

**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:** 22 October 2020

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**TRANSCRIPT OF PROCEEDINGS**

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**INDEX**

	<b>Page No.</b>
<b>Ernest Garth Young</b>	
XXD by Ms Janes	410
QD by Commissioners	516

1     **CHAIR:** Mōrena, tēnā koutou katoa, Ms Janes.

2     **MS JANES:** Kia ora, Commissioners, and good morning,  
3     Mr Young.

4     A. Good morning.

5     **MS JANES:** And similar oath?

6     **CHAIR:** Good morning, Mr Young.

7     A. Good morning.

8     **CHAIR:** You remain on the affirmation you took  
9     yesterday.

10    A. Certainly, thank you.

11

12

13

**ERNEST GARTH YOUNG**

14

**CROSS-EXAMINED BY MS JANES**

15

16

17     **MS JANES:**

18    Q. Mr Young, yesterday you agreed, and Mr MacPherson had also  
19    said on Tuesday, that both of you believed that litigation  
20    was not the best way to resolve historic claims for abuse;  
21    correct?

22    A. That's certainly my view, yes.

23    Q. And if we can look at CRL ending in 16545, and while that's  
24    coming up, it's a memorandum to Cabinet Policy Committee.  
25    So, it's from the Attorney-General who at that stage was  
26    Michael McCullen. It's undated but if we look at  
27    paragraph 1, it says, "On 21 February 2005", so we can  
28    assume for these purposes it is after that date?

29    A. (Nods).

30    Q. Thank you. And it refers to the Cabinet decision of 2005,  
31    as we've seen, and then it talks about consistency of  
32    approach. That's not highlighted, let me just quickly have  
33    a look through this.

34        Can you go to the second page, please? I'm looking for -  
35    it looks for consistency of approach.

1     **CHAIR:** Does your magic machine have a search  
2 function, Ms Janes?

3     **MS JANES:** No, it doesn't unfortunately.

4     **CHAIR:** All well, we are all busily looking.

5     **MS JANES:**

6 Q. Perhaps while the trial director looks for a paragraph that  
7 talks about consistency of approach, the cases are to be  
8 considered on the merits and on the same terms. I think I  
9 can just put the proposition -

10    **CHAIR:** It's found.

11    **MS JANES:** Perfect, thank you.

12 Q. Paragraph 27, if you can just read that through?

13 A. "Consistency of approach (though not necessarily of outcome)  
14 is important to ensure that all cases are considered on  
15 their merits and in the same terms. It would be undesirable  
16 to have some cases settled on one basis while other cases  
17 are put to the test of a trial, unless there are clear  
18 parameters that distinguish one from the other".

19 Q. So, that very much goes to the principle of treating like  
20 cases like, correct? So, not treating them dissimilarly?

21 A. With, it would appear with the proviso, if you like, that  
22 there are some issues or the word that's used there  
23 "parameters" that distinguish some, I guess, as being  
24 different to the norm.

25 Q. And so, if it's undesirable to put some to the test of a  
26 trial unless there are clear parameters that distinguish  
27 them, what would that entail?

28 A. What might - shows parameters mean, do you mean?

29 Q. What would those clear parameters be?

30 A. I'm not sure that I'm entirely qualified to make a comment  
31 on that, although I guess one might be if a plaintiff, for  
32 whatever reason, chose to go to trial. And again I guess,  
33 subsequent to this, if efforts to settle a claim couldn't  
34 be - don't achieve settlement and so any other avenues of  
35 achieving the settlement, such as a judicial settlement

1 conference, aren't successful, so ultimately the case may go  
2 to trial. But, beyond that, I am not sure that I can offer  
3 any distinguishing features.

4 Q. And so when we're looking, you've made the distinction  
5 between those that, for whatever reason, go on the trial  
6 track and those that are not on the trial track because  
7 there wasn't an ADR process necessarily for a period, was  
8 there?

9 A. No, not in kind of formal terms, if you like.

10 Q. Correct. And so, we've looked at the duty of care issue,  
11 and that's obviously something that is looked at when going  
12 to trial, the duty of care, but I'd like to just explore  
13 that a little further. For the Historical Claims Team,  
14 whether you take it as sort of a formal legal principle,  
15 what would you say the Department's duty of care is when a  
16 claimant comes forward for a redress process?

17 A. Whether there's a general duty of care or not, I'm not sure.  
18 All I could speak to, I guess, is, has that duty changed in  
19 some regard depending on the timeframe and approach?

20 And, again, I'm not a lawyer. As I understand it, duty  
21 of care is a legal concept but if I think about the ADR  
22 process, which is I guess the process that I'm most familiar  
23 with and have primarily worked in, then our duty of care is  
24 about, I guess, some of those principles that we talked  
25 about yesterday, treating - and that, I guess, starts with  
26 treating a claimant with respect and integrity, right  
27 through to dealing with their claim in as fair a way as  
28 possible and with the aim of achieving some kind of  
29 resolution or redress for that person in a fair and  
30 reasonable way. But most of all, I guess, dealing with that  
31 person respectfully.

32 For claims that are being dealt with in the litigation  
33 realm, then again, I guess I'm making some assumptions that  
34 duty of care is to, I guess, act as a model litigant and  
35 deal with the litigation in a way that the Court would

1 expect. So, I guess that's my best answer, I suppose, as to  
2 what that duty might entail.

3 Q. And would it be fair to say that at the heart of it as well,  
4 I assume like Mr MacPherson you would accept that these  
5 really are some of the most vulnerable citizens that  
6 New Zealand has?

7 A. Again, without wanting to sound dismissive, I think again we  
8 can make some generalisations. It's without doubt that many  
9 of our claimants, many of our survivors, are incredibly  
10 vulnerable, incredibly traumatised from their experiences.  
11 But some claimants that we have met are also amongst  
12 probably the most resilient, strongest and most courageous  
13 people that we've ever met. So, I think it doesn't benefit  
14 any of us to think of claimants as one homogenous group. I  
15 absolutely agree that many are very vulnerable, yeah, and  
16 have been very traumatised and still living with the  
17 legacies of their experiences.

18 Q. And it's important to acknowledge that there are a large  
19 number of very resilient victims and survivors?

20 A. Absolutely.

21 Q. So, if one looks at the redress process and you take your  
22 claimant as they are, would you agree that one of the  
23 principles to apply is to do no further harm as they go  
24 through the redress process?

25 A. Every effort should be made exactly to do that, in the same  
26 way as when a child or young person comes into care, the  
27 bottom line principle should be to do no more harm,  
28 absolutely.

29 Q. And part of that do no further harm, would you accept that  
30 that is not to put a claimant to an unreasonably high burden  
31 of proof when all the information and power lies with MSD?

32 A. That is, on the face of it, a reasonable proposition but I  
33 would have thought it needs to be seen within the context of  
34 the claim as a whole. I assume we're talking about the  
35 White case?

1 Q. We're heading towards the White case.

2 A. I guess, yes, we shouldn't be putting people to an  
3 unreasonable test, but I guess if you find yourself, for  
4 whatever reason, in the litigation framework, then by  
5 definition that suggests that there's going to be a level of  
6 testing and, clearly, a level of testing that doesn't  
7 necessarily apply in an ADR process.

8 Q. Because the reason I'm talking about this before the White  
9 case, is that we've heard, not just from Mr White, but we've  
10 also heard from Georgina and Tanya Sammons and on behalf of  
11 their sister Alva Sammons. We've also heard from Mr Wiffin.  
12 We've also heard from a range of other survivors who would  
13 all say, and have said to the Commission, that the burden of  
14 proof that they were put to was unreasonable and the  
15 evidential sufficiency, on the one hand MSD says we take it  
16 at face value, we don't expect it to be recorded in the  
17 records and so that doesn't disqualify it if it's not in the  
18 records.

19 But if you take the Sammons sisters, for example, there  
20 were three of them. There was information in the records,  
21 there was individual corroborating evidence that could have  
22 been obtained in relation to the step siblings, and that's  
23 just one illustration and it was, again, an 8 year period  
24 certainly for Georgina Sammons. And there are lots of other  
25 examples, you know, that we have seen and heard. So, it  
26 really is that issue that they have all said evidential  
27 threshold very high, it takes a very long time, we don't  
28 have the information or the ability to alter that timeframe.  
29 And so, there is that and at what point do you say how can  
30 we change a system that is doing harm?

31 **MS ALDRED:** Excuse me, sorry, I'd just like to - that  
32 kind of question does face the witness with some  
33 significant difficulties, I think, because it was an  
34 extremely long - I am not sure it was a question. It  
35 asked him to accept or assumes that he accepts a

1 number of propositions in a number of cases where he  
2 hasn't been taken to the references in the evidence  
3 supporting those assumptions.

4 I just wonder if that question can be put in a simpler  
5 way that the witness - or if the question could be divorced  
6 from the material that came before it, so that the question  
7 can be put to the witness in a way that he can answer the  
8 question without being assumed to have accepted a large  
9 amount of preparatory material which seems a bit unfair.

10 **CHAIR:** Yes, I did note, Ms Janes, that Mr Young was  
11 asked to assume that all of the foregoing had caused  
12 harm without having an opportunity to agree or  
13 disagree with that. Maybe you should rephrase it.

14 **MS JANES:** I can put the Sammons evidence to you and  
15 use that as an illustration in terms of what they have  
16 told the Commission.

17 Q. At paragraphs 6 and 7 of their brief of evidence, Georgina  
18 Sammons says, "I still don't understand how MSD can say  
19 there was insufficient evidence of psychological and  
20 physical abuse. They didn't even talk to anyone who might  
21 be able to corroborate what I was saying" and it then talks  
22 about not talking to Tanya, the foster sisters or any other  
23 people. She goes on to say, "Just like my Police complaint,  
24 I felt like I was being treated like a liar, even though  
25 no-one actually took the step of talking to anyone who might  
26 know".

27 At paragraph 111 of her brief of evidence she goes on to  
28 say, "When you look at our case, all three of us had been  
29 telling people about the abuse we suffered in that household  
30 in different ways, different times, totally independent of  
31 each other."

32 And then she goes on to say at the end of that paragraph,  
33 "And yet MSD still didn't believe me and said there was  
34 insufficient evidence of physical and psychological abuse".

1           So, just as an example of somebody going through an 8-  
2   year process and still feeling unheard, disbelieved, treated  
3   like a liar. We also have Mr Wiffin's evidence, and I can  
4   take you to that transcript part if you would like me to.

5   **CHAIR:** Did you follow Mr Wiffin's evidence?

6   A. Yes.

7   **CHAIR:** You are very familiar with his claim, aren't  
8   you?

9   A. Yes, so that's not necessary, no.

10   **MS JANES:**

11 Q. So, even if we take, and you will be aware of the White case  
12   and similar expression?

13 A. Yes.

14 Q. So, if we just take those three cases as illustrative of  
15   that proposition, if you look at the process that is built  
16   in a way that as Mr Wiffin says starts from a position of  
17   disbelief and Georgina Sammons similarly felt that way and  
18   Earl White similarly felt that way, what could be done  
19   differently and in a more timely way to not do the harm that  
20   each of those three individuals has clearly expressed?

21 A. Just an initial comment, and I know you're not necessarily  
22   asking me to comment on those cases, but so far as the  
23   Sammons cases are concerned, they are claims that I have  
24   recused myself from because of my past involvement, so I  
25   don't know the details and haven't had any involvement.

26           But I guess the answer is to deal with people and their  
27   claims in a way that we have been making our best, but not  
28   always the best efforts in more recent years. The time  
29   delays I'm certainly not going to try and defend or justify,  
30   and we all acknowledge that time delays of much less than 8  
31   years are not acceptable to anybody.

32           But, yeah, the principles that our ADR process attempts  
33   to follow is, I think, a much better approach than, as you  
34   say, putting people to any unreasonable test.

1           And I was reflecting last night on, you referred then to  
2 Mr White and Mr Wiffin and the Sammons sisters all feeling  
3 that they were disbelieved, and I'm the last person to  
4 question how they feel then or now but I really challenge  
5 that assumption that we, and not the Ministry but myself and  
6 the team that I have worked with at still work with, take  
7 that position. We listened to people's accounts of their  
8 experiences, I believe, without judgement, and I suspect, in  
9 the same way as Ms Cooper or Ms Hill or any of their  
10 colleagues will listen to their clients as they come into  
11 their office and will listen to their story without  
12 judgement. But then they'll also access their records to, I  
13 guess, determine if a client says "I was in Hokio", then  
14 they will want to see the records to confirm that that's the  
15 case to be able to give advice to their client as to the  
16 best approach or, "If you said you're in Hokio, the records  
17 don't reflect that, could you be confused? Was it somewhere  
18 else?"

19           So, they are, I would have thought, in a very similar  
20 situation to us. They are listening non-judgementally and  
21 then carrying out - I don't think any person wouldn't accept  
22 they are reasonable checks to provide their client with the  
23 best possible advice, and I think in the same way as we  
24 would carry out some checks out of fairness to the claimant  
25 and to other claimants.

26           So, I accept I may have diverted somewhat from the  
27 original question but, yeah, my answer, I guess again, is a  
28 process that is certainly similar to the ADR process that we  
29 work in now and that's not to say, of course, that that  
30 can't be improved in perhaps any number of ways but perhaps  
31 the fundamentals are there.

32 Q. Just if I can clarify very quickly because we have tended to  
33 merge unrepresented claims and the filed claims and unfiled  
34 claims, so if I can use that as the shorthand.

1           So, yesterday we did clarify that there was a two-step  
2 process particularly when there were serious allegations  
3 such as sexual abuse.

4           If you take an unrepresented, unfiled, claim can you just  
5 talk us through what accepting that at face value looks like  
6 and what are the basic checks or process that that goes  
7 through before we turn to the filed claims?

8 A. Well, they're both dealt with the same, so there's no  
9 distinction in the way we deal with a claim or assess a  
10 claim. There is no distinction between one that is filed in  
11 court or that is legally represented but not filed and those  
12 that come to us correctly. So, there is no distinction in  
13 the way they're dealt with, now anyway, and in recent years.

14 Q. So, when would that have changed because we're looking over  
15 a very long time period.

16 A. Sure. Well, the way in which, I guess, the facts, if you  
17 like, of a claim have been assessed has always been pretty  
18 much the same, despite the way the claim got to us. I  
19 think, as I said yesterday, in the first few years of the  
20 Historic Claims Team life claims were managed because many  
21 of them were filed and represented within Legal Services  
22 with input and advice and some factual and practice  
23 assessments from my team. But probably around 2013-2014,  
24 that situation reversed, and I guess we took the lead more,  
25 as there was a better embedded ADR process.

26           But the level of checks, of testing, didn't fundamentally  
27 change. What has changed more recently is the process that  
28 was introduced in late 2018 and which my colleague, I'm  
29 sure, will talk about later. And that did introduce a  
30 different type of assessment but, again, that type, that  
31 form of assessment applies to all claims, regardless of how  
32 that claim reaches us.

33 Q. So, if we just look at the unfiled claims, they can come to  
34 you either represented or unrepresented?

35 A. That's right.

1 Q. And you're advising that both of those, irrespective in the  
2 unfiled claims, are assessed, evaluated, dealt with in the  
3 same way?

4 A. That's right.

5 Q. And then in the filed claims area, I assume because of the  
6 court aspect there is more involvement, discussion, with  
7 legal and Crown Law?

8 A. Now, under the new process, there's, as far as I'm aware,  
9 and again I might - Ms Hrstich-Meyer might be able to  
10 correct me, but there is negligible, if any, involvement  
11 from Crown Law.

12 And just recently I've been involved in overseeing a  
13 number of settlement offers for claims that are filed. Once  
14 the assessment has been completed and settlement payments  
15 approved, then those offers go out directly from the  
16 Ministry, rather than via Crown Law as would have been the  
17 case some years back.

18 The involvement of our in-house legal team is restricted  
19 only to considering issues such as BORA breaches, false  
20 imprisonment, those kinds of, as we discussed yesterday,  
21 slightly more head scratching legal issues. But, if you  
22 like, if there is any such thing as an average claim, and  
23 there isn't, then that wouldn't necessarily involve any  
24 input from the Legal Team.

25 Q. And is part of that because effectively there is that cohort  
26 of cases called the DSW Protocol Group that are parked in  
27 the Court while the ADR process, sort of, works?

28 A. I'm not even sure if that cohort still sits in the court, to  
29 be honest.

30 Q. The answer is, yes, it does. So, turning then to the  
31 litigated cases, the filed cases. You mentioned yesterday  
32 you had read the Aaron Smale article and I just want to read  
33 an excerpt prior to discussing the White trial because this  
34 is a perception from an individual who has done a lot of

1 research. You will accept it or not, but it is a perception  
2 that I think we need to put to you.

3 A. Mm-Mmm.

4 Q. So, he has said, "The legal strategy that Crown Law deployed  
5 in the White trial was directly related to the allegations  
6 that surfaced in the Lake Alice claims. One of the options  
7 laid out by officials during the Lake Alice litigation was  
8 to use all available technical legal defences, i.e. never  
9 mind morality, just win however you can. That option was  
10 likely chosen as a tactic in the White trial because a loss  
11 in that case would mean the courts would independently  
12 decide the penalty, something the Crown was desperate to  
13 avoid. Another option was listed, that the Crown goes to  
14 litigation but waives the right to use technical defences.  
15 This option was not taken."

16 Now, I know that you have said, as did Mr MacPherson,  
17 that MSD's preference was not to go to trial and there were  
18 attempts to settle with the White plaintiffs beforehand, and  
19 I think you confirmed that you had read Mr Earl White's  
20 brief of evidence?

21 A. I have and heard his evidence at this hearing, yes.

22 Q. Because he goes very carefully through the process and the  
23 steps that both parties took in terms of settlement and  
24 rather than reading a lot of paragraphs to you, if I may be  
25 permitted to just read a couple first and then go through  
26 the actual timeframes of those settlement offers and some of  
27 the communications, just to put it in context, in fairness  
28 to you.

29 So, at paragraph 72 of the brief he talks about his  
30 lawyer Cooper Legal on the 12th of July 2001 followed up a  
31 third time by letter dated 23 August 2001 again requesting  
32 alternative dispute resolution.

33 So, is it your - I know you weren't there in 2001, so are  
34 you aware that there were several requests by the White

1 plaintiffs through their lawyer to try and go through the  
2 ADR process at that time, rather than litigate?

3 A. The only awareness I have of those attempts are from  
4 Mr White's evidence and I'm sure I will have seen other  
5 documents over the years that perhaps paint a similar  
6 picture. But, yes, not being there I can't comment one way  
7 or the other. I have no reason to question Mr White's  
8 account.

9 Q. And so, you may not also be aware of the actual details of  
10 what occurred in terms of the letters. Have you had an  
11 opportunity to look at the correspondence subsequently?

12 A. Between the parties?

13 Q. Between the parties.

14 A. I will have looked at some of it, but I certainly wouldn't  
15 say that I have a detailed knowledge at all, yep.

16 Q. Would you have an awareness that in 2002, November, there  
17 was an offer made by the White brothers to the Crown through  
18 their lawyer to settle for \$35,000 plus legal costs, which  
19 at that stage was \$10,000? So, that was the initial offer  
20 to settle in 2002?

21 A. I know that there were various offers made both by Mr White  
22 and offers made by the Ministry. That sounds familiar but,  
23 again, I don't have the dates and amounts of the various  
24 offers that were made in my head.

25 Q. And you were involved, in 2011, when the actual settlement  
26 was made, and you will be aware that it settled at \$35,000?  
27 So, 12 years later it settled for almost the same amount as  
28 offered in 2002?

29 A. Well, I don't know that you can fairly use the word  
30 "settled" because -

31 Q. Ex gratia payment?

32 A. Yeah. And, just a slight correction, I think it was said on  
33 Tuesday that Mr White, and I don't mean to be pedantic but  
34 just as a matter of record, Mr White received \$25,000 and  
35 \$25,000 towards Legal Aid, not \$10,000. Mr Paul White

1 received \$10,000 ex gratia payment and a \$10,000  
2 contribution to his Legal Aid debt.

3 Q. Certainly at paragraph 28, Mr White records that he got  
4 \$25,000 and he thought \$10,000 went to his lawyer?

5 A. I accept that, it's just a small point.

6 Q. So, given that there was \$5,000 effectively difference  
7 between 2001 and 2011, and Mr White has described those  
8 12 years as being brutal and a nightmare. If one is looking  
9 at that duty of care and morality and doing no further harm,  
10 if it were your brother, somebody that you cared about and  
11 you stood back and said, "Look at this process, \$5,000 to go  
12 through all of that over that very long period", what, in  
13 terms of human compassion, would you say about that?

14 A. I think any reasonable person, whether they had any level of  
15 compassion or not, would think in hindsight that that is  
16 ridiculous, and I don't think any of us would disagree.

17 Q. And you said in your evidence that Mr Wiffin's case is one  
18 that particularly has disquieted you over the years. Would  
19 you say the same about the White case, particularly Mr Earl  
20 White's case?

21 A. I'm not sure that there's much of a distinction between Earl  
22 or Paul because they went through obviously very similar  
23 circumstances and delays. But, yes, yes, I - and there  
24 seemed to me to be some differences between the cases but,  
25 yes, in hindsight, any other reasonable option would seem  
26 reasonable.

27 I guess what I'm saying in general terms is that, I  
28 personally am not trying to justify or defend the approach  
29 that was taken in White.

30 Q. And if we look at paragraph 90, you were involved in 2006?

31 A. Sorry?

32 Q. You were involved in the White case in 2006?

33 A. That would have been the year probably later in 2006 that I  
34 became involved, yes.

1 Q. Paragraph 90 talks about the 27th of October, so I don't  
2 know whether you would have been there at that stage but  
3 it's talking about the possibility of the government looking  
4 at other options for historical claims and the letter says,  
5 "Within that context, it is difficult to understand what is  
6 hoped to be achieved by forcing Earl and Paul White to  
7 litigate their cases. If government is intending on  
8 embarking on an out of court process for resolving claims of  
9 this claimant group the relevance of establishing some legal  
10 precedent appears to be fairly limited".

11 So, are you aware of why at that stage because the trial  
12 was not until 2007, MSD and Crown Law didn't stand back and  
13 say we're actually just about to implement an alternative  
14 out of Court process which I think was due, the decision was  
15 due in April 2007? Was any regard paid to at that point  
16 saying, "Let's stop this process, allow these plaintiffs to  
17 join all of the other claimants in this process that we're  
18 just about to rollout"?

19 A. I simply don't know whether any regard or what regard might  
20 have been given to that. And if it was, I guess a possible  
21 scenario is that the ADR process, as I suppose it was taking  
22 shape, the details of which weren't necessarily known at  
23 that stage and so, how that might have impacted on or  
24 benefitted the Whites, I guess perhaps was unknown.

25 It may have also been considered that, given presumably  
26 the attempts to settle by that stage hadn't been successful,  
27 then I guess a question may have been, well, if that - if  
28 those efforts weren't successful, would any ADR process, the  
29 details of which haven't been agreed, would that be any more  
30 successful? They are assumptions and speculations on my  
31 part.

32 Q. If we look at MSD ending in 2007, and this is a March 2006  
33 report to the Associate Minister. We're going to look at  
34 paper bundles of this.

1           Mr Young, if I can have you turn to page 4, paragraph 7.  
2           If we just call that out. This just talks about the length  
3           and complexity that a trial like the White carries,  
4           significant expense, legal and media risk. And then if we  
5           go to the next page, carrying on with that paragraph, it  
6           talks about both the Crown and Cooper Legal will be treating  
7           these cases as a test case to argue legal and factual points  
8           that will be relevant to many of the other CYF historic  
9           residential claims, and working closely with Crown Law to  
10          progress this claim; that's correct? There was a very close  
11          working relationship between MSD and Crown Law in relation  
12          to this litigation?

13        A. Yes, that's certainly my understanding.

14        Q. So, if we go down to page 7, paragraph 23. I don't know if  
15          you were involved in it but there was quite a lot of  
16          international research done by MSD around the same time, in  
17          terms of what was happening with other jurisdictions?

18        A. That's right.

19        Q. And the short point in this particular paragraph is halfway  
20          down, "In Victoria the State Attorney-General has issued  
21          model litigant rules which inform the Department of Human  
22          Services response to claims - to avoid litigation where  
23          possible"?

24          And there is another paper around the same time that the  
25          Scottish Inquiry had made similar recommendations.

26          So, looking at what was happening internationally and  
27          model litigant rules and recognition that litigation really  
28          was not the best way to progress these cases, was again  
29          there any consideration by MSD, particularly as you were  
30          embarking on a new process to say halt, this is not  
31          actually, it's not good for the plaintiff, we have a real  
32          human being who is the face of this test case, do we even  
33          adjourn the litigation until we see what happens with the  
34          ADR process to give them an opportunity to have choices?

1 A. I'm really not sure that I can add much more to my previous  
2 answer. I just don't know if those kinds of considerations  
3 were taken. And if they were, by whom. Again, it seems a  
4 reasonable proposition but it would appear that at some  
5 point, given that the attempts to settle had been  
6 unsuccessful, that there was some kind of decision that  
7 litigation was the next step but the detailed reasons and  
8 rationale for that is something that I just can't speak to.

9 Similarly, whether or not, as you say, the prospect of an  
10 ADR process possibly being more successful for the Whites,  
11 whether that was something that was actively considered.

12 Q. And in the same document, just before we leave it, at  
13 page 8, paragraph 28, again the short proposition is it  
14 says, "MSD is not in a position to litigate 500 individual  
15 claims. There will be significant fiscal and resource costs  
16 arising from such litigation. Added to this, the potential  
17 compensatory and exemplary damages that may be awarded, it  
18 could be considerable. Those plaintiffs are legally aided  
19 and even if the Department were to be successful in  
20 defending some or all of the claims, it is unlikely that any  
21 award for costs would be made against the plaintiffs,  
22 therefore even a claim that is successfully defended by the  
23 Crown will incur significant costs".

24 So, just going back to our conversation yesterday, you've  
25 got 500 potential claims looking at MSD having to both  
26 manage and the Crown fund. So, there really be major fiscal  
27 resource considerations at this point in time leading up to  
28 the White trial?

29 A. That's clear in that statement. I think I said yesterday,  
30 one would expect that those kinds of considerations, yeah,  
31 would and should have been considered in some way, so that  
32 there was some realisation of potential costs.

33 Q. Because we took Mr MacPherson through several documents and  
34 I don't want to repeat the exercise but he, just for the  
35 record, looked at CRL22719 and MSD ending in 2030, and again

1 they talked about the importance of the White trial setting  
2 a benchmark in terms of all of the other cases that were  
3 going to come through and recorded that Crown Law  
4 instructions, based on Crown Law advice, are to pursue the  
5 case to trial, even though there is a risk the plaintiffs  
6 will succeed in some of their claims. "Going to trial is  
7 essential to ensure that the allegations are properly tested  
8 and the result in White will assist the government in making  
9 decisions on how to deal with those other claims as it  
10 should set parameters for dealing with both liability and  
11 quantum in future cases".

12 So, from your involvement, can you confirm that these  
13 were the drivers in relation to the White case, in terms of  
14 setting legal precedent; would you agree with that? Testing  
15 parameters, legal principles?

16 A. No, I can't confirm that beyond what is in the documents  
17 because they are, I guess, considerations and decisions that  
18 weren't mine.

19 Q. Whose would they have been within MSD?

20 A. I guess, they would have been a combination of the Legal  
21 Services team, the relevant Deputy Chief Executive and I'm  
22 reasonably confident, I think, that ultimately the  
23 Chief Executive was involved in, if not being aware of and  
24 understanding the applications, if you like, of the White  
25 case going to trial, whether or not he actively approved  
26 that approach or not, I just simply don't know but it would  
27 have been in that tier, if you like, of people that were  
28 involved in that decision-making.

29 And, yeah, so that's, as I said, not something that I was  
30 part of decision-making around, certainly around the legal  
31 basis on which to pursue litigation.

32 Q. And if we look at MSC ending in 320, and this might help  
33 orient us to when you became involved. It is a document  
34 dated 30 August 2006, it's a Historical Claims Steering  
35 Group meeting, minutes of 30 August, and you will see that

1 you are one of the attendees third from the bottom. I will  
2 wait for you to get the document. It is on the screen if  
3 that's helpful. Page 1, paragraph 3, clearly there is a  
4 discussion at this point, and this confirms that alternative  
5 approaches would not be ready before the Court dates have  
6 been set; and again, we're talking about the White case  
7 here. And it talks about two questions need to be answered,  
8 if you could read those out, please?

9 A. Just the bullet points?

10 Q. Just the bullet points.

11 A. "Should we settle at any cost rather than litigate? If we  
12 litigate, how strong should our approach be, i.e. how hard  
13 should we push legal points?".

14 Q. And if we go to page 1, paragraph 5, and then if you can  
15 read that and then we'll go over the page because it  
16 continues there.

17 A. "Three key keys would underpin any principles:

18 - are the claims valid?

19 - if valid is the settlement a fair amount?

20 - would the settlement establish an adverse precedent?".

21 Q. So, from that meeting, there was a clear discussion about  
22 what the approach to White could or should be and what the  
23 options were. Do you recall what the decisions were made in  
24 relation to these questions and principles that were raised?

25 **MS ALDRED:** I'm sorry, Madam Chair, the point I would  
26 just like to make is, firstly, if it could be noted  
27 for the record that these are drafts minutes. That's  
28 clear from the form.

29 But, more significantly, my friend, Ms Janes, has  
30 suggested that these are clearly about the White case, but  
31 it seems to me that it's fairly clear that, in fact, the  
32 minutes relate to approximately 100 lodged claims and it  
33 seems to be a more general discussion than that. So, I'm  
34 simply -

1     **CHAIR:** You want the factual basis clearly  
2 established?

3     **MS ALDRED:** Yes. I just don't think that we can  
4 assume there's anything, on the face of this, that  
5 invites an assumption that this is specifically about  
6 the approach to White.

7     **CHAIR:** Thank you.

8     **MS JANES:** I am happy to rephrase.

9     **CHAIR:** Thank you, Ms Janes.

10    **MS JANES:**

11 Q. It's talking about 100 filed claims, one assumes White is  
12 one of those 100 filed claims and with the date being August  
13 2006 and White being scheduled for 2007, would you accept  
14 that White would be one of the claims that was being  
15 considered in this particular discussion?

16 A. It could have been. It could have been one of those 100,  
17 it's likely it probably was. Whether that specific claim or  
18 claims were discussed in the context of this meeting, I  
19 simply - well, firstly, I regrettably don't have a memory  
20 going back that far and the minutes, so far as I can see,  
21 don't specifically reference White. So, yeah, it's  
22 difficult to know whether, yep, that -

23 Q. It is the general proposition actually. MSD asked itself  
24 these questions about filed claims. So, irrespective of  
25 which filed claim, it was making philosophical, strategic  
26 decisions, moral decisions, about how it was going to  
27 conduct these filed claims.

28       So, if we take -

29    **CHAIR:** Just let Mr Young answer that question.

30 A. I'm not sure that it was a question.

31    **CHAIR:** Do you accept that statement?

32 A. Yes. I mean, clearly, we were giving consideration to a  
33 range of issues relating to how those claims might be  
34 managed.

35    **MS JANES:**

1 Q. And you were asking yourselves, sort of, fairly fundamental  
2 questions about do you settle at any cost, rather than  
3 litigate. Do you recall what the decision on that was?

4 A. No, I certainly don't. As I said, unfortunately my memory  
5 doesn't go back quite that far. And it's possible, I  
6 suspect, that those questions were never answered  
7 specifically, that a specific decision didn't arise from  
8 each of those questions, that they were merely - by saying  
9 that, I'm not minimising them but they were considerations,  
10 thoughts, principles that needed to be considered but  
11 whether they got to any clear decision about, yes, we will  
12 litigate at any cost or not, yeah, I don't know and don't  
13 recall. I suspect, I suspect not.

14 Q. Given that you had 100 filed claims at that point, you were  
15 looking at 500 filed claims, would you accept it actually  
16 was pretty fundamental to make decisions at this point in  
17 time on those particular questions? For example, if we  
18 litigate, how strong should our approach be?

19 A. Well, I think what some of - not necessarily this document  
20 but what some of this demonstrates is, and the other work  
21 that was beginning to take place around this time, is that  
22 we had a very clear understanding that litigation,  
23 notwithstanding the White claims, that litigation wasn't  
24 tenable for a whole variety of reasons. And that's the  
25 exact reason why we embarked on a process of thinking about  
26 and developing an alternative process because we clearly  
27 acknowledged, whether that's documented or not, that  
28 litigation wasn't suitable, not just because it was going to  
29 be traumatic for clients, costly and take an inordinate  
30 amount of time, so there needed to be an alternative, and  
31 that's exactly what we were thinking about and working at  
32 doing and subsequently did.

33 So, I think some of those questions are answered, as I  
34 said, not necessarily by documented decisions but by the

1 fact that we did develop and implement an alternative  
2 resolution process.

3 In the meantime though, White, for better or worse, was  
4 proceeding and that, I guess, reflects that to some extent,  
5 I suppose certainly at that stage there were also parallel  
6 processes. And, as we know, the White case was a perfect  
7 example of the fact that litigation doesn't work and doesn't  
8 achieve the outcomes that you would hope for, for the  
9 claimant.

10 Q. And if it - one were taking three principles, the  
11 underpinning principles that are outlined in this particular  
12 document, and we've just - accepting that it was a broader  
13 question across the 100 claims. But if we take each of  
14 those questions, are the claims valid? So, would your  
15 evidence be that if there was consideration that one of  
16 these 100 claims was valid, that would be a consideration  
17 for not proceeding with litigation and settling  
18 alternatively, if possible

19 A. Yes, and I guess that goes to does a claim have merit? So,  
20 yes, that's - and, again, I guess even just using the White  
21 example, they were considered to have merit, presumably  
22 otherwise a settlement offer wouldn't have been made. So,  
23 yeah, that was one of the fundamental basis of how we have  
24 dealt with claims that if they are valid, if they have  
25 merit, then we would do what we could to try and resolve  
26 them.

27 Q. And the second question, is the settlement a fair amount?  
28 And we've seen that the settlement was very close from what  
29 was offered with the ex gratia payment. So, it would seem  
30 to establish a tick on that particular principle as well?

31 A. Well, it doesn't necessarily answer the question, is it a  
32 fair amount because that's a whole other -

33 Q. But in terms of what quantum that was being offered by MSD?

34 A. Yes, I guess, again in the - yes.

1 Q. And on the third one, would it establish an adverse  
2 precedent? I take it, that was not outside the realms of  
3 payments for sexual and physical abuse?

4 A. I'm sorry, I'm not sure that I follow that.

5 Q. The White, eventually when it went to trial, it was proven  
6 that there were 13 incidents of sexual abuse and the  
7 physical abuse was also substantiated against three of the  
8 perpetrators. So, would \$25,000 have been within the realms  
9 of the category that type of abuse would fall within?

10 A. Yes.

11 Q. So, no adverse precedent?

12 A. Yes, that was our determination at the time, yes.

13 Q. Just a question that I wanted to ask you. In a different  
14 document which we don't need to go to unless it would be  
15 helpful. Alex, perhaps if you could find MSD 2030. It's a  
16 very long document and it has a large number of points in  
17 it, so what I am looking at really, is page 10, bullet point  
18 3.

19 If you've got it, that would be good. So, as part of  
20 preparing for White, there was evidence - so White and the  
21 other filed claims but this one is specific to the White  
22 case. So, this is the document that talks about there was  
23 no evidence of systemic or endemic failure. So, I can take  
24 you to that if you want but that's not the topic of the  
25 conversation.

26 But if that's of use for the record, it's page 2, under  
27 "Findings", paragraph 1, and also page 10, just for the  
28 transcript.

29 It talks about witness briefings, collecting - "evidence  
30 being collected on individual claims, witness briefings and  
31 research are being undertaken as part of preparation for the  
32 W case. Witnesses have provided extensive recollections of  
33 their work in state facilities and programmes, and these  
34 bear out the conclusions that are suggested by the above".  
35 The above meaning there's no evidence of systemic or endemic

1 failure which is the paragraph under - we can also see that  
2 above, but you can't quite see?

3 A. I have the document, thank you.

4 Q. Excellent, thank you. As you will recall from the White  
5 trial, there was a belief that the White plaintiffs and the  
6 similar fact witnesses were colluding; do you recall that  
7 being part of the findings by the Judge?

8 A. He found that they weren't colluding, I think is -

9 Q. They weren't colluding?

10 A. Yes.

11 Q. So, there was a very firm finding that he believed the  
12 evidence of the similar fact witnesses and, in fact,  
13 preferred it to that of the people, the caregivers, the  
14 staff?

15 A. That's correct.

16 Q. So, I guess the broader question in terms of claims, whether  
17 they be filed or unfiled claims, is that this sounds very  
18 reassuring, in that as you go around your witness briefing  
19 you're hearing that the practices of the day were fine,  
20 these particular perpetrators were not known to have been  
21 abusing residents. Given that the claimants have this sense  
22 of starting from a position of disbelief, would you comment  
23 about whether there may, on the other side, be an  
24 unconscious propensity to accept the evidence of staff and  
25 caregivers when they give you reassuring evidence and to  
26 prefer that over the claimants' evidence?

27 A. Firstly, I'm not sure that the statement there in that third  
28 bullet point does entirely reassure us that the  
29 recollections of ex-staff are contrary to the experiences of  
30 claimants because I'm sure elsewhere it suggests that in  
31 fact some of those recollections support claimants.

32 Again, I guess all I can say is, and I talked about it  
33 yesterday perhaps a little, is that the team that I work  
34 with I think take a very objective approach and view to the  
35 work of assessing a claim. And that begins with the account

1 that they hear, in many instances personally, from the  
2 claimant.

3 The other reality also is that, with some notable  
4 exceptions, for those claims that were heading towards trial  
5 and where witness briefings were being carried out, the  
6 extent to which other staff members, caregivers and the like  
7 were spoken to or their accounts taken were very, very  
8 minimal.

9 So, in reality, we're hearing the voice of the claimants  
10 much more so than the voice of staff or caregivers.

11 Q. And just before we leave this document, a very quick point  
12 on page 24, paragraph 3, the highlighted one. Paragraph 2  
13 says, we are looking at cost implications both for MSD and  
14 cross-government of a change to the Crown's current approach  
15 in managing historical claims. At present, this is a cost  
16 in several areas, including the more than \$2 million that  
17 has been paid in Legal Aid to claimants' lawyers."

18 But the paragraph we pulled out:

19 "It is likely that the Historical Claims Unit and budgets  
20 for spending will continue to be required. Currently costed  
21 at \$3 million". It talks about funding for this expiring at  
22 the end of 2006/07. "A bid to continue has been lodged in  
23 the budget process".

24 I really wanted to touch on that because it just raised a  
25 question about whether there was any budgetary imperative?  
26 That there was this \$3 million in historical litigation  
27 budget that was about to expire. Would that have played any  
28 part in a decision to proceed with the White trial?

29 A. I simply don't know. As we know, the legal costs in that  
30 were huge. So, I guess, in budgetary terms, it simply would  
31 have been cheaper to have settled almost at any cost than to  
32 proceed to trial.

33 But, yes, I simply don't know what consideration, if any,  
34 what financial consideration, if any, was given to whether  
35 that played any part in any decisions about the White trial.

1 Q. Because there was definitely a sense, and I can take you to  
2 the documents if necessary, that if the Crown ended up in a  
3 situation where a number of claims were successfully  
4 litigated, there would be increased expectations from  
5 claimants? There would be a larger number of files claimed  
6 and, therefore, there would be major fiscal consequences?  
7 As a proposition, I take it, you would -

8 A. Yes, and in many ways, I mean, again, this goes, I suppose,  
9 to my personal view, to the extent that I can express that,  
10 as opposed to perhaps a Ministry view. But, in many case,  
11 it would have been beneficial, not just obviously to the  
12 Whites, if the Court had made an award of damages because,  
13 you know, I for one am not concerned about Ministry or  
14 government budgets but if the Court had been able to do  
15 that, then it would have given us all some kind of baseline,  
16 some kind of precedent, upon which, you know, subsequent  
17 claims could be settled.

18 And, yeah, I think it is unfortunate in many ways. I  
19 know that might sound a bit averse, perhaps, but - and,  
20 again, whether that was one of the considerations in  
21 continuing the litigation, I just don't know. But quite  
22 apart from any legal tests or legal precedents that might  
23 have come from it, I believe it would have been helpful to  
24 have had the Court make a determination about an award.

25 Q. And are you aware of any discussions that you either were  
26 involved in or heard about where consideration was given to  
27 letting it proceed on the merits and not using the  
28 Limitation Act, so that it could be fairly tested and the  
29 Court be allowed to at least determine some quantum?

30 A. I honestly don't. Look, I would, again making some  
31 assumptions, imagine that, and I am sure I will have been  
32 part of some discussions where Limitation Act or ACC bars  
33 were discussed or at least raised in some way, but the  
34 extent to which they, yeah, active consideration was given  
35 to not relying on those defences. Although does the Crown

1 not have an option, as I understood it, again I'm not a  
2 lawyer, there's discretion not to rely on one but the other  
3 has to be pleaded?

4 Q. They have an option to rely on the Limitation Act, but the  
5 ACC bar -

6 A. And, again I don't mean anything dismissive by this, and  
7 it's one of the other reasons why litigation doesn't work,  
8 is that even if the limitation bar and the ACC bar were put  
9 aside for the Whites, the Courts also grappled with that  
10 causation issue and failed, to put it bluntly, on that.  
11 And, again, my understanding of the law, is that to succeed  
12 in damages, the person needs to be able to create that link  
13 between the abuse they suffered and the harm that they have  
14 suffered, and are still suffering, as a result of that. And  
15 if you can't do that, then you may not get damages.

16 I think that's inherently unfair and, you know, clearly  
17 that is in addition obviously to those other legal bars. As  
18 I understand it, it's certainly one of the reasons  
19 unfortunately that White failed. So, yeah, I guess that's  
20 just, yeah, some context.

21 Q. And if we could look at CRL16524 because, just in this sort  
22 of budget discussion and what was being thought of in the  
23 Crown Agencies at the time, if we can go to page 3, please.  
24 It talks about potential liability but it's actually  
25 paragraph 16. So, the face value of the claims is  
26 \$29 million for 61 plaintiffs. But the question I want to  
27 ask, as we read the paragraph if you can have a think about  
28 the numbers. It says, "However, even if we assume  
29 relatively modest damages awards across the board of, say,  
30 \$50,000 to \$80,000 per plaintiff (and in reality, some will  
31 be much higher and some less, or nothing)" and it talks  
32 about \$25-40 million.

33 Just to give you a bit of context because you weren't  
34 there at the time and so it may not be totally on your radar  
35 but prior to White, the two previous cases were something

1 called W v Attorney-General and S v Attorney-General. And  
2 the damages in those were around the \$140,000-150,000 plus  
3 costs of at least that amount or slightly more,

4 So, in the context of what the Court had previously  
5 awarded in these cases.

6 But, I guess the question, where would this modest  
7 damages figure of \$50,000-\$80,000 per plaintiff have come  
8 from? Would that have come from MSD? Who would have  
9 inputted that into the thinking process?

10 A. I simply don't know but given that this is Crown Law  
11 advisers because it's a Crown Law document, the number could  
12 have come from Crown Law's thinking.

13 Whether there had been any previous discussions between  
14 Crown Law and Jacinda or anybody else in the Legal Team, I  
15 don't know but - yeah, I don't know is the short answer.

16 Q. I can find it over the break if I need to, but do you  
17 remember writing a paper at some point, and I can't  
18 immediately recollect the date but it might have been  
19 slightly after or around this time, on comparator damages?  
20 It looks at Lake Alice, Hepatitis B and different sectors.

21 A. I recall writing a memo to my then manager of that sort some  
22 years later. If I had done something similar around this  
23 period of time, I'm not saying I didn't, but I don't recall  
24 but I certainly recall one possibly 2014 or thereabouts but,  
25 yeah, somewhat later.

26 Q. My recollection is it was later, but I wondered if you were  
27 aware of a similar exercise done around this time that might  
28 have led to those figures?

29 A. Not that I recall but, as I said, I can't say there wasn't  
30 but I don't recall one.

31 **MS JANES:** Madam Chair, should we take the break now?

32 **CHAIR:** Yes, I think that's appropriate. We will take  
33 15 minutes.

34

35

1           **Hearing adjourned from 11.25 a.m. until 12.00 p.m.**

2

3

4           **MS JANES:**

5 Q. If we can go back to the document we were looking at just  
6 prior to the break which is CRL16524 and if we can call out  
7 paragraph 6. Mr Young, could I please have you read through  
8 the highlighted passages slowly because I was told that I  
9 was reading too fast. Thank you.

10 A. Hopefully I haven't been. "As a preliminary point, it is  
11 unlikely that all the claims filed will go through all the  
12 litigation stages, and to trial. It is much more realistic  
13 that either:

14           6.1 Some will settle, within the litigation process, if  
15 investigations reveal that it is likely a Court would find  
16 the government liable.

17           6.2 Some plaintiffs may be refused leave to proceed under  
18 the Limitation Act or because their claim is barred by the  
19 Accident Compensation legislation (these matters considered  
20 in more detail below).

21           6.3 Some plaintiffs may give up along the way the process  
22 from filing to any hearing (even interlocutory) may take  
23 some years and some plaintiffs may be put off continuing if  
24 they see another plaintiff having to go through the  
25 litigation process, face cross-examination etc.

26           6.4 A small number of cases being progressed to hearings  
27 will provide a framework may assist in others being settled  
28 or discontinued.

29           6.4.1 Factual findings of unacceptable physical violence  
30 or of sexual abuse in a particular institution or against a  
31 named perpetrator would likely mean that other similar (time  
32 period, institution and/or contact with perpetrator) cases  
33 can be settled.

34           6.4.2 Findings to the contrary (a number of plaintiffs  
35 lose) may mean that future plaintiffs discontinue."

1 Q. Just a few things that arise out of those particular  
2 paragraphs. It was clearly understood by both Crown by MSD  
3 that the trial process can be so tortuous, if I can use that  
4 word, that some plaintiffs will give up along the way?

5 A. It contemplated, presumably for a variety of reasons, that  
6 people may give up, yes.

7 Q. And contemplated also that watching plaintiffs be subjected  
8 to cross-examination and the whole litigation process could  
9 dissuade them from continuing and they may be persuaded to  
10 discontinue their claims?

11 A. That's -

12 Q. Understood at that time?

13 A. That's as Crown Law stated there, yes.

14 Q. And we've heard the evidence of Mr Keith Wiffin, it's at  
15 page 26 of his transcript, where he says, "The White  
16 decision in November 2007 seen the Crown approach had  
17 brought an end to the White case may equally apply to his  
18 case and many others which in all possibility was why the  
19 Crown spent so much time and so much money on the case".

20 At page 27 he went on to say the White outcome weighed  
21 heavily on him, he did not want his case thrown out on the  
22 Limitation Act. He was worried about facing trial,  
23 particularly if the Crown would not be held accountable  
24 because of the Limitation Act. And it looked like the most  
25 likely reason he would lose and that would have  
26 ramifications for others.

27 And we do know that he did discontinue his claim. So,  
28 very much the knowledge of what the trial process could  
29 likely do to a plaintiff we have seen borne out in a real  
30 live human case as being the outcome; you'd accept that?

31 A. Certainly, I would accept what Mr Wiffin has said, yes.

32 Q. And in a slightly later timeframe but in document MSC490,  
33 that is an Official Information Act request from Mr Mike  
34 Wesley-Smith and he's asked questions about how many claims  
35 are filed, but how many have been discontinued.

1           And at page 4, paragraph 9, so this is MSD's response  
2 to - we've lost the document.

3     **CHAIR:** It is important to note the date, I think, of  
4 this letter.

5     **MS JANES:** Yes, 21 July 2015 but it talks about claims  
6 all the way up to that point.

7 Q. So, if we call out, it should be paragraph 9, "Between 1  
8 January 2004 and 31 December 2014, 518 claims have been  
9 filed, 184 finalised, 134 were settled out of Court", but  
10 the information relating to this discussion is that 45 were  
11 discontinued "as the claimant decided not to progress claim  
12 through the Court". So, a chilling effect on 45 claimants  
13 arising from the White decision for a number of reasons  
14 obviously?

15 A. Yes, yes, and I wouldn't want to speculate on what those  
16 reasons were for those 45 people.

17 Q. So, that's just really setting the framework for what is  
18 understood. And we saw a document about how emotionally  
19 distressing it is for claimants, and if needed I could take  
20 you to that document, but I would assume that you accept  
21 that it is emotionally distressing for a claimant to go  
22 through the court process?

23 A. It's emotionally distressing to be here, so yes for a  
24 claimant in a litigation process, absolutely.

25 Q. Thank you, we can skip that. So, just actually turning to  
26 the strategy and the mechanics of the White case, having  
27 sort of set that scene, if you like, leading up to it. Just  
28 going back to our discussion yesterday about the records  
29 particularly relating to Mr Ansell and his conviction.

30           In the Cooper Legal evidence at page 502, lines 13-14,  
31 they said, "If I can just point to that again in the White  
32 trial, Mr Ansell who sexually abused Earl, the Crown claimed  
33 legal privilege over his conviction information history".

34           Can you just outline why MSD or the Crown, Crown Law,  
35 whoever made that decision, determined it was appropriate to

1 claim privilege over conviction history which was clearly  
2 relevant to the case?

3 A. I simply have no idea, unless that conviction information  
4 was subject to any suppression order at the time, and I  
5 don't believe it was, then I would have thought that's  
6 publicly available information. But, no, I have no idea.

7 Q. So, in terms of Privacy Act requests which we also  
8 understood you and your team were responsible for, can you  
9 now say why that information was not provided and privilege  
10 was claimed instead?

11 A. I can't - as I said, I can't say why privilege was claimed.  
12 So far as privacy is concerned, that would depend on whether  
13 or not a request was made under the Act for information  
14 about Mr Ansell.

15 **CHAIR:** Can I just ask you, Mr Young, were you  
16 responsible for Privacy Act requests or, if not, who  
17 was?

18 A. I was, or my very small team was, not for Privacy Act  
19 requests across Child, Youth and Family but those that  
20 related to -

21 **CHAIR:** To historic claims?

22 A. Yes.

23 **CHAIR:** So, you were responsible?

24 A. Yes.

25 **CHAIR:** Thank you.

26 A. So, yeah, I don't recall that a specific Privacy Act request  
27 was made for the records of Mr Ansell. That's my  
28 recollection. Whether or not one was, I can't say at the  
29 moment.

30 **MS JANES:**

31 Q. Thank you. And if we turn to CRL ending in 26754, again  
32 this is a draft, 2 December 2002. It is a letter to Child,  
33 Youth and Family and it's from Crown Law. So, I'll let you  
34 actually look at the whole document.

1           At page 2 of paragraph 3, call that out, thanks. So,  
2 this goes back to yesterday, the knowledge in 1976 of the  
3 complaints about sexual abuse at Epuni at the time that  
4 Mr White was a resident there. Can you take that down,  
5 please?

6           If we look at paragraph 5, if I can have you read that?

7 A. "There is no direct or documentary evidence of which we are  
8 aware, save for the plaintiff's allegations, that tend to  
9 prove the plaintiff was sexually abused by Mr Ansell. Be  
10 that as it may, the circumstances are relatively compelling:  
11 the plaintiff attended the school at the same time as  
12 Mr Ansell who all but admitted to sexually abusing other  
13 boys in circumstances similar to those alleged by the  
14 plaintiff. In my opinion, it is likely that the plaintiff  
15 would be able to prove on the balance of probabilities that  
16 he did suffer the abuse that he alleges".

17 Q. So, as early as 2002, the opinion of Crown Law was that the  
18 allegations were likely to hold ground?

19 A. That's absolutely true, yes, based on that document, yes.

20 Q. If we go to page 2, paragraph 6, it says, "The school's  
21 investigation of the abuse seems unacceptable. While its  
22 staff acted on rumours of serious and criminal misconduct to  
23 the point of removing a child abuser from vulnerable  
24 children, its failure to inform the Police is inexcusable.  
25 The comment made by [       ] the of Kohitere that Mr Ansell  
26 seems to be getting away with it, is particularly  
27 concerning".

28           Just before we leave that document and quickly jump to  
29 another one, no let's go there, MSD 2374. So, just keeping  
30 in mind that Crown Law believes that how the school behaved  
31 was inexcusable, and further in the document it talks about  
32 the fact they didn't make further inquiry about other boys  
33 at the same time, which is what Earl White said, nobody ever  
34 contacted him. So, conduct in terms of lack of

1 investigation, unacceptable, not reporting to the Police,  
2 inexcusable.

3 If we can jump in this particular document to page 4  
4 under "Other relevant contextual information". This is a  
5 document, Mr Young, just orientating you, that you provided,  
6 the summary in relation to the TV3 The Nation?

7 A. Mm-Mmm.

8 Q. So, you've just provided a little bit of overview of  
9 response to historic claims. "Evidence that in some cases  
10 where disclosures of abuse were made the correct action was  
11 taken, staff were dismissed and referred to the Police for  
12 criminal investigation. Equally, it is without doubt that  
13 some disclosures of abuse will have been overlooked, not  
14 heard or acted on as they should have been".

15 If we move over the page and I'll have you read the next  
16 paragraph. Pull that paragraph out, thank you.

17 A. "The cases of Ansell and Tukupua at Hokio Beach School and  
18 McDonald at Holdsworth are examples of cases where when  
19 disclosures were made, the Police were advised, charges were  
20 laid and convictions were entered. Some of the examples  
21 above show that this was not always the case and practice  
22 was at best inconsistent".

23 So, just contrasting those documents, you've used the  
24 Ansell case as an example where disclosures were made and  
25 Police were advised. That doesn't seem to be correct  
26 according to Crown Law's understanding of the occurrence at  
27 the time?

28 A. That contrasts with that Crown Law 2002 document, yes. I  
29 would have relied on the records that we had at the time of  
30 me drafting this and, clearly, it was my understanding that  
31 the Police were advised of Ansell's offending. Whether that  
32 was by the Hokio School staff or not, I don't recall, but  
33 somehow the Police were advised, clearly since he was  
34 charged and convicted.

1 Q. I suppose, the general point is that government is reliant  
2 on the information that is being funnelled through agencies  
3 and up to them in terms of making policy decisions or  
4 government decisions; would you accept that?

5 A. Yes, Ministers can't make decisions - I suppose they can  
6 make decisions in isolation but, typically, they would rely  
7 on information and advice from officials.

8 Q. And it's important -

9 **MS ALDRED:** Excuse me, Madam Chair, just in that  
10 regard I think there's a point that needs to be  
11 appreciated in relation to this line of questioning,  
12 which is that, as Ms Janes did acknowledge at the  
13 outset, the letter from Crown Law that you were taken  
14 to was a draft. Now, if you look at that document  
15 carefully, you will see it appears to be a somewhat  
16 early draft. It appears to have contained information  
17 or given advice that, as Mr Young acknowledged, wasn't  
18 the same as his understanding. I don't know because I  
19 don't have the final copy of the letter but of course  
20 it's quite possible that there were some later  
21 revision of the information of the Crown Law advice.

22 So, I simply want to make that point and have the  
23 Commissioners appreciate that it's not entirely fair to have  
24 Mr Young assume that Crown Law's understanding, as it was  
25 finally encapsulated in whatever went out, is necessarily at  
26 odds with his own.

27 **CHAIR:** All right.

28 **MS JANES:** I take the point and Mr Young can, as he  
29 has given evidence to the best of his knowledge when  
30 he wrote this, that was the information.

31 **CHAIR:** Can I just ask Mr Young a question? Mr Young,  
32 were you aware at any time, whether through that draft  
33 document or any others, that Crown Law had provided  
34 advice to the Ministry of the matters referred to in

1 that draft, including whether or not Mr Ansell's  
2 convictions were reported to the Police?

3 A. Certainly, when I drafted this document in 2017, I wasn't  
4 aware of that earlier Crown Law letter and any advice that  
5 they may have provided to the Ministry about Mr Ansell.

6 **CHAIR:** Did you make any checks with legal when - when  
7 did you get your information for this?

8 A. I would have got it from the records that we had collected  
9 over the years about Mr Ansell, including his staff file  
10 which, as I recall, held information about the fact that  
11 disclosures had been made about him abusing boys and the  
12 fact that he was subsequently convicted, charged and  
13 convicted.

14 **MS JANES:** If I may ask a follow-up question?

15 **CHAIR:** Yes, please.

16 **MS JANES:**

17 Q. When Crown Law drafts a letter like this knowing that it's  
18 important to be accurate, and this is a draft, but I am  
19 assuming MSD as the repository of the information, you've  
20 got your TRIM and your EDRMS databases, would it be standard  
21 practice that they would check with you what information you  
22 held about particular named alleged perpetrators?

23 A. Would Crown Law check with us?

24 Q. Yes.

25 A. They might but they might not. Yeah, I - and if they did,  
26 any query or question would go through our Legal Team who  
27 may carry out a search on their own or they may also refer  
28 that to me or somebody in the Historic Claims Team or the  
29 administration team who would actually carry out a document  
30 search.

31 Q. I suppose, what we're trying to clarify is, what is the  
32 interface between the organisations to ensure that accurate  
33 information is both captured internally but then escalated  
34 to your reports to a Minister. So, this information went to  
35 the Minister, would have been reassuring. So, whether it's

1 correct or not we may not be able to determine here but  
2 there is clearly a disparity between what Crown Law believed  
3 the case to be and what you believed the case to be. In  
4 terms of advice to Ministers, what internal checks are  
5 undertaken to ensure consistency of information and accurate  
6 information?

7 A. I can't say what - in every instance what kind of internal  
8 checks might be made to ensure information is accurate. But  
9 without wanting to minimise the importance of this  
10 particular 2017 report, it wasn't a report seeking advice  
11 from or seeking decision of the Minister. It was, I was  
12 going to say merely, that sounds like it's diminishing the  
13 importance of it, but its purpose was to provide the  
14 Minister with some information in relation to some media  
15 events. So, I guess the important point is that those  
16 particular individuals are examples where subsequent to  
17 disclosures of abuse being made, they were charged and  
18 convicted. It clearly doesn't go into the detail of how  
19 that process evolved and the steps that were taken in that.  
20 It's, by nature, a reasonably brief commentary, if you like,  
21 on what happened. And the Police were advised in those  
22 instances; by whom it doesn't say. So, yeah, I don't think  
23 it proposes to be a detailed account of the specifics of  
24 each individual case.

25 And, I guess, I'm distinguishing the nature of that kind  
26 of report from a more policy driven report to a Minister  
27 that might seek approval or decisions to be made.

28 Q. I suppose, the point is because in another document, which  
29 we can go to, on a similar matter, it talks about the boys  
30 who the Department knew had been abused appear to have  
31 received the appropriate help and support afterwards. And  
32 we've certainly heard, and it was upheld by the High Court,  
33 that the boys at the time in the school were not approached,  
34 did not receive the support.

1           So, it's a matter of where the information is coming from  
2           and whether it is falsely reassuring that things are  
3           happening to support victims of abuse or not?

4   A. I'm not sure of the question, sorry.

5   Q. So, you probably can't resolve it but there's clearly a view  
6           that appropriate steps were taken to support, investigate  
7           and support the boys at the residence?

8   A. At the time those disclosures were made?

9   Q. At the time the disclosures were made. We certainly know  
10           from Earl White that did not occur and the Court found that  
11           to be credible, that it did not occur. But then internal  
12           agency documents say the opposite, which is reassuring,  
13           people think that the process is working?

14   A. What support the boys did or didn't receive at the time  
15           disclosures were made isn't something that I don't think  
16           I've given opinion on or could. And it would be,  
17           presumably, assessed within the context of the day. And I  
18           seem to recall Mr Mike Doolan talking about that, if not in  
19           his evidence in relation to White, in some other matter.  
20           And if - yeah, so, how that might contrast with someone's  
21           more subsequent view of what happened and what should or  
22           shouldn't have - what support should or shouldn't have been  
23           given to the boys, I don't know. I'm not familiar, I have  
24           to say, with the Court's finding specifically around that  
25           matter of support that was or wasn't given to Mr White.

26   Q. No, it found there was no investigation.

27   A. Into?

28   Q. So, if I reframe it in terms of our discussion yesterday  
29           about is there a proactive duty of care, so that you've got  
30           these three boys who have made a complaint. Mr Ansell  
31           leaves his position but is there a proactive obligation at  
32           that stage to find out if they were the only victims of  
33           abuse or whether there was wider abuse and there was a  
34           responsibility to take action and provide support and  
35           investigate it?

1 A. I think that's the issue that, as I recall, Mr Doolan  
2 canvassed. And I guess, yeah, those were considerations  
3 that the staff at the time had to think about and consider  
4 but I don't know that I can offer an opinion 20 years later  
5 about whether those actions were or weren't appropriate,  
6 given the time.

7 **CHAIR:** Ms Janes, I missed it but you said that some  
8 assurance was given to the Minister that appropriate  
9 support was given at the time; is that -

10 **MS JANES:** Yes, an internal document. That didn't go  
11 to the Minister but internally, that was the belief  
12 between Crown Law and MSD.

13 **CHAIR:** Right.

14 **MS ALDRED:** Could we have a reference for the  
15 document?

16 **CHAIR:** I would be reassured by that too.

17 **MS JANES:** We are just going to the actual document.

18 **CHAIR:** Thank you.

19 **MS JANES:** So, you will see that document.

20 Q. So, this is CRL40575, and if we go to page 34. The numbers  
21 are up the top for those who have the bundles. And perhaps  
22 just to orientate you, it's the 30th of April 2004, it's a  
23 file note.

24 **CHAIR:** Do we know by whom?

25 **MS JANES:** It's by Alison Mills, who is an assistant  
26 Crown counsel.

27 Q. So, the relevant paragraph is 18 at the bottom of page 2.  
28 It says, "When the abuse was discovered, the Department's  
29 response was very quick and effective".

30 **CHAIR:** We haven't got that.

31 **MS JANES:**

32 Q. No, page 35, page 2 of that. It's paragraph 18 at the  
33 bottom. "However, it is highly likely that," that is White,  
34 "claim will be believed. The boys who the Department knew

1 had been abused appear to have received the appropriate help  
2 and support afterwards."

3 So, that is likely correct, that they did but others, it  
4 was not investigated, which is what the High Court found, so  
5 just putting those two pieces of information together.

6 **CHAIR:** This is a Crown Law document?

7 **MS JANES:** This is a Crown Law document.

8 A. Which interestingly, seems to contradict the earlier Crown  
9 Law document.

10 Q. Yes. This is a particular document, we're going to look at  
11 the Crown Litigation Strategy and the MSD meetings that were  
12 held in terms of the run up to the White trial, again just  
13 to orientate you to what the document is. It is about the  
14 use of private investigators but for present purposes, we  
15 will skip a lot of the initial documents. It's there to  
16 show that from as early as 2003, when you weren't there, MSD  
17 had been using a private investigator, at that stage a  
18 Mr Trevor Morley. So, the first 35 pages or so relate to -

19 **CHAIR:** Of this document?

20 **MS JANES:** Of this document.

21 Q. If we go to page 37, and again this is just to orientate in  
22 time, this is an email dated 27 November 2006, and if we  
23 look at the third paragraph, it talks about a meeting  
24 tomorrow "Jacinda Lean and Garth Young will be present from  
25 MSD and Sally McKechnie and I", the writer Chris Mathieson,  
26 "will be present from CLO".

27 From 27 November 2006, it would appear that you were a  
28 member or attendee at meetings relating to discussions about  
29 the White trial?

30 A. Yes, I certainly attended some meetings.

31 Q. And then if we jump to page 44, the date is the 28th of  
32 November 2006. And you will see in terms of the attendees,  
33 again we've got Chris Mathieson, Sally McKechnie, we have  
34 Kristy McDonald and yourself. Just to note on this

1 particular page, at the bottom is the first reference to  
2 investigator, the very last bullet point.

3 Jumping over to page 46, which is the second page of this  
4 particular meeting, it talks about similar fact witnesses  
5 objecting to the admissibility of it, forcing her to apply  
6 for similar fact. I assume by "her" that relates to Sonja  
7 Cooper; could you confirm?

8 A. I would imagine so. I can't absolutely confirm but I would  
9 imagine so.

10 Q. And then the note that it's going to be opposed. So, if one  
11 looks at that in the round, it's obviously notes but there's  
12 an awareness that Cooper Legal is going to be looking at  
13 providing similar fact witnesses and there is going to be an  
14 objection to that.

15 When those decisions are being made about tactics and  
16 strategy for trial, and you are in attendance, how much  
17 ability do you, on behalf of MSD, have in shaping or  
18 inputting into those strategic decisions?

19 A. I would probably characterise my position as a passenger.

20 Q. Is it a bit like yesterday where one wished one were more  
21 assertive?

22 A. Perhaps, I would make distinctions, I think, of my  
23 involvement between Mr Wiffin's case and Mr White's. I  
24 would like to think I have been a little perhaps wiser and  
25 well informed by the time Mr Wiffin's claim came around but,  
26 yeah, and it's not necessarily something I look back on with  
27 a great deal of - admiration is the wrong word but, yeah, I  
28 had, I think, little decision-making ability when certainly  
29 the legal strategy for White was determined.

30 Q. In terms of attending these meetings, were there any rider  
31 instructions, if I can call it that, that you were given up  
32 by anyone higher up or in different departments with MSD as  
33 to what you should be saying or agreeing to?

34 A. I certainly don't recall being given any instructions. And  
35 I think if you think, I guess, of a client/solicitor

1 relationship, then the internal client in the White matter  
2 was either the Chief Social Worker and/or the relevant  
3 Deputy Chief Executive. Certainly, some of the earlier  
4 claims preceding White, the Chief Social Worker, my  
5 understanding is he or she was essentially the instructing  
6 client for White. Again, I may not be 100% accurate but I  
7 suspect the Deputy Chief Executive at the time was the  
8 client, probably more so than the Chief Social Worker, and  
9 their instructions would have been to the Legal Team, as  
10 opposed to me.

11 I guess, without wanting to under-sell my role, and I'm  
12 certainly not suggesting that I'm abrogating any  
13 responsibility, but I was still a reasonably small fish in  
14 the historic claims pond at that time.

15 Q. And so, just on that, why were you the one attending these  
16 meetings on behalf of MSD?

17 A. Well, I wasn't the only MSD attendee there. Jacinda Lean  
18 was the key person probably. I guess, my role, and at that  
19 stage the Historic Claims Team, other than some privacy,  
20 people doing Privacy Act response, the team was me, that was  
21 it, a team of one. My apologies, by that stage there were  
22 two. Our role was essentially providing that social work  
23 aspect. So, we - and that's really the reason both myself  
24 and the senior adviser at the time became involved, to  
25 assist the Legal Team in anything from locating ex-staff  
26 members who we may have wanted to speak to, to giving advice  
27 on any social work practice matters that the Legal Team  
28 might have sought. So, it was, I guess, bringing that  
29 social work perspective to the case, as opposed to any  
30 strategy about how it might be litigated.

31 Q. Because that takes us to the next point, if we can call out  
32 that second "striking similar" paragraph. It's the bottom  
33 bullet point, it says, "Approach it like a criminal trial".  
34 And I really want to explore with you because you were at  
35 this particular meeting on behalf of MSD, you're dealing

1 with a claimant who is a victim of abuse, they are seeking  
2 redress and yet here the strategic decision is made that  
3 instead of approaching it on a merits based strategy, in  
4 other words leave the facts to fall where they may, it's  
5 going to be approached like a criminal trial.

6 So, the questions for you are, do you recall that  
7 discussion? That's the first question.

8 A. No, I don't recall the discussion. I guess I would comment  
9 that these are, I'm pretty confident, Jacinda Lean's  
10 handwritten notes. The extent to which that indicates an  
11 agreed strategy or approach to the trial, I simply don't  
12 know. What I do know though is that despite the shape that  
13 the approach to the hearing took, Jacinda and I sat with the  
14 QC some time before the trial out of concern that the Whites  
15 and similar fact witnesses might be harshly cross-examined  
16 and were concerned that that wasn't the case.

17 Q. Can you expand -

18 A. So, despite, I guess, that particular bullet point, we were  
19 concerned that those people weren't exposed to harsh  
20 cross-examination.

21 Q. And was that clearly articulated?

22 A. I believe so, yes.

23 **CHAIR:** The QC you are referring to here?

24 A. Ms Kristy McDonald.

25 **CHAIR:** The QC representing the Crown?

26 A. The QC representing the Crown, yes.

27 **MS JANES:**

28 Q. And do you recall a timeframe where those instructions were  
29 clearly given to Crown Law?

30 A. Well, as I said, it was to Ms McDonald, as opposed to Crown  
31 Law itself. I don't recall a specific date, but it wouldn't  
32 have been long before trial, I wouldn't have thought.

33 Q. And just lastly on this particular - just taking a step  
34 back. What would you, because you can't speak for  
35 Ms Jacinda Lean unless there was a discussion, but what did

1 you and MSD generally think a criminal trial would look like  
2 and whether that was an appropriate approach to a victim of  
3 abuse seeking redress?

4 A. Well, I suppose, one similarity, and to my mind again not  
5 being a lawyer or an expert on either kind of criminal or  
6 civil trial, but one similarity is that witnesses will be  
7 cross-examined. And whether there are any rules around that  
8 that differ between civil and criminal courts, I don't know,  
9 but I guess the very nature of cross-examination can be  
10 difficult and testing. I guess that's the purpose of it.  
11 And the difference is, again as I understand it, the  
12 different evidential threshold, criminal court is obviously  
13 beyond reasonable doubt, whereas the civil court is lower  
14 than that. So, the Court will be looking for a lesser level  
15 of evidence, if you like.

16 But, beyond those observations, what that comment  
17 "approaching it like a criminal trial" might have meant, I  
18 simply don't know. And, at the risk of seeming unhelpful  
19 because I'm not wanting to be unhelpful, whether we had any  
20 further discussions prior to that meeting at the meeting or  
21 subsequent to it about the approach, I simply don't recall.

22 Q. Apart from the issue about the cross-examination that you  
23 raised?

24 A. Yes, and I think that's because that's just, you know, there  
25 are some things that, for various reasons, stick out in your  
26 mind and that's one of them. I recall even the cafe where  
27 we sat and had that discussion.

28 Q. Just finally on this particular document, again just for  
29 completeness at the very bottom, it again talks about the  
30 private investigator.

31 If we then turn the page, I think this is either the 9th  
32 or the 7th of December 2006.

33 **CHAIR:** This is another meeting, I take it?

1 **MS JANES:** This is another meeting. The date, I am  
2 not sure if somebody can see better than I can, but I  
3 think it's the 7th.

4 A. It looks to me like the 7th.

5 Q. When it comes up it's the 7th and again you're at attendance  
6 at that meeting. And the first record of business is the  
7 private investigator. And it talks about "Kristy is going  
8 to come up with some names", a legal shorthand, the first  
9 one is the plaintiff. I know you won't be able to confirm  
10 that but as a lawyer, that's the shorthand that we use for  
11 plaintiff.

12 A. Okay.

13 Q. So, the private investigator is going to be looking at the  
14 plaintiff and the witnesses "hers and ours". So, just  
15 orientating everyone to the context of the document. A  
16 little bit further down, I think 3, call that out. It looks  
17 like you were charged with sending through and drafting the  
18 communications statement. Do you recall being involved in  
19 communications about the White trial?

20 A. As in media communications?

21 Q. Yes. There is another document where it is about media  
22 communications.

23 A. I don't recall drafting anything but that's what Jacinda has  
24 written.

25 Q. And then if we look at number 5, it looks like on the  
26 similar facts matter, a decision is being made to not  
27 challenge it now and it won't negatively "to not challenge  
28 it now, would negatively impact upon the trial". Do you  
29 recall any discussions about the strategy of timing of  
30 oppositions or such matters or were they much more within  
31 the Crown Law -

32 A. No, I don't recall, I am not even entirely sure that I  
33 understand that particular point.

34 Q. No, that's fine, I just wanted to check it with you as you  
35 were at the meeting.

1 Moving on to number 6, your answer may well be the same  
2 because this is, again, a strategy discussion but do you  
3 remember discussions about abuse of process?

4 A. I remember the term certainly but, I don't want to sound  
5 stupid but, yes, I am not sure I understand the, if you  
6 like, what that means in practice.

7 Q. Okay, we'll leave that. Just for the record, it just  
8 records "not sure that it would be appropriate here, perhaps  
9 adds an affirmative defence"?

10 A. Right.

11 Q. Do you recall any discussions about topics for this private  
12 investigator, areas that they were being tasked to look at?

13 A. I don't recall specific conversations but, I mean, some of  
14 these notes suggest obviously that that was a discussion  
15 point.

16 Q. If I can turn you to page 49. You are not involved in this  
17 document, so really it is just checking whether you had a  
18 recollection of these as potential topics. So, again, just  
19 to orientate, this is a draft "topic/areas to be the subject  
20 of investigation by private investigator". So, do you  
21 recall whether there was discussion that the private  
22 investigation would look at the complete life history of  
23 each plaintiff, including personal associations, work, life  
24 experiences, medical history?

25 A. Was aware of discussions?

26 Q. About the brief to be discussed?

27 A. Again, at the risk of sounding unhelpful because I want to  
28 be as helpful as I can, I don't recall - I mean, clearly I  
29 was aware that a private investigator was being used for the  
30 White matter. I don't recall any specific conversations  
31 about the breadth of the inquiries that he might undertake.

32 As I talked about in my brief, I had a particular  
33 understanding of at least one of the key roles that they  
34 were to undertake but, beyond that, yeah, I'm reasonably  
35 confident, perhaps there might be other documents that

1 suggest otherwise but that was certainly my understanding of  
2 their brief.

3 Q. And in the next one, a focus in this document and other  
4 documents where that might be more familiar to you, but it  
5 is about the collusion. So, one of the - in briefing the  
6 witnesses, there was a particular focus in a strategy about  
7 any indications of possible collusion between the plaintiffs  
8 and other witnesses. I take it that wasn't new information?  
9 That collusion was a focus for both the Crown Litigation  
10 Strategy and the private investigator?

11 A. How much of a focus it was, I don't know, but it was clearly  
12 one of the issues that was considered at trial anyway.

13 Q. And there are other documents where there are discussions  
14 but because we're on this one but I can take you to other  
15 ones if necessary, paragraph 4, it appears through the  
16 documents in this particular compendium that one of the  
17 strategies to counter the allegations that were being made  
18 by the White brothers was to find people who had different  
19 experiences at Epuni, they call it reverse similar fact. In  
20 fact, these people were short-handers for either "happy  
21 boys" or "good boys". Do you recall those discussions about  
22 finding that evidence as a counterbalance to plaintiffs?

23 A. I do recall some discussions and I think some efforts were  
24 made to find other, as it says, other boys that were in the  
25 same institutions.

26 **MS JANES:** Madam Chair, we're going to spend a little  
27 bit more time on this particular document. I wonder  
28 if we take -

29 **CHAIR:** Time for a break. Thank you, Mr Young, we  
30 will resume again at 2.15.

31

32

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

34

35

1     **CHAIR:** Thank you, Ms Janes.

2     **MS JANES:**

3 Q. I'll just go back to the document that we were at before  
4 lunch which was CRL40575. In fairness to Mr Young, in the  
5 break I had a look back and the document I was asking him  
6 about he actually had received. If we look at this on the  
7 8th of December, it's sent from Chris Mathieson and we'll  
8 see that -

9     **CHAIR:** For some reason, it's not showing on our  
10 screen. If a technical person can wave their magic  
11 wand. Yes, there you are, thank you so much, Madam  
12 Registrar.

13     **MS JANES:** Excellent.

14     **CHAIR:** Sorry, would you say again, please, Ms Janes.

15     **MS JANES:**

16 Q. Yes, the document that we were on before lunch was the  
17 topic -

18     **CHAIR:** Of the investigator's brief?

19     **MS JANES:** Exactly.

20 Q. And the page before that, which is page 48, shows that Mr  
21 Young did actually receive that document. It says, "As  
22 agreed, I attach a note for areas of possible investigation.  
23 Please let me have any comments/additional areas."

24         We don't really need to look at the possible  
25 investigator, it didn't involve Mr Young.

26         So, Mr Young, your evidence was that while you didn't  
27 totally recall that document, certainly the areas for the  
28 private investigator were not unknown to you?

29 A. And I assume the following pages was the attachment to that  
30 email?

31 Q. That's correct, yes.

32 A. Yes.

33 Q. So, just again emphasising that point, it was an agreed  
34 investigation topic that the complete life history of each

1 plaintiff with personal associations, work, life experiences  
2 and medical history would be looked into?

3 A. Whether it was agreed or not, I mean I don't mean to be  
4 pedantic but whether it was agreed or not or whether there  
5 were any comments from any of the recipients or not, whether  
6 any other documents show that that's the case, I don't know.  
7 But, on the face of it, that would seem the areas that that  
8 were at least considered for the fuller examination.

9 Q. Is your understanding that the reason for looking into all  
10 of those areas was to inform the Crown approach to how they  
11 would conduct the litigation and what would be asked of the  
12 witnesses at trial?

13 A. That, I don't have recollection of that but certainly,  
14 again, this document would suggest that that was the purpose  
15 of it.

16 Q. And Jacinda Lean, as I understand it, was in the legal side  
17 of MSD?

18 A. Yes, she was a solicitor in the Legal Team, yes.

19 Q. And would it be routine or expected or your recollection  
20 that she would share information that came to her about this  
21 with you?

22 A. Um, it would really depend on the nature of the information  
23 and whether she, for any reason she wanted my or our input  
24 or advice or, yeah, or comment.

25 Q. The reason for asking, I won't put the document to you  
26 because you are not a recipient but Jacinda Lean was a  
27 recipient of the document, just for the transcript,  
28 CRL0025588, and talks about similar fact witnesses, "Please  
29 investigate the similar fact witnesses for anything in their  
30 adult lives for cross-examination using all the above-board  
31 legal means".

32 Does that ring any bells in terms of something that may  
33 have been communicated to you or just to Jacinda Lean?

1 A. It doesn't ring any specific bells but, again, I can't with  
2 absolute certainty say that it wasn't something that crossed  
3 my eyes for some reason but, yes, I don't recall it.

4 Q. And if we then move to page 51 of the composite document,  
5 and just to orientate everybody, this is a memorandum. It  
6 lists, it's from Deborah Harris. Can you just confirm who  
7 Deborah Harris, Crown counsel, looking at the end?

8 A. Yes, she was, from memory, either a Crown Counsel or  
9 Assistant Crown Counsel, yes, Assistant Crown Counsel.

10 Q. And in terms of the recipients, I can see your name and also  
11 Jacinda Lean. Is there anyone else there that might have  
12 been from MSD?

13 A. Jacinda, Michael Timmins was also a solicitor in the  
14 Ministry's legal team, Leanne Pearson was a graduate  
15 solicitor I think at that stage also in the Legal Team and  
16 Jennifer Pomeroy was the senior legal adviser in the  
17 Historic Claims Team, myself, Jennifer and one administrator  
18 person.

19 Q. And if we can call out paragraphs 4 and 5 of this document.  
20 And if I can just have you read those too, please.

21 A. "Kristy McDonald commented to Chris that while MSD has any  
22 remaining policy confusion concerning this litigation, it  
23 will be difficult to progress the litigation satisfactorily.  
24 The Ministry will need to confirm its strategy for the  
25 progression of cases. Crown Law needs to be clear that MSD  
26 is ready and willing to progress the cases. There is no  
27 cheap option. A Commission of Inquiry would have its own  
28 equivalent expense. Garth Young commented that it would be  
29 beneficial for MSD to have an analysis of the projected cost  
30 of the litigation.

31 Jacinda Lean commented that if MSD proceeds to run  
32 limitation defences, strong cases should be picked to begin  
33 with. Otherwise, Jacinda and her team may run into  
34 opposition from the chief executive at MSD. Chris is to put  
35 together a process document around these issues. The

1 proposal is that Crown Law is to progress all claims that  
2 can be reasonably and rationally dropped away."

3 Q. A number of points arise from those two paragraphs which I'm  
4 hoping you are able to assist the Commission.

5 So, the policy confusion concerning the litigation that  
6 is referred to, what was MSD, what was the confusion within  
7 MSD?

8 A. I note given that I was one of the recipients of this  
9 suggests I should be better informed, but I don't have any  
10 recollection from the time. But the comments suggest to me  
11 that perhaps the Ministry was in two minds about the need to  
12 or the usefulness of litigation. And it seems to me, I  
13 guess, a question, if you like, or an unanswered question  
14 between Crown Law and the Ministry as to, yeah, I suppose,  
15 the benefits or the pros and cons of litigating a particular  
16 claim.

17 Q. And would it be fair to read into that paragraph, and tell  
18 me if it's not, but that there seems to be concern about  
19 whether MSD wants to progress the cases and attendant on  
20 that, it doesn't say about merits but that may be an issue  
21 as well, but certainly the cost of the litigation was a  
22 factor exercising MSD's mind?

23 A. That comment absolutely, clearly suggests that cost was on  
24 people's minds, yes, yeah, there's no cheap option, I guess  
25 is reasonably clear.

26 Q. And so, who would make the final decision? So, if there's  
27 policy confusion, there were two minds about whether one  
28 even runs this litigation and there's attendant cost. At  
29 what point could MSD say, "We don't want to run it"?

30 A. I presume at any point really, and that comes down to a  
31 decision-maker, whoever that might be, making that call. In  
32 the White case, I'm not sure when or who made that  
33 particular decision, if it is clearly documented as a  
34 specific decision.

1 My, I guess, understanding or assumption would be that, I  
2 think as I mentioned earlier, it is likely to have been the  
3 instructing client, if you like, that may well at that time  
4 have been the Deputy Chief Executive, if not the  
5 Chief Executive. But, as I said, without seeing any  
6 documents that confirm that one way or the other, that would  
7 be my assumption and I think accord with what memories I  
8 have from the time.

9 Q. And I don't know if paragraph 5 gives us any guidance, and  
10 you can comment on this, but it looks like the - and we have  
11 heard that Peter Hughes looked at documents where he had  
12 concerns about using the Limitation Act as a shield which  
13 avoided settling moral and meritorious cases.

14 So, can you help us understand what might be behind  
15 paragraph 5 where Jacinda Lean comments that "if MSD  
16 proceeds to run limitation defences, strong cases should be  
17 picked. Otherwise, there would be opposition from the  
18 Chief Executive"; what would that be all about?

19 A. It suggests to me that if a case is to go to trial, then  
20 that should be one perhaps where the limitation defence had  
21 a greater chance of success than not. As it says, to do  
22 otherwise, I guess that reflects perhaps what you mentioned  
23 earlier, the Chief Executive's view that perhaps limitation,  
24 what he said I don't know but, yeah, he had concerns about,  
25 I guess, that defence being used.

26 Q. And in terms of the proposal for Crown Law to progress all  
27 claims that could reasonably and rationally drop away, do  
28 you recall what that meant and what happened as a  
29 consequence?

30 A. Again, I don't. I guess, my guesstimate or assumption about  
31 what it might mean, is that other claims that may either be  
32 settled or discontinued for some reason.

33 Q. And turning over to paragraph 7 on the next page, if we call  
34 out paragraph 7, please, we've returned to the matter of the  
35 private investigator, in this case the suggestion is

1 preferably a former Police investigate issues at arms-length  
2 for the Crown. As we've seen, the intention was to  
3 investigate both the plaintiffs' witnesses and the Crown's  
4 witnesses. "It is important to find out as much as  
5 possible" and again we return to that topic of "any  
6 suggested collusion should be investigated as a matter of  
7 importance. Jacinda confirmed that MSD don't need prior  
8 approval for this". I assume, I shouldn't assume, were you  
9 involved in any discussion on behalf of MSD or approval on  
10 behalf of MSD for the use of a private investigator?

11 A. No, that's not something that I would have had the authority  
12 to approve one way or the other. And whether that means  
13 financial approval or approval in principle, I don't know  
14 but neither of those would have been my call to make.

15 Q. And would you have any understanding of the internal  
16 processes where something like use of a private  
17 investigator, in terms of the Code of Conduct in case it may  
18 involve surveillance, where would that lie?

19 A. Well, I guess it would depend on what - approval for what  
20 was being sought. And I simply have no idea what kind of  
21 approvals might be required to engage a private  
22 investigator. But one would have thought that if it was  
23 questionable, that it didn't fit within the Code of Conduct,  
24 then firstly, one would have thought that pretty serious  
25 consideration would be given to not doing that, if it  
26 conflicted with the Code of Conduct. But if it didn't and  
27 for some reason Jacinda or anyone else thought it was useful  
28 or necessary to get approval, then that could have been  
29 anybody from presumably either the Chief Legal Adviser or  
30 someone more senior.

31 Again, if it wasn't a matter of whether it was  
32 appropriate or not and it was a financial issue because  
33 obviously that would have - there would have been some cost  
34 to that, then that would have depended on who had budget  
35 authority.

1           Whