR MOUNT: That may be a convenient moment.

CHAIR: Did you mention 2.00?

MR MOUNT: I was wondering about 2.00 if it suits the Commissioners.

CHAIR: I know we're conscious of time and the pull on your time. If it suits everybody else, does it suit the stenographer and the signers? We can't do anything without any of those three important people. On that basis, we will start again at 2.00.

Hearing adjourned from 1.00 p.m. until 2.00 p.m.

MR MOUNT:

Q. One point we held over before lunch was the exchange with Legal Aid, you will recall. Just two documents to look at. The first, MoJ240, an email from someone at the Legal Services Agency in February 2005 to Crown Law. Do you recognise the recipients' names? It will come up on the screen in a moment, I believe. If we zoom in on the top half of the page, it appears that information is being provided from Legal Services to Crown Law for the purpose of a briefing to the Minister. And I think the point that was put to Mr Howden was looking at the third star, which is

there on the screen, there was some reference to counsel's original strategy, albeit on the face of it not an earth-shattering revelation about strategy but I think what triggered the line of questioning of Legal Services was the notion that any information about the claimant's strategy would go from Legal Services to Crown Law. That was the first of two documents.

A. Sorry, can I just check, are you sure this is a recipient of Crown Law? Justine is now at the Crown Law Office and has been before, but she was also at the Ministry of Justice.

Q. Right.

A. It is worth checking that.

Q. Thank you for that clarification. Would that change the way we think about it?

A. This note seems to say it's important to keep - I thought I just saw this note saying it's important to keep -this oh, it's at the beginning, you just had it on the screen, "We need to be careful of the confidentiality of the clients-", anyway -

Q. It could well be justice. Our colleagues at the front bench may be able to check in quick time where Ms Falconer was in 2005. In fact, I think it may have been put by Mr Opie on the basis that this was the briefing to Justice, so that may well be the case.

I think the point still holds, even if it's a briefing to Justice, because I think the point was asymmetry, and that is that claimant strategy was communicated outside of the claimant's own lawyers here for a briefing to the Minister, either Minister of Justice or Attorney-General. Whereas, Crown Law had an opportunity to object to information about its strategy being released into the public domain.

A. Mm.

Q. So, the second comparator document was MoJ115, and this is in April 2008. Again, it's just the top half of the

document recording that the Crown Law Office, I take it that would most likely be what CLO means?
A. Yes.
Q. Crown Law Office wanted to have certain information, a particular email, withheld and Crown Law wanted to be consulted on the release of any particular documents. Let's assume for the sake of the question that the first one was claimant strategy being provided through to the Ministry of Justice for a Minister of Justice briefing. The point Mr Opie was I think raising with Legal Aid, was whether there is unfairness in that difference in treatment, if you like? Acknowledging you are not copied on any of these, you are not party to any of this, but I am questioning whether you have any comment on that potential unfairness?
A. I can see the point you're making there, on the one hand the Crown Law Office gets to say we withhold our strategy on a legally privilege basis. It's questionable whether that is being done here, although it says it is common ground that the strategy was this. Why that is common ground and not a matter of privilege, I'm not sure. I accept that it appears that there has been asymmetry about what Ministers knew, as opposed to what plaintiffs and their counsel knew about strategy.
Q. It perhaps goes only so far as to underline the need for extreme care?
A. Mm.
Q. As the email pointed out, where the Crown is the defendant, the potential for perceived unfairness is very strong?
A. Yes, I agree.
Q. The second point that just arose this morning was the Terms of Reference for the Law Commission. We have those at Crown bundle tab 13, which I think is page 137 of your hard copy bundle.

We need to come on in the pdf document to the draft Terms of Reference and just to orient you in time, this is from a

May 2005 document, if that makes sense to you. It may be a little hard to read on the screen. Perhaps if we can zoom in, first on the top half of the page. We can see in the second paragraph under "Purpose", that the government was asking for advice to enable a consistent and principled approach. And then paragraph 4, bottom half of the page, we can see broadly the types of advice that it was thought that the Law Commission could work on.

Perhaps if we go over to the next page and just complete that bullet point list.

I am not sure if you have any comment now that you've seen the draft Terms of Reference for the Law Commission. I think what you said earlier was that it would have been in hindsight helpful for the Law Commission to have been able to proceed with this work. I am assuming that answer won't have changed?

A. Sorry, no, that doesn't change, it would have been helpful for that work to have been done.

Q. It might be unfair to help you, but looking at it now, might in hindsight there be reason to broaden the Law Commission reference in light of what we see here, there are some gaps, I guess?

A. Well, I mean, it's possible to broaden it indefinitely, so yes, it's a hard question to answer it ordinarily but the- next page is interesting, sorry, just to observe, it hasn't been something, this says the paper was consulted at a Ministerial level following direction from Cabinet, so departments weren't consulted. At least I think that might be why I can't remember it but whether that would have made a difference about the breadth of the scope, I don't know. It didn't happen, as it turned out.

Q. For whatever reason in 2005, it doesn't seem, on the face of it, that the Treaty dimension to redress was identified as something the Law Commission should focus on which seems to be an obvious omission?

A. It does, although the Law Commission's own guiding statute requires it to think about matters relating to Te Tiriti as it does its work, in any event. But, yes, I think today it wouldn't be omitted, such a relevant and important part.
Q. It does also seem to have been limited to non-compensatory- redress, perhaps because of the ACC interface, do you think?
A. Perhaps, yes.
Q. I know it's not your document but - -
A. Mm.
Q. We may not need to take this any further, this will probably drop into that category of the policy discussions that we'll have after this, but I did just want to put that document up before you, as promised.

I should just check whether the Commissioners have any other questions about that before we move on from that topic?

COMMISSIONER ERUETI: Not from me. Only it seems the Terms of Reference was contemplating something like the Confidential Forum or CLAS, so no monetary compensation, but looking at alternatives.

MR MOUNT: That seems to be the case.

COMMISSIONER ERUETI: Thank you.

CHAIR: I have no questions on that point, thank you.

MR MOUNT:

Q. All right. We'll move back to the broader policy discussion that we were having.

There is a particular piece of correspondence I want to put up, it's a letter from the Attorney-General to Cooper Legal, 11 March 2009, Crown bundle tab 40, page 442. The particular parts of this I wanted to highlight were, firstly, paragraph 3. Obviously, this is correspondence from the Attorney-General to Ms Cooper. In paragraph 3, the message to Cooper Legal was that there was no strong case for a global out of Court settlement process, given that the

bulk of claims are very old, allegations contested, the Court is the best forum to conduct that inquiry and make any damages awards.

And a similar message on the next page, paragraph 14, a message that the Court process is the appropriate forum for considering and determining Crown liability.

And, again, same page, paragraph 20, sorry next page, "If, however, participants wish to continue to seek damages, the Court process remains the most appropriate forum for such claims".

I am just interested to ask you your view about this. Locating ourselves in March 2009, so it's after the White case in the High Court. Such a strong message from the Attorney-General that the Court is the appropriate place for claims to be doesn't sit comfortably with the views that have been repeatedly expressed in this Royal Commission about the deficiencies in the Court process for this type of claim. I am wondering if you have any insight into the messaging in this -letter?

A. I think the messaging is consistent with what this Inquiry has been hearing, that there were alternatives being established but where people chose to continue or start a process of seeking compensatory damages, then the Court was the place for that because that was the forum to consider it. So, I don't think it's inconsistent with that approach because the Attorney's note sets out a couple of places, sorry a couple of alternatives that have been described or discussed, Confidential Forum and the Listening and Assistance Service as alternatives but, he says, if you want to seek compensatory damages, he doesn't say all those words but he says to seek damages, then the forum does seem to be the forum for that. That seems to me to be consistent with many years of informal alternative but if you want to, that is the forum that you test contested matters and seek damages.

Q. We don't have the other letters and I don't think we need to go through the whole sequence but from this letter, it does seem that Cooper Legal was proposing or asking the government and Attorney-General to consider some form of out of Court process and here the Attorney-General was saying, no, there's no basis to do that.

If we go back to paragraph 2 on the first page, "The Crown will not establish a Lake Alice style settlement process".

The dynamic there on one interpretation seems to be the lawyer for the claimants wanting to embrace the idea the Court is not the place for these and wanting to say, rather than going to Court, please could a global settlement scheme be setup; does that accord with your recollection of the issue that was being dealt with in this letter?

A. Yes. Ms Cooper has for a long time been encouraging governments to think of something else to put in place.

Q. Does that leave us in a slightly difficult position from the claimant's perspective, where their lawyer is saying we don't think these claims should be in Court, we've heard repeatedly in the Royal Commission the deficiencies of the Court process for these claims, but essentially the response from the government, at least in 2009, is, well, where there are contested facts, Court is your option. So, really, claimants were being directed back to the Court still in 2009?

A. Well, it does say at paragraph 2, "That position does not rule out individual settlements (or even settlements with groups of plaintiffs)", so it is still acknowledging the off ramp.

Q. Because the difficulty, as I think it has been expressed to us, is that for claimants who made allegations and who didn't, for whatever reason, get treated by the Crown has meritorious claims that could be settled, effectively they were being channelled towards Court as their only option, as

we see here. And whilst on one interpretation that's perfectly reasonable, if the Ministries and the Crown take too narrow a view of meritorious claims, don't fully investigate, don't recognise where there is a genuine claim, too many people are being funnelled towards Court in a way which ultimately is bad for them, bad for the Crown, bad for everybody?

A. I would say the government was not funnelling people towards Court. I don't know the extent to which this Inquiry will hear from representatives of the hundreds and hundreds of people who didn't ever file in Court and who have settled. That's not the right word then but who have reached a resolution and an ex-gratia payment and other forms of resolution directly with the Ministry, both represented and unrepresented people who haven't commenced in the Court process. And, with the benefit of reflection over decades, that original choice of forum and the approach of many hundreds of claims being filed that way, to force the government to look at an alternative or to encourage the government to look at an alternative, has left a whole tranche of survivors as plaintiffs with Court cases that became intractable. So, I disagree that the government funnelled them to Court.

Q. The position that's been reported to us from many claimants, at least as they perceived it, was that on the one hand the type of approach we saw in the White case from the Crown ensured that any claims going through the Court would be strongly defended and that claimants' experience of the Court process would, if you like, maximise the disadvantages of litigation, and I think we've seen that in the evidence over the last couple of days?

A. Yes, although again I'm bound to say that we haven't had a Court case in the last 12 years. I am not saying it was a good thing, but we keep returning to one case that was run,

as you say, firmly defending. We haven't seen what happens next because there hasn't been a next.
Q. Yes.
A. Actually because of the commitment to not litigate these claims if we can.
Q. I think what would be said is the ripple effects of the White case, the effects of the way that case was conducted did affect other survivors, we saw Mr Wiffin's response earlier.
A. Mm.
Q. And he would just be one example. But the reality seems to be for claimants that we haven't had a case since 2007, as you say, in part because of White and how that resulted from the claimant perspective?
A. And in part because the Ministries have been working very hard and pouring considerable resource into an alternative. I accept your position, but it has to be seen in the context of what else has happened in that period.
Q. From the claimant perspective, in many ways is it fair to say that the big question is what type of alternative to Court should there be?
A. Well, that is a question, yes. I mean, I don't know, you yourself said claimants are a diverse group and a perspective will be what alternatives should there be?
Q. I think, and I just need to put this squarely so that you can respond, I think the suggestion would be that because of hard, aggressive tactics by the Crown in the Court zone, any ability by claimants to negotiate or have some power in a bargaining situation with the Crown is taken away. So, in the non-Court- zone, that leaves them with take or leave it type outcomes?
A. Well, I have to accept that, if you put it that is the perspective, then I have nothing to say against that and I have to accept that perspective. But I would hope that the processes that are building and are maturing, I mean they're

better than they were, they can be better still, don't engage on that. There's no point in having an alternative that still scraps around the legal questions. The alternative has to actually engage differently and, as I understand it, the agencies are engaging quite differently and are not putting up questions of legal defence and/or hurdles and thresholds, so they are aiming to engage in a way that does a different job. You can't just put litigation in a different hat and pretends it's an alternative, and I understand we are not.

Q. In this letter, 2009, there were two reasons given for why a Lake Alice style settlement would not be appropriate. Paragraph 13, split between the bottom of page 2 and the top of page 3. If you go to paragraph 13, the first was that the Lake Alice claims could be verified from the files, which is the point I think you made yesterday or the day before or both?

A. Yes.

Q. I just want to test whether that really was a difference that should have mattered because what we seem to have seen with a lot of these historic abuse cases is that they can - sorry, an assessment can be made of their merits, even without contemporaneous documents. It is possible for the Crown, through the Ministry or through whoever, to make a judgement whether a claim is factually meritorious?

A. Yes.

Q. The second reason given in the letter across the page, 13.2, was that all of the Lake Alice claims essentially related to treatment by the same doctor. Whereas, the wave of claims coming through, certainly by 2009, had a much broader range of settings and perpetrators and so on. And certainly, it's easy to understand that from the Crown perspective but from a claimant perspective, is that a good reason not to setup a broad and independent settlement regime on a Lake Alice model or something similar to that?

A. I can't answer that question. I mean, I can accept that is a claimant perspective.
Q. The other repeated justification that we see through the Cabinet Papers was something you touched on, on Monday, and that is that a Lake Alice style response was not justified for these later claims because there was no evidence of systemic or endemic abuse?
A. Mm.
Q. And I think you said on Monday words to the effect that in hindsight, perhaps officials had not sufficiently grappled with what they meant by that; is that right?
A. Yes, and what I was saying on Monday, perhaps not as eloquent, well I hope I say it more eloquently now, is that with the benefit of hindsight there was no way anybody was going to see a systemic problem if what we looked at was the production of Statements of Claim and/or even following those through into institutions. It wasn't going to tell us what about the system is wrong here. If we fix that part of the system, we will stop these claims or stop the damage, we will stop the conduct being complained of from happening.

And so, perhaps it was a confusion between the systemic and widespread.

Q. Yes.
A. But I don't think that that work has been done. What do we fix in the system? I could be wrong, it could have been done. I am not aware of it, certainly not in those days when we were talking like that in that letter you referred me to and other places in Cabinet materials that we looked at. That assertion about systemic, good question whether it was looking at the right end of the system, to answer that question in that way.

CHAIR: You did mention earlier, you referred to, I can't remember the document, with the reference to the – was it investigation or review of Kohitere?

A. Yes, there was, I don't know what happened to the end of that but I know there was a process that went on for some time.

CHAIR: Do you know why it was initiated? Do you have any insight into that?

A. I think on account of the claims.

CHAIR: Because there were a large number of claims coming in?

A. And, as I recall, that Kohitere work helped the settlement of a number, I don't know how many, not a huge number as I recall but sort of the sequential settlement of cases from that piece of work.

COMMISSIONER ERUETI: I think there was a report by understanding Kohitere and then there was a broader piece of work which looked at the residential institutions by Wendy Parker in 2005-2006, it may have been, those two pieces of work, established for that reason.

COMMISSIONER ALOFIVAE: The emerging patterns that were coming through and referred earlier on in your evidence also to cookie cutter type pleadings, that wasn't raising red flags around systemic issues? Even though there was a range of different claimants, but they were all aimed at different institutions and the evidence I think of Mr Garth was there were three institutions that were just rising to the top constantly, Kohitere, Epuni a- nd Hokio.

COMMISSIONER ALOFIVAE: And Hokio.

A. I think there was that realisation, and I couldn't now say when, that there was some intuitions that there was something to be looked at. And I understand that that was then, they were looked into, I'm afraid I don't know enough about what that result, what that process was that resulted from those concerns.

COMMISSIONER ALOFIVAE: Was there a statistical point that perhaps the agencies were wanting to get to, to sort of say once you get to this point there really is an issue with the system?

A. I'm afraid I don't know.

COMMISSIONER ALOFIVAE: Thank you.

MR MOUNT:

Q. Just to stay with this topic a little longer, I think you said on Monday that there was perhaps some confusion about what we meant by systemic or what was meant by systemic. Would one working definition be that a problem is systemic when there is something about the system at fault, as opposed to merely an individual misbehaving?

A. Yes, I think that could be a broad definition of systemic.

Q. Some of the things, for example, that we saw in the email earlier today, training, supervision, Head Office monitoring, those are all systemic factors?

A. Yes.

Q. Two real questions about the topic here. One, whether, from a claimant perspective it was a red herring even to say we won't do a broad settlement process unless we find systemic abuse. And then secondly, in any event, whether that was right, that there was no evidence of systemic abuse.

On the first question, why would it be the case that you only need to do a broad settlement process if you find systemic abuse? That doesn't make sense from a claimant perspective, does it?

A. Well, I find it hard to give a claimant perspective because I don't have that perspective. But are you saying, I mean - sorry, I'm not the right person to be answering that question but if you say that is the claimant perspective, I can understand that it would be because individual's life is the point to the individual.

Q. Yes, and that is the point, I think, that from the claimant's perspective, if you have been sexually abused,

for example, your claim against the Crown doesn't change whether the ultimate failure was one of an individual simply acting in a criminal way or a systemic failure. From the claimant perspective, it is the same injury essentially?

A. Of course, I accept that, and that claimant also has a no-fault compensation scheme that it could go that- they could go to and/or a Police process of criminal investigation and possible decision point. So, again, I want to put that into a wider framing about why government is looking for something more to do something different, given there are several streams of possible approach.

Q. I don't think we need to go back to the document but when in 2000 Cabinet decided to setup the broad Lake Alice scheme, I don't think in the Cabinet Paper the justification given was we should do this because there is a systemic problem. Do you remember we went through this yesterday? The reasons given to Cabinet were more there was assessed to be legal risk from a Crown Law perspective, plus the sense that it was morally the right thing to do. But I don't think we saw in that Cabinet Paper any reasoning that said the trigger for a broad approach is when you find systemic abuse; if that seems right to you?

A. I have to take it from you that the paper didn't say that, it probably didn't, I don't recall it saying that.

Q. So, the idea that you need to find systemic abuse before you take this broader approach, seemed to be a later idea that came along?

A. That may be so or maybe it's just an interpretation of why the Lake Alice process was run the way it was.

Q. Yes.

A. Because the way the system worked was the one that the government then decided let's not put people to proof on that, we can see for ourselves that the system was flawed. Flawed is an understatement.

Q. So, the second part to the topic is whether actually, properly analysed, there was evidence of systemic failure from quite an early stage. Certainly by 2010, we can see reference in a Strategy Group minute to the conclusion from Judge Henwood and the CLAS programme, that's MSD ending in 1993. It's page 3 of this pdf, if I was on the first page, it is a Claim Strategy Group set of minutes from January 2010. I see you were there that day?
A. Yes.
Q. If we go to page 3, at the bottom there's clearly been some discussion of the CLAS report and it's noted in the second bullet point that there was some discussion of systemic abuse and an idea for a separate mediation process.

So, this is I think January 2010. There clearly were some signs that were there to be seen that there may well be a systemic problem to be dealt with; is that fair?
A. Yes, that is what, that I mean, that is definitely making- that point.
Q. And Judge Henwood when she gave evidence to the Inquiry last year mentioned, albeit in passing, her conclusion about systemic failure. This is I think clip 7 if Madam Registrar could help us with a short excerpt. (Video played).

So, it certainly seems that, through CLAS and the hundreds of people who were seen, what was recorded in those January 2010 minutes was a theme that Judge Henwood was trying to draw attention to. I know we always come along with hindsight and you may have already answered this but was that idea grappled with sufficiently by officials in that period, 2010 and afterwards, the idea that there may well be systemic failure?
A. It doesn't seem so from this point, does it? Although one point that Judge Henwood just said then that reminds me that one of the things that would be done on files, again perhaps missing the mark that we can now see about how you understand what it was about the system that let these

events occur, that MSD would spend a lot of time in social work practice reviews. And I hadn't heard Judge Henwood say that before, that there was a lot of good social work being done, social work practice being done, and that was often a result of these social work practice reviews too, but they weren't uncovering the right, they weren't picking up the right stones perhaps in doing that work. From this, you know, 2020, both the year and with the vision that gives us looking back, it does look like that point has not been grappled with. I don't know about now, I must say, but certainly at this point.

Q. We may not need to take this point too much further, I think. I think the Commissioners have heard the point and it will of course be one of the functions of this Inquiry to look harder at that question.

COMMISSIONER ERUETI: Are you going to move from the systemic -

MR MOUNT: Yes, please go ahead.

COMMISSIONER ERUETI: The question I have, Ms Jagose, if I may, is the connection between systemic abuse and independence because it seems that over time the fact that there is no apparent evidence of systemic abuse is used to justify not having this third-party process that has some degree of independence. This is a red herring question about whether they necessarily need to be connected because irrespective of whether whatever definition you have about whether there's systematic abuse, you still have an ADR process that is maturing as you say. That seems to be separate from this question of the extent of abuse or what have you, this question of independence. Do you see how they can be? Do you agree that they don't have to be connected in this way?

A. Sorry, I'm not sure that I understand the question. I thought you were saying, -sorry, can you ask me your question again?

COMMISSIONER ERUETI: Yes. It seems in the past that they are connected, that we won't have an independent third-party Inquiry because no evidence of systemic abuse, but it doesn't seem to me that, you know, you need to either have evidence of systemic abuse or an alternative resolution process to be independent, they can be divorced?

A. Yes, they can be separate points.

COMMISSIONER ALOFIVAE: Can I just ask a question? Different time periods, there are always like prevailing attitudes and so, the attitude that the State is always right, the State doesn't make mistakes, you know, it's a good attitude to have if it's correct. But making the State seem more humane by recognising that actually, there were some points in time when it really wasn't right.

I'm really asking about the public sector and the bureaucracy. And it might be an unfair question and it might also be an evolving question and one which I think your office is rising very, very much to the fore in terms of leadership around this issue, but how do you, -what will it take, I suppose is what I'm asking, what will it actually take to get that human face to the bureaucracy that the average New Zealander can have confidence in around these really big issues?

A. Part of the answer will be around how does the Public Service reflect the public that it serves? I mean, in part, that's a diversity question. Not just how do we get diversity of description of people in our agencies but actually diverse thinking. I've said this before too, that for lawyers for whom precedent is so important, how do we unhook ourselves sometimes when that's needed in order to

see something else coming? It is about keeping diverse thinking and having, exposing ourselves to different ways of thinking. And I think a great benefit of being the Crown and all of the power that that gives an institution is the ability to be able to say either we don't know or we were wrong.

And so, being able to feed those ideas in, it's very much how I lead my organisation and myself, and I know that's just a small part of the system but there is a very growing aspect of public service, how do we reflect the public? How do we show that we are open to challenge and criticism?

There are a lot of other places in the system that are available, Ombudsman, Privacy Commissioner, Human Rights Commissioner, other institutions of State that are independent that know how to come in, know how to bring matters to the attention of the otherwise I understand seemingly impermeable machine from an individual's point of view. I didn't really wasn't your question, I appreciate, but to me that is some of the way through, is to be open to being wrong. And, in this context, and I've said it before this week to the Commission, understanding, actually truly understanding the impact that the Crown has had on these survivors' lives and being able to show that it has been heard and responding from the right person is going to be a significant part of taking a big step as a country, I would say.

COMMISSIONER ALOFIVAE: Thank you.

MR MOUNT:

Q. Still in the policy zone, one of the big policy choices for the government was whether to rely on, and to what extent to rely on, defences such as Limitation Act defence because, of course, we've heard many times it is a defence, but it is a choice as to whether to rely on it?

A. Mm-Mmm.

Q. We can see in one of the documents, CRL ending 25877, that by June of 2010, zoom in on the top half of the page, and I think this is a document the Commissions have previously been taken to, we can see reference in the number 2, to a request from Peter Hughes, who at that stage I think was the Chief Executive at MSD?
A. Yes.
Q. To come up with a way to work on old claims without holding up the Limitation Act as a shield, to avoid looking at the facts, so meritorious cases should be resolved. And this of course was in the context of the topic we were discussing earlier, the ex-gratia payment to the Whites.

From your own perspective, what view did Crown Law take on that policy question; not can the Crown rely on the Limitation Act, but should the Crown?
A. As I recall this, I mean I don't recall this note but as I recall this issue, the point at 2 there is not a reference to the White ex-gratia payment, even though it is the context in which the Solicitor-General was meeting with the Chief Executive. But I think that's a reference to the stopping of the clock agreement that we were discussing with MSD, the protocol. And the reason I think it's that is because that's what we called it "the protocol", that would allow claimants to not have to address the limitation question as they did when they filed their proceeding in the Court. So, how did we come up with a way and kind of took that element out, so the matter could be looked at and the protocol, as we know, worked so that if parties could engage with MSD in an alternative resolution way, then we, MSD I should say, would agree to stop the clock. That was what the protocol did. So, that's an early, I think that's an early reference to the development of that stop the clock agreement because it does what is said, Peter Hughes' request that we come up with a way so that we can work on

claims that are hold without having to say Limitation Act, is precisely what the protocol allowed.

Q. I see. So, the reference to meritorious claims being resolved without holding up the Limitation Act as a shield, does that mean, and this is your own email, were you referring there to the out of Court settlement process by MSD, rather than the filed claim group?

A. I think that is right, that it's a reference to what became the non-filed claims, if you like, if I can call them those because otherwise, they would keep being filed in the Court in order to stop the clock themselves. I think that's what that is a reference to.

Q. The point I have to put to you for comment is whether the Crown's decision to rely on the Limitation Act, which it did in the Court claims at least, was in part motivated by concern about the financial cost of the cases or a concern to avoid claimants having more bargaining power. And before you answer that, I want to take you to a document in fairness to you. It's MOE ending in 221. Just orient ourselves for a moment. This again I think is draft advice and it's from, just go on a page, I'm afraid I don't have a hard copy of this, 2018 by the looks of things.

If we go on to page 18 of the document, noting that it is draft advice, and have we managed to find a hard copy of this document for you?

A. I have one thank you.

Q. You are in a better position than me.

A. Excellent.

Q. If I'm missing something please tell me. It's the section under the heading "Financial and Administrative Consequences" that I want to ask about. Clearly, there's some consideration being given to a change in approach on limitation and it's a bit messy to look at this because it's a draft document but it's the paragraph 81 that I'm interested in where it is said, "If the limitation defence

were removed or the discretion expanded there would be a significant improvement in the prospects of success of many claims. A significant plank of the Crown's defence would be removed and claimants' improved prospects of success would likely have a number of consequences".

And the question is really whether, in essence, what this is showing is that for the Crown to back off its limitation defence would increase the bargaining power or increase the prospects of success for claimants in a way that might have a financial cost for the Crown?

A. Yes, that is what this is saying and that's quite a proper thing for Ministers to decide.

Q. I don't suggest at all that it isn't. What I need to put squarely is that the perception, as it has been heard from claimants, has been that over the life of these claims from the mid 2000s, the consistent reliance by the Crown on the limitation defence has been partly motivated to keep the financial exposure down and, whatever the motivation has had the effect of leaving claimants with no bargaining power; and I just want to give that to you for comment.

A. A financial exposure is certainly one of the anxieties of an institutional defendant, yes, and not just in these claims either. Something I did say earlier, it will also be an anxiety to an institutional defendant, and I can't speak for the government but in my experience working for government, is also understanding that here common law damages claims in the law of torts don't just cover Historic Claims, accepting this document only covers Historic Claims, but also how does the Crown behave consistently across all of those places for which such tort claims might arise. And they could arise in quite a different factual setting, defective homes for example or I think I mentioned already something that's still before the courts, the kiwifruit growers challenge to the incursion that a virus, I think it was a virus not a bacteria, came into the country and devastated the crops,

the same law. So, the government does need to think about how is it consistent across time.

So, not taking a limitation defence when it's available is a big policy question and this paper is calling that because you'll see, even though it's a draft, the very beginning of this note, paragraph 13 actually, recommending that the Minister, the Attorney consults with his Cabinet colleagues, where the government wishes to give policy consideration to a change in that stance.

CHAIR: It was such a big issue, it was one that you required government to make, rather than just at Crown Law level?

A. Yes.

CHAIR: That's how significant the question was?

A. Yes.

CHAIR: Thank you.

MR MOUNT:

Q. Just before we leave limitation, I know you've always resisted the label "technical defence", so we don't need to go over the reasons for that. Just a couple of points.

One, we know, I think, the policy justifications for the limitation defence, that there might be prejudice because of the unavailability of evidence, also perhaps a moral expectation that if people have got a claim they shouldn't sit on their hands, they should get on and file, and the various other policy justifications.

But where there is evidence available to the defendant that it's a meritorious claim, do those policy justifications largely fall away or what are we left with in terms of the policy of the Limitation Act?

A. In the context of these claims where it is determined that those matters are wanting settlement or are calling out for a resolution, then limitation isn't held up. There is a contested fact in law in the Court matters where the government's instruction is to take the limitation defence.

Q. A proportion of those cases headed towards Court will still involve partial or even more than that, partial elements of well-founded- factual allegations. We saw that in White and with the retrospective vision of the Inquiry we saw it in Mr Wiffin's claim too, that he was on the Court track but, actually, on the information available to the Crown, it was a meritorious claim.

So, even for that cohort that ends up on a litigation track, is it fair to say that sometimes the policy reasons for limitation cease to apply?

A. No, I wouldn't agree with that. Policy reasons are still there. It might be that the parties are able to come to an agreement to resolve it. So, to use Whites as an example, along the way to trial attempts were made to settle, at no insignificant sums. And, as I've said already, the parties didn't ever, there was never any meeting of agreement there.

The policy reasons still exist, as was evident in that case, I think I've also mentioned Justice Miller commented on that, that the defendant, the Crown, was unable to call some evidence on some things because of the passage of time, so it was very real but I think it's a good example of the things on a settlement basis the reasons still exist but they're not held up. But if we are going to a Court for a common law damages claim, that is where we are instructed to take those defences, where they're properly taken, available.

Q. What I was trying to get at was that for some claims, and Mr Wiffin's might be an example, despite the passage of time, the failing of memories, all of those things, the lack of documents, the defendant is, as a matter of fact, able to reach a view that the allegations are correct. So, if you reach that point factually of being satisfied, despite the lack of documents, the death of witnesses, all those things, you can reach a view that this is a well-founded- claim,

that first policy justification is of no materiality; does that make sense?
A. Yes.
Q. And I think it's at that point that some would say a defence like limitation properly attracts the label "technical"? It's there, it can be pleaded but it doesn't have any reality to the particular claim, and so people say, well, it's a technical defence; does that seem fair?
A. I understand that, yes.
Q. I'm also just wanting to grapple with the documents we saw right at the beginning of the question, the Australian model litigant policy, where it is said an obligation on the Crown is not to rely on technical defences unless you're prejudiced. It's different from our document which is much more empowering and, in fact, explicitly says the Crown may plead limitation. There's a difference in emphasis, accepting of course in Australia the Crown can and does plead limitation.

But I know you are resistant to the label "technical differences" when would you classify a defence as technical? What meaning would you give to that phrase?
A. It's not a phrase that I use because defences are defences and calling them technical defences suggest that they have no, -that they are just a trick, and that is why I resist the phrase, so I can't think of other defences that I would use that for because defences are properly brought in the right situation or the Court says that defence, you know in a Court case, I disagree. Saying it didn't happen is a defence and Courts invariably say I agree with you or I agree with you.
Q. I hope I don't mean to demean the position by saying you are allergic to the phrase technical defence in any context?
A. I don't think it's a useful descriptor.

MR MOUNT: Do the Commissioners have any questions on that topic? I am about to move to a new subject.

Q. Earlier, you quite rightly raised that the correspondence with Ms Falconer was a Justice official, we ended up assuming that it was, and you are quite right, she was at Justice at that stage, so just to make sure the record is clear on that, thank you.

Next topic is whether the Crown's overall approach, and this includes not only Crown Law but the Departments, Ministries as well, whether that overall approach has sufficiently reflected rule of law and access to justice goals. The starting point, of course, being that the importance of the rule of law overall, and I'm sure that is a topic that you speak of frequently, it is a strategic goal of Crown Law's?

A. Mm-Mmm.

Q. And it's of constitutional significance. And, again, you may well have a definition in your back pocket from many contexts in which you are asked to speak on this but is it fair to say that elements, such as equal treatment, the equal application of the law to public officials as well as private, transparency of rules, accountability for decision-making, consistency of decision---making, potential for judicial review, are all elements of -

A. Yes.

Q. - of the rule of law? Commissioners now over some weeks have heard a lot of detail about the different redress schemes and processes of the Ministries which have evolved over time. But there are a number of features which the Commissioners will have to form a view on, but which could be said to raise rule of law concerns and I just want to invite your comment on those.

For example, what Commissioners have heard is of the disparities between different redress schemes, both across agencies and, also, within agencies over time. I know it's not your direct responsibility to administer those schemes but, as a law officer, would you agree with the general

proposition that consistency is clearly desirable for claimants? And then from your own assessment of what you've heard, are there improvements to be made in our redress systems for claimants on consistency grounds?

A. I agree that consistency of treatment is important. There might not be consistent outcomes but of treatment, yes. Are there changes that can be made? Doubtless there are. I mean, again, I don't mean to duck the question by saying it is a question that feels too big for me to answer. I don't have my hands on the material or the understanding of the systems but there is always room for improvement. And consistency of treatment is an important feature of both transparency of those systems and them being understood to be fair and fairly applied. So, they are important values, if you like, to achieve. Different systems in the system do different things though, right? So, there's the agencies doing their alternative resolutions which sometimes include financial compensation or at least financial recognition of harm and sometimes include other things. The Ombudsman has a role, a wider role in relation to institutions, people in the care of the State. So, the Ombudsman has a convention against torture function. The Police obviously have their function. So, it isn't always easy to compare all of those mechanisms and say are they consistent? But, I agree with you, that systems that do the same, attempting to do the same thing, three different Ministries' alternative processes, consistency should be pursued.

Q. Another dimension of this potentially is the need for clarity about the basis on which officials will exercise their discretion, and I think that might have been a point raised more than once in the evidence already. And, again, it's been an evolving picture as more and more information as been disclosed about the way in which officials will decide how to approach redress decisions. But at a general level, I take it you would agree that not only consistency

of decision-making- but clear, transparent guidelines for officials exercise discretion are all desirable things?
A. Yes, they are.
Q. To your knowledge, how frequently over the last decade or so has Crown Law been called upon to give advice about the different redress processes, schemes, run by the agencies from a system level point of view looking at these types of questions, consistency, transparency of decision-making? So, from a, if you like, system rule of law perspective, has that been a lens that has been brought to bear?
A. I don't know. I can find out and come back. I mean, one of those, we saw that recently something like that, could you look at the Ministry of Education and MSD's processes and tell us are there any, I don't know now, I don't remember what the question was asked of us but I think it was something like that and we were pointing out in the draft some exposure to differences. In the finish, they were said not to be real and so the matter wasn't required but that is only one example I can think of but I'm just not close enough to all of the instructions that come to us, to know if we've been asked that question.
Q. Yes, I think we had that evidence last week from the Ministry of Education witness and I think it was quite recent, perhaps last year, that the Crown Law and the Ministry of Education exchange occurred.
A. Since I was involved in a more hands-on lawyering way in these claims, the Ministry of Social Development, primary Agency that I dealt with, was very aware of consistency as being one of the things that was a principle in their process.
Q. I think it is a fair summary of the Cooper Legal evidence from the last phase of this hearing, that their experience over the last decade or two has highlighted quite significant numbers of disparities, both in terms of

financial payments but also different approaches across the Ministries.

Putting your forward-looking lens on now, and perhaps accepting for the sake of argument that they're right, that there have been a number of disparities, can you give a view about what the most appropriate way is to address this, to make things more consistent, transparent, and more rule based in a way that people can understand and which will comply more with those rule of law goals? It is a big question, I know.

A. Mm. And I don't know that I can answer it. I can think of sort of devices to make things more transparent but they might not work in this context. I can think of ways to make things more consistent but what one person thinks is consistent might not be what another person says is the basis of their grievance or their dispute. So, that is a big question that would need quite a lot of thought and delivery to a set of principles I think about what is transparency and consistency to deliver and then where the likely points of disagreement, how might we get through those? I'm afraid that is a big question for me.

Q. One aspect of this, of course, is quantum; how much money is available for a particular type of injury. And, as you pointed out earlier today, I think, in New Zealand since 1974 we haven't had personal injury litigation and so, one source of information about placing a value on injury through the Courts we have not had. And so, at different times various Ministries have had to grapple with this exercise, and I think you talked about it on Monday, the comparison with Taunoa through the Bill of Rights damages.

Do you think overall we have sufficiently grappled with this question of quantum and has enough work been done to come up with fair ranges, in your view?

A. I know a lot of work has been done in the agencies to work out what is a fair range. Is it enough? Possibly it's the

sort of question that can never be answered affirmatively, yes, that's enough work, stop. But I think we are very hampered by the fact that ACC cover continues to exist, it isn't being removed, it continues on. In that light, what is reasonable and what is fair is not a discussion that is being had either, sorry, is not a discussion that is had publicly- as a society; how do we grapple with that? And then if there is a set of figures that we come to for certain claims, what about others? What about other types of injury, illness, disability? It is a question of some magnitude that I find hard to answer in this, even in this big Inquiry, on this narrow point, when you think of the whole society question.

Q. One of the themes that we've returned to a lot has been independence.

A. Mm.

Q. And you will have heard from participants in the Inquiry the call for an independent lens of many topics. Is this question of quantum another one where there could be obvious advantages in an independent view because, accepting what you say that these are very difficult questions, we lack many comparators in New Zealand because of our legal system, so these are hard questions, very important questions. Leaving that to the agencies themselves, the defence and legal lens, to come up with their own version of what the right dollar value is to put on this, particularly in a context where, putting it neutrally, claimants have little, if any, negotiating power, where the lack of independence almost inevitably will lead to dissatisfaction on behalf of the claimant group. I'm sorry it's a long question but what I'm trying to say is because of the difficulty of setting quantum is that not another reason to consider some form of independent model?

A. It might be a good reason to suggest another model, although I'm bound to say there is already an independent arm of

State that assesses damages and makes monetary awards, and it is the Court.

Q. That was the Attorney's answer in 2011. So, we come back again to that fork in the road because the answer in 2000 was an independent arbiter of quantum to some extent, that was Sir Rodney?

A. Not really because the government gave him the envelope.

Q. Gave him the envelope, yes. But within the envelope -

A. Sure.

Q. That's why I say semi-independent-, within the envelope he assessed that. Now, I'm not sure how that process would stand up under a rule of law lens either perhaps because there wasn't necessarily full transparency or any right of appeal or published criteria, any of those things, but there was at least a degree of independence about that process?

A. Yes.

Q. But everything after Sir Rodney, essentially claimants have been asked to trust the agencies, perhaps I'm- not sure if that's the right word but have been in the hands of the agencies and have received, for better or worse, a verdict from the Agency, your injury has been assessed at this many dollars and that's the end of the story for them. We may have taken the topic as far as we can but I'm not sure if there's anything more you want to say about the possibility of an independent view of that, other than the Courts?

A. Well, except to acknowledge there is an argument to be made, the one you are making, but I'm not the decisionmaker about that argument but yes there is an argument to be made there. There are other independent parts of the system, I was going to say of the State but they actually stand outside the State, like the Ombudsman as I've already mentioned with his authority about people in State care or control, that is independent,- but it doesn't deliver a financial outcome. So, if you look at the whole picture, there are bits of independence, significant parts of the system that are

independent. They might not deliver a financial result. There is one that does, it has problems, it is an argument to be made that something different should be done.

Q. One example often given here is, of course, the Human Rights Review Tribunal, and that's one of the disparities that have been pointed out. I think a $10,000 award or something like that for a breach of privacy, much more than the underlying payment in recognition of the injury. And I mention that only in case you want to add the Human Rights Review Tribunal to that equation of alternative systems that we've got. But certainly, on the face of it, that independent body almost adds to the disparities that we're seeing, rather than anything else?

A. Jurisdiction doesn't seem terrifically relevant in this context.

Q. Understood, understood.

MR MOUNT: Commissioners, can I check if there's anything you want to add on this topic of quantum or all of law considerations?

CHAIR: Only to put to you, Ms Jagose, that we've heard so much evidence from the Ministries about each of the individual ADR system which they had, health, education, MSD. And it's quite clear from that that although to some extent some are aligned, there is a big disparity between the processes, the number of claims they get, but the processes, the time it takes and the quantum that they are giving to survivors. So that, the survivors and for roughly similar allegations.

A. Mm.

CHAIR: To that extent, we have been concerned to hear about that, that even within the government, take out the Ombudsman and all the others but just within the Ministries we have been concerned to hear about these very obvious disparities. I am not sure if you are

aware of that but it's something we're looking at closely and are concerned about.

A. And I'm thoughtful about the comment that you make that there's a difference in I- hear you saying there's a significant disparity in the quantum. I am surprised to hear that. It doesn't surprise me that agencies are at different levels of sophistication about the process. MSD is best practiced at, I mean has had the most and has established systems and teams to deal with it, so it doesn't surprise me that others are slower, have got less claims.

CHAIR: That is a reason why they're different but the bigger question is should they be different? Should it matter for a survivor that they get treatment of this just because they happen to have been abused in a health setting rather than an education setting? It does seem to be disparate?

A. Yes.

CHAIR: And unequal?

A. Yes.

CHAIR: I am really just putting that to you.

A. It does seem that way and turning it round from a survivor's perspective, why should that be. I understand that.

COMMISSIONER ERUETI: It's much the same for independence too, we have heard over the past 3 weeks now, particularly for survivors the need for these agencies to be independent and recognising that, of course, the Courts are independent, it is an independent forum, and you have the Ombudsman and these other, the Health and Disability Commissioner and Office and so forth but really the main forum for addressing these issues for many survivors are the agencies themselves. This is why this issue of independence in particular keeps coming back to us and why we have to explore it fully.

A. Yes.

COMMISSIONER ALOFIVAE: I think I will just add to that, really it's about the underlying policy concerns documents that lead to the disparities.

A. Mm.

COMMISSIONER ALOFIVAE: And trying to understand that and the different levels of, like you said, sophistication or perhaps even maturity at which they're grappling or have come to understand and internalise the positions that they've reached really, yeah. And is there a role perhaps for your office, an over-arching role, in terms of being able to give it some considerable thought about how that should play out in terms of, you know, the overall Crown position?

A. Yes, and there is. I mean, there's plenty to take, in fact it has started before I appeared in this Inquiry, so I'm not pretending that I have magical powers but the agencies have, they are urgently and earnestly thinking about how do we get these things in the right place. So, I will take that back and even doubtless improved by this Inquiry's comments here and in reports that will come. But we don't need to wait until then, there is certainly things to go and look at and to, I mean I sit on the Chief Executives Group of Agencies on Historic Claims, that's a perfect opportunity to start raising and moving these things.

CHAIR: Just one last thing on independence, it's certainly expressed by survivors that there is something maybe repugnant is too strong but maybe it's not, about having to go to the very institution or the Ministry of the very institution that abused them, and place themselves effectively at their mercy. And although we've heard many good people talking about how they're doing it and how they aim to keep it independent, the reality is the perception of survivors is that they're having to go to their abusers to receive some form of acknowledgment of

compensation and that I know wrangles quite strongly with a lot of survivors.

A. Yes, I hear that too and I have heard that for a number of years that that isn't what they would want.

CHAIR: That's right. 3.30, Mr Mount.

MR MOUNT: Thank you, Madam Chair.

CHAIR: It's time we all took a break. We will be back in 15 minutes, thank you.

Hearing adjourned from 3.30 p.m. until 3.45 p.m.

CHAIR: Final run, Mr Mount.

MR MOUNT: Thank you, Madam Chair.

Q. In your brief, paragraph 2.26, there is an acknowledgment of the importance of tikanga Māori, Treaty principles in this area, particularly given how many Māori have been affected, 2.26 of your brief.

A. Mm.

Q. You say in your statement that this feature has not always been explicitly recognised in the manner it is today across the range of Crown responses to these claims.

Is it fair to say that it's very hard in the material to see any proper recognition of the Treaty dimension of this topic in the approach of Crown Agencies or the Crown more

broadly? Perhaps right through until the most recent Cabinet document which we'll look at shortly, the Cabinet decision?

A. Yes, and that is a reference to the Resolution Strategy with its very deliberate focus on principles taken from the Crown Māori relationship to try and guide this part of the work, so that is referring to the document you are speaking of.

Q. Yes. Perhaps if we pull that up, it's Crown bundle tab 95, and on your hard copy page 1078, I think. Perhaps if we move on to the second page, paragraph 9.5. This is the 2019 Crown Resolution Strategy underpinned by a series of principles, and principle 5 on the screen now which I'll read for the vision impairment. "The Crown's approach to alternative dispute resolution and litigation of historic abuse claims will be guided by the principles of manaakitanga, openness, transparency, learning, being joined up and meeting the Crown's obligations under Te Tiriti o Waitangi and the outcomes that support those principles".

This was a 2019 document. Can you help us with what, in practical terms, has changed since this principle was agreed?

A. Do you mean the Agency's Resolution Processes?

Q. Perhaps starting with Crown Law, presumably the area you will know the most, and then if you are able to comment on any other agencies, that would be helpful as well.

A. Well, the first practical thing is a recognition of the absence, that is not to be understated, the recognition that what are those obligations on the Crown partner to iwi Māori. The good government, yes, but active protection of the taonga, active protection of tamariki, bringing those really into our work, into our understanding of what we're doing. There isn't yet, to my knowledge, a, sort of, structural feature that is new that might be informed by a shared design or a shared understanding of what is to be

built yet. That might come. So, I think the most tangible thing is the recognition that we need to do better.

Q. Looking backwards, you rightly say that the recognition of the past omissions is a key starting point. Among those omissions, is it fair to say that the claims processes have not ever taken into account cultural damage or the destruction of those critical links that are so important in Te Ao Māori?

A. Yes, I agree with you, they have not. If to any extent they have been focusing on anything, they have been focusing on an individual.

Q. And in terms of the design of processes within the Ministries, it seems an obvious omission that there has been an absence of dialogue engagement with Māori and recognition of the principles that we now see reflected in the current document; is that fair as well or too broad?

A. I am thoughtful, I am just thinking, wondering whether that is too broad a proposition for me to agree with.

Q. It may be.

A. But this is a recognition that engagement with Māori needs to happen and where that might take us, well it might take us to different places depending on what part of the process we're talking about, but it might be about where and how resolution systems are established and what they look like. Do they look like this, in a Courtroom that many of us are very familiar with? Or do our systems and processes operate in quite a different setting that perhaps public servants are less familiar with but for which Māori will be comfortable and at home? How do we move to those types of structural features?

I would agree with your earlier statement, I thought it was too broad. To that extent, I will perhaps resist there has been no thinking and no engagement but not of that fundamentally different way of thinking about the institutional structure that should be built.

Q. Undoubtedly, this Inquiry will play a part in that forward-looking design process, a point you have made before. How do you see Crown Law's role in that forward-looking exercise? How will Crown Law be able to breathe life into these principles?

A. Well, those principles about how we treat others and that reflection of manaakitanga and how we deal with people will be one way. But I think you're getting at how we, in the litigation process, reflect these principles. And, to some extent, I think that is even harder, an even harder question is our system of civil redress hasn't yet kept up in any significant way to reflect the Treaty obligations on the Crown. We see in the Courts some aspects of the institution being able to move, Rangitahi Courts, for example, using different methods of understanding the person before the Court. As I've said before, we haven't had a Court case for some years and so we haven't been faced with this question, about how might we think through, for a particular plaintiff, how they can bring their connections and their support with them and show the Court the impact of what has happened to them but that is what will need to happen if we are in litigation.

Q. Is it fair to say we are still at the beginning of the process of understanding how this could look, should look and will look?

A. Very fair to say that, yes.

Q. And this may be another one of those topics where we will have to progress the discussion outside of this public hearing forum in the processes the Inquiry will have next year and in the future but I'll check with Commissioners.

COMMISSIONER ERUETI: Ms Jagose, on this question, when we talk about what's on the horizon with the agencies work, it's quite tentative about we recognise that work needs to be done and we're looking into the Treaty question and we'll engage with Māori in the

near future. There seem to be echoes of that with your first response too, about the need to do better and more work needed to be done basically. I just wanted to check with you about what you saw as being the next steps towards or the first steps towards meeting this principle 5 in this Cabinet Paper?

A. I was trying to get to that point when I was talking about understanding what are the bits of the structure, the institutional structure that we might not otherwise think about and we might just use as if it's some neutral ground in which matters can be determined, in order to unpick the bits where the Crown parties home way of doing things is said to be the neutral way and undoing some of those things about where we meet, how we meet, who do we meet with, how do we understand and hear from the person the damage not just to them but the damage that runs through generationally and/or through whanau or connectedness. Those are the things we have to do. I don't think it's any good to say we have to engage Māori and say what do you think? This is a big question for the Crown. I don't think it's good enough to say, yes, we'll engage and ask Māori what do they want. I think we need to be going out to say we identify these aspects of our process that have things in them that we recognise are not neutral way to ask and answer the question, we are about to change that. Until we're doing that, until we recognise that what we've got is not a neutral system into which you can put a problem and come out with a good answer, I think we will continue just to say we're still working on it.

COMMISSIONER ERUETI: These are the big picture questions, aren't they? There's yet to be a structural way of ventilating these ideas?

A. As we've talked about earlier with Mr Mount's questioning, I mean take the Waitangi Tribunal, an easy example to point to of a very different way of both in sort of in law but also

in kawa, and where we are when we meet to address the questions. Those are things we're going to have to do differently to show that we mean this.

COMMISSIONER ERUETI: Okay, thank you.

CHAIR: If I might, and again to pick up on the thread that I raised earlier about the difference in the different agencies, and given your position on that inter-Agency Board, that's another issue that we are really concerned about, that the agencies as, first of all, they should have known since 1840.

A. Yes.

CHAIR: We all should have known since 1840 but more recently since 2017 when the first kaupapa claims were being brought through which related to the treatment of Māori children etc. Warning bells were more than ringing then. They were called to account in the Tribunal then but the evidence we've heard over the last week or so has been, oh yes, we know, yes, we do have to do it, we're looking into it, we're thinking about it. And each Agency is at a different stage. So, again, we have a disparity here and it didn't seem, at least to me, but I might have missed it, that they're even talking to each other about how they're doing it.

A. Right.

CHAIR: So, again, buried in principle 5 is about being joined up and I think there's a strong feeling that we have that there is no joining up in relation to Treaty obligations and how to operationalise them.

A. Yes, although just something that you said, Chair, I say that you may not have had any of this evidence, and I'm only -I'm not the right person to give it either but, in terms of current care for tamariki and the Crown's current understanding of its obligations, more is being done in terms of engagement with and protocols and agreements with

iwi Māori about looking after, I mean there's a lot else being done.

CHAIR: There is a lot being done. I am only talking about the alternative dispute resolution historic claim aspect, so keep it confined to that and I think we can probably agree as Commissioners there's not much evidence being joined up there.

A. No, I hear that, yes.

CHAIR: Thank you.

COMMISSIONER ALOFIVAE: Just on that because it's clearly a very useful mechanism again at its highest level, the meeting of your CE colleagues with yourself.

A. Mm.

COMMISSIONER ALOFIVAE: There will be no surprise that we've heard a lot of criticism about the siloed effect and our Chair has already alluded to the fact that it sounds like nobody talks to each other, despite the rhetoric that we consistently hear. Does the office of the Crown Solicitor, even though it's part of the Crown but actually almost at arm's length being able to actually give over-arching advice to your colleagues? Because at the end of the day this is always about legal consequences in the historical claims space. So, you're all seated at the table but actually whether or not, as the Crown Solicitor, you're able to hold your colleagues to account on what's happening and not happening in their different agencies?

A. Certainly, that function of being the adviser on the law to the Crown gives a measure of independence to the role, yes. Invariably, that needs to be, well this is my own view, needs to be done in a way that is collaborative with agencies because being independent but ineffective, there's no point in that.

And so, I would say that there is a facility for that independent function to come to say this is what it might look like or help people build that but we do need to do it together to be effective.

So, holding my colleagues to account might mean different things to you and to me but that is the function of the Solicitor-General, to bring that independent voice to bear so that advice that might not want to be heard or taken can be given fearlessly, if you like.

COMMISSIONER ALOFIVAE: Thank you.

COMMISSIONER ERUETI: I just wonder too, whether the Peter Ellis case might be another example of like a Treaty informed approach towards litigation. And this is the big question, that is the big puzzle, isn't it, can you have the trauma-informed, Treaty-informed approach against litigating the historical abuse cases. It does seem there are precedents being made?

A. Yes, and with your reference to that case, which is still before the Court so I am not commenting on that particular case but very recent new ways that even the stuffy old hundreds of year old common law is starting to realise that it needs to do something else for this country to develop its own common law. So, we're at the start, I think, one of Mr Mount's questions to me, of what I hope will be a big shift in how this country and this Crown sees its role.

MR MOUNT:

Q. We will move on, if I may, to human rights. I can put these up on the screen if we need to but I don't think we will need to.

There are obligations on the State to provide effective remedies of redress in a number of international treaties and conventions to which we are party, that include the Universal Declaration of Human Rights, ICCPR, Convention on Elimination of Racial Discrimination, Convention Against

Torture, and Declaration on the Rights of Indigenous Peoples.

A. Mm.

Q. They all say slightly different things but all are effectively in the same zone of placing an international obligation on New Zealand to ensure effective remedies for infringers of the relevant human rights.

The first question is whether, in your observation over the last decade or more, a human rights lens has been properly applied to this topic of historic abuse litigation and other claims?

A. That lens has been applied. It is probably in more recent times getting a more critical human rights specialist scrutiny than perhaps at the beginning, certainly than at the beginning. So, again, it's a thing that is moving to a better, more rights focused approach to how we apply the law and how we understand those international instruments and indeed the domestic equivalents affecting how agencies think through their processes with survivors, so improving.

Q. Again, I could put these up on the screen but I don't think it will be necessary. We've seen the array of Cabinet Papers going up?

A. Mm.

Q. There's a template, I think, that invites each paper to say whether there are human rights applications.

A. Mm.

Q. And I think I'm right in saying that most, possibly all of them, say no human rights implications. Is that an indicator that, the Commissioners will be able to look at these papers to get the time periods exact, but is it an indicator that the human rights dimensions have been overlooked or under-appreciated at those relevant times?

A. I think that's right, yes.

Q. I don't mean this to be a memory test but can you call to mind any examples practically of where that human rights

framework or human rights thinking has specifically informed or been part of the design of either a Litigation Strategy approach to litigation or any of the agencies' redress processes?

A. It is a test but I know that there is advice that is going that has gone to agencies about how do we view allegations of physical and sexual crimes in care against both our domestic human rights legislation and our international instruments and obligations and how might that sound both in a measure of what's our legal exposure and risk but also how might agencies think about that in settling claims or entering into- ex gratia payments. I couldn't now, you know, iterate that but there is a stream of advice along those lines. I think it's probably fair to say that it's in more recent times, it certainly won't have started in the early 2000s.

The Courts were too, just recalling, the Courts were raising these questions too about in the mental health immunity context, what role does a human rights breach play in that mental health immunity. That makes me think that would have caused a stream of advice about that, although I couldn't say when.

Q. Would it be fair to say that this is a more recent strain of thinking, in terms of the Crown's approach to historic abuse cases?

A. Yes, I think that is fair to say.

Q. There was, of course, in 2011, a draft report from the Human Rights Commission which did explicitly consider New Zealand's international human rights obligations in had this zone and the Commissioners have heard some evidence about that and saw the draft hearing last year.

I think we saw an exchange of correspondence between the Attorney-General's Office and the Human Rights Commission over the feedback on that draft report. Did you have any knowledge of those events at the time?

A. Yes.
Q. Are you able to shed any light for the Commissioners on that process and, in particular, and this may well be outside your direct knowledge, but how it came to be that the report ultimately didn't get finalised and didn't get published?
A. I hadn't understood that the report was never finalised. This just goes to show my - -I was involved in parts of that process because a man whose name I don't recall now from the Human Rights Commission would ask us for information about Court cases and process and strategy and so on. So, I remember that happening.

I thought that the Commissioner, Ms Noonan, completed that report, but I did understand that it was not made public, but I don't now remember the detail of that because I was in the office at the time, of course.
Q. Can you shed any more light for the Commissioners on the way that report was received within Crown Law?
A. Can we look at that report, that letter from, or was it a briefing to the Attorney about it? That is going to help me remember.

MR MOUNT: I might need a short break in order to pull up the right document. And I don't want you to have to strain your memory unduly, so perhaps the right thing would be to take a short break, I hope no more than 5 minutes.

CHAIR: We can do that, thank you.

Hearing adjourned from 4.16 p.m. until 4.20 p.m.

MR MOUNT:

Q. Having now had a chance to refresh your memory on the correspondence, I forget what my exact question was, but I think I was asking whether you could shed any light on Crown Law's view about the draft report and any light you could shed beyond that, on how it could be that the report didn't see the light of day in the end?

A. Sorry, thank you for the indulgence. This does remind me that one of the points that we didn't agree with the Human Rights Commissioner was about what was needed to be meeting the international obligation of a prompt and impartial investigation. And so, as this letter shows - does everybody have the letter?

Q. We can put it up on the screen, MSC1091.

A. As this letter shows Crown Law's view, not just Crown Law's view but also the leading commentator on the Convention Against Torture, makes it clear that impartiality is what is record rather than literal institutional unfairness and it quotes that no whack commentary at the bottom of the page and over the page, a comment over the page there about -

Q. Let's stay on the first page, just while we let the Commissioners catch up with reading. There is a distinction drawn between institution and impartiality?

A. Yes, institutional independence and as it goes on to say in the commentary even Police Chiefs and Prison Directors can be a competent authority for the purpose of meeting an

international obligation for an impartial and prompt investigation into an allegation. So, that reminds me that was a point of seemingly great disagreement between the Human Rights Commissioner and our view of the law. And then the other points raised are the ones we have been addressing over the course of a few days about whether the system as a whole had enough in it to provide options that were in different measure meeting the obligations. So, no fault scheme in the ACC, Police, it doesn't mention the Ombudsman or the function under the Convention against Torture. These points at 2, 3 and 4 are not new ones, we have been discussing around them already.

So, that was the view that, I mean the Crown Law Office will have briefed the Attorney to this point, when he was asked to comment on the draft to say we still disagree with it in these four significant points.

I know that what happened next was that an incoming Human Rights Commissioner didn't release the report, perhaps didn't finalise it, I understand the report was left in draft, but I don't remember, or I don't think I had any involvement in that question. Mr Rutherford, I think, was the incoming Commissioner. Yeah, I don't know what happened or why that happened.

Q. If we can take that down now. Would it be fair to say perhaps, that the very proper discussion of that interpreted point, the difference between independence, impartiality and those other points aside, overall the opportunity to bring a human rights lens onto this topic in 2011 now looks a little like an opportunity lost?

A. That's probably a fair point. And I don't remember the report now. If it was the opportunity to take a more human rights focused view of the allegations, I can see why you say that, although we would have had the draft report, so it might have been an opportunity lost, yes.

MR MOUNT: Commissioners, I haven't quite finished with this topic. I am getting ahead of myself.

Q. I am by no means wanting to overlook the very significant human rights development earlier this year which is the Zentveld decision in the Human Rights Torture Committee. In your hard copy, that's starting on page 1105.

We see a January decision of the Committee Against Torture in the United Nations. If we move to paragraph 9.9 on the 15th page of the pdf, and zoom in on paragraph 9.9 down the bottom, the opinion of the torture Committee on the screen we see was that, the State party, that is New Zealand's failure to conduct an effective investigation into the circumstances surrounding the acts of torture and ill-treatment suffered by Mr Zentveld while he was at the Child and Adolescent Unit of the Lake Alice Psychiatric Hospital was incompatible with New Zealand's obligations under articles 12, 13 and 14 of the torture Convention and those obligations were to ensure that competent authorities proceed to a prompt and impartial investigation where ever there was reasonable ground to believe an act of torture and/or ill-treatment has been committed.

Across the page, paragraph 11, the Committee urged New Zealand to conduct a prompt, impartial and independent investigation into those allegations.

And at 11(b), to provide the complainant with access to appropriate redress, in line with the outcome of the investigation.

Do you have a comment on that rather strong finding by the United Nations Committee about New Zealand's deficiencies under the Torture Convention?

A. While those are accepted as the Authority's findings, and the State party, New Zealand, has acted on that, I think I mentioned it the other day with the Police.

Q. Have re-opened the case?

A. They have re-opened their investigation. They have committed to a prompt, independent and impartial investigation of those allegations and I don't know where they are at with that, of course, but that is what the response has been to that very clear finding.

Q. Is this a tangible indication of the consequence of missing the human rights dimension to the historic abuse claims, that in fact New Zealand has suffered an adverse finding in the Torture Committee?

A. Yes, this is the outcome of somebody else, an international body reviewing the State's response, yes.

MR MOUNT: We will, as I have said, come back to the Lake Alice topic in much more detail next year. I will check with Commissioners whether there are further questions you have, either on human rights or on this particular topic?

COMMISSIONER ALOFIVAE: Not from me.

CHAIR: No, I have nothing to raise.

COMMISSIONER ERUETI: No questions from me, thank you.

MR MOUNT:

Q. I took the opportunity to check with Mr Wiffin who is here if there are matters he wished as a member of the survivor group to raise. He has highlighted a topic which I think we have covered, and that was the influence of the Crown Law Office in helping to develop policies which were ultimately accepted by Ministers or Cabinet. I think we've addressed that, if there's anything further you'd like to say, please do?

A. No, I think I've said what I need to and been open about that wrong.

Q. Yes. He was particularly interested as well in the role of Treasury, which is something I don't think I've asked specifically about, other than perhaps in passing yesterday when we looked at the Lake Alice Cabinet Paper from 2000 when it was noted that critical Judge, when the Cabinet was

considering whether to setup the alternative process for Lake Alice, at that stage Treasury's advice had perhaps been conservative, they favoured litigation as the right way to resolve it.

But I perceive for many survivors, that the influence of Treasury, perhaps as a proxy for the influence of financial considerations, is a genuine concern. Is there anything you would say on that topic?

A. We didn't mention the Treasury specifically, but we have already touched on government's general interest in understanding what its choices are and what they cost in order to understand fully what it might forego in other areas of its policy agenda. And, as we've gone through the paperwork, that has been a material feature of government's consideration of options and the Treasury, like the Law Office's role is one of saying, putting in a legal stream of advice. The Treasury's is to put that funding and cost stream of advice, so it's just seeing the different parts of how government takes decisions.

Q. In speaking to Mr Wiffin a moment ago, a member of our Survivor Advisory Group, I was reminded of what he said in his statement to this hearing in paragraph 59 of his statement where he talked about the way forward.

His first point was that there needs to be a different approach and it should start with constructive engagement between relevant agencies and survivors.

And I'm reminded that, in a completely different context, a government Agency like EQC has a Survivor Claimant Advisory Group, I forget the exact name but there is a reference group of claimants that the Agency can consult with when they need a claimant perspective.

This is a radical thought for an Agency like Crown Law but I wonder, would you be open to considering something like a reference group of historic abuse claimants, so that when Crown Law is called upon to give advice to the

government or to consider its own approach to this very important topic, there is a mechanism for the Crown Law Office to seek input from historic abuse survivors. I don't seek any commitment or any details, that would not be fair, but the question is just, would the office in principle be open to considering such an idea?

A. I think the answer to that is yes because, as I've mentioned before, you know, how do we get diverse views in if we're not prepared to listen to diverse views? So, I am committed to the idea of diversity and an entirely different topic, we have in recent times, this year, invited in some people who didn't share our same perspective and invited them to kick the tyres of what we were thinking and doing, and that was done in a very controlled and private way. But it reveals some interesting things about the way we think. So, I won't today and in the moment commit to something in particular, except to say that I think the whole system, not just the Crown Law Office, could do with finding a way to get that different perspective in to different parts.

It comes back to something I said earlier to the Commissioners, we need to start in a different place because currently we start, the trigger is a Statement of Claim that triggers language of accept and deny. How do we start in a different place, accepting that some people will want to bring a civil claim and they should be able to, that is their right.

Where that kicking of the tyres or whatever is the right word for an Advisory Group sits, is a question I'd like to give more thought to.

Q. Thank you. As I say, not seeking firm commitment or the design in any system today - and thank you for that polite device from whatever response that was.

A. I don't know if it everyone else heard, but Siri is answering Mr Mount's questions.

MR MOUNT: On that note, I'll check with the Commissioners if you have any questions for the Solicitor-General?

COMMISSIONER ERUETI: I did want to ask briefly about because there is a reference to a footnote in your brief to a briefing given to one of the Cabinet Committees and it was by the Attorney-General 2004 and she suggested that there be an alternative process that's independent of the Crown that would have a fact finding function to establish, to make a prima facie case, to waive Statute of Limitations, claims that are barred by ACC and couldn't be heard. But it seems that the proposal by the Attorney-General is quite striking to me, I just wondered whether you had any knowledge of how this came to be?

A. If I'm remembering it right, I think it was a response to the lawyers for claimants, both Cooper Legal or Cooper Law as it was in the day, and another firm, Johnston Lawrence, meeting with us, Crown Law, to say isn't there an alternative way to deal with this? And the Cabinet sent us away to try and negotiate with those lawyers, I think that's what you're referring to? That model where somebody else was charged to do the fact finding and work out what a remedy would be. And, as I recall it, and there is a paper in the materials I think that says this, the negotiation, if that's the right word, I think it is, as between Crown lawyers and plaintiff lawyers, failed to reach agreement that that was a good alternative model. I now don't remember all the detail of why that wasn't a good alternative model. I think it was that it still put barriers in the way of the claimant's story being or the claimant's experience being heard. I don't quite remember now but it didn't - that matter was put to the lawyers by the Crown's lawyers and we couldn't get to agreement.

COMMISSIONER ERUETI: I think you mentioned this briefly on Monday but I'm talking about something different actually.

A. Sorry.

COMMISSIONER ERUETI: Yeah, it's in footnote 18 of your brief of evidence and it's an actual proposal by the Attorney-General, Margaret Wilson at the time, for an independent process, for psychiatric claims, that was the focus.

A. Mm.

COMMISSIONER ERUETI: And so, the question I have is, it seems to have been put to Cabinet but just not adopted.

A. We'll have to go to the document, I'm afraid, because I can't remember.

MR MOUNT: By magic.

CHAIR: It magically appears. [Crown bundle Tab 7, page 0001]. Do we need to enlarge it?

A. There must be more to it than one page.

CHAIR: Do you have a hard copy?

MS ALDRED: I have it here.

CHAIR: I am happy for you to provide that. (Copy of document handed to witness).

A. I think that is the same thing that I'm speaking about, Commissioner Erueti, that the alternative process was explored with the plaintiff's Council as it says at paragraph 4, "Subject to final determination of funding" but I don't think that we were able to reach agreement on what that factual forum would do.

As I recall and perhaps we need to find, not today necessarily, for the Inquiry the decision that records because here we've got an either/or, it records what it was that was decided. I recall it was that the Crown Law Office should explore those alternative processes and that we did but we were unable to agree on them.

MR MOUNT: It might help if we go to CAB6, I think this is a decision minute from the 20th of October 2004. I think that might help us with the outcome. Is that big enough to read on the screen? The decision was to setup a Confidential Forum, which I mentioned earlier, and then setup a Departmental Working Group, if that rings a bell?

COMMISSIONER ERUETI: Yes.

A. Yes, okay, I'm quite wrong in my recall because this does appear to be the minute that follows that paper, saying let's setup the Confidential Forum, the government says, no matter what the response. It is not something we need to negotiate. Let's set it up. And, of course, it wasn't, to your point Commissioner, it wasn't what the Attorney-General had proposed, this fact-finding body, but something more listening and restorative than determination of facts and compensatory.

COMMISSIONER ERUETI: I just don't think we've got the right document. The actual proposal by the Attorney-General for the alternative process?

MR MOUNT: If we go back to what on my numbering here is CAB5, that's the 18 October paper, and if we go on in that to the third page, there's the underlying paper, sorry the next page. This is the more detailed document that set out the proposal in more detail. Does that sound right? I am not wanting this to be a memory test but the document on the screen now, that first page is what's set out the detail of that proposal for Cabinet and the particular part that talks, I think, about -

A. It is the appendix, about 16 pages on, that's got the real detail that you're recalling.

MR MOUNT: Yes. So, from about paragraph 56, I think, and perhaps the appendix as well, but the appendix

probably is, yes, this is where the independent person would conduct the fact-finding exercise.

Q. I'm not sure what Commissioner Erueti was specifically asking but, on the face of it, does it appear if we go back to page 2 of the document, that Treasury's view somewhat prevailed, in the sense that the overall decision about the alternative process as set out in the appendix was deferred? There was a Working Group set-up but it was a mixed result because the Confidential Forum did come out of this Cabinet decision?

A. Yes, that's right. The Commissioner's question was what happened to this idea?

COMMISSIONER ERUETI: Exactly. The proposal was put to Cabinet, this is quite early in the piece, in 2004, for quite a comprehensive fact-finding process which would waive the Statute of Limitations and instead, we get a Working Group and a Listening Service.

A. Yes.

MR MOUNT:

Q. I don't mean this to be a memory test, but I think was the draft submission to the Law Commission after that?

A. I think it was, yeah.

Q. Which also doesn't proceed. And then we get to the Crown Litigation Strategy which we spent quite a bit of time on.

COMMISSIONER ERUETI: 2008, that's right.

MR MOUNT:

Q. That is the broad chronology and it may be at this distance in time you are not able to shed any more light on the evolution of that thinking but please do if you can?

A. I can't specifically but I think we have it in the right framing of time, early thinking, Cabinet says no, keep going with litigation, let's have a Listening Service and Working Group start working on a strategy and, as you say, we've been through in quite some detail in the years that followed.

CHAIR: Ms Jagose, I don't even know if this is a question, but I think it's important if we share with you something of what we have heard from survivors in relation to what they want. Now, when I say this, I'm mindful of the many thousands of survivors. I am mindful we've only heard from some and I'm mindful that not all survivors want the same thing. But there's a general theme which is this, that survivors, first and foremost, want to be heard, they want to be listened to, but they want to be heard.

And then the second thing they want, and it's a very general broad way, is that they're not so much concerned with liability in the strict legal sense, which is what of course all the Court battles are about. But they want acknowledgment, acknowledgment by the State that what happened to them was wrong and needs to be given some redress.

So, I'm saying it's not even a question but I'm placing it before you with the provisos that I have put round it as something for you to take away from today as a direction when you, as I'm sure you are, with your colleagues and your agencies thinking about where to from here.

So, I just leave you with that thought ringing in your ears. I don't know if you want to comment on that at all?

A. Thank you. It's very useful to send me away with that because, as I think I said earlier, we can't wait, sorry it's not a disrespectful comment but we can't wait for the Inquiry to finish, we need to be moving. But the Inquiry has let us also hear that theme from survivors that they want to be heard, they want the appropriate acknowledgment from the State with some redress and accountability, and I hear that. I will certainly be taking that back.

CHAIR: Thank you. Put it like that, it doesn't sound too difficult, does it? I do appreciate that you have taken that message.

MR MOUNT: Madam Solicitor, thank you from me. Madam Chair, those are all my questions.

CHAIR: Ms Aldred, do you want to ask any questions?

MS ALDRED: No, I don't, thank you, Chair.

CHAIR: Oh my goodness, that then, you will be relieved to know, concludes. As we farewell, we have a whole 5 minutes left, may I say on behalf of the Commissioners, first of all, thank you for coming. I think it's important that it is made publicly known that you came voluntarily. You weren't summonsed or required to come but you accepted the onerous responsibility of representing the Crown today without being compelled.

The second thing we want to acknowledge is that you have at least facilitated and authorised the full disclosure of Crown documents, and that includes the extraordinary step, in my view, of lifting the legal privileges that would otherwise attach. And we are very conscious that that is a major step in the Crown being transparent with the Royal Commission and we acknowledge and appreciate that very much.

A. Thank you.

CHAIR: And then the third point is, it comes from what you said in your evidence. You told us that you have seen and heard that survivors have lost trust in government agencies, including the Crown Law Office, and I think that's been made very apparent in many ways. And you have stated that by being here before the Royal Commission, subjecting yourself as you have to questioning, that you hope this is a public recognition that we're into a new phase. And in your conversation with me just then, I think you've reiterated that.

The Royal Commission must continue to engage with the Crown because our work impacts absolutely on the work of the Crown, as well as all our other important stakeholders, so

that we can understand what is needed to resolve these huge questions that we have before us.

The Commissioners hope that this ongoing engagement, which won't probably be in the public forum, but they will be in round tables and hui and the rest, will result in very positive outcomes for survivors and we hope as a by-product will assist the Crown to perhaps regain some of the mana that it has lost in relation to historic abuse claims.

So, those are the three points that the Commissioners really want to convey to you. And finally, just to thank you again very much for coming, in spite of your ill-health, and we respect and thank you very much for that.

A. Tēnā koutou, thank you very much for those words.

(Closing waiata and karakia)

Hearing adjourned at 5.00 p.m.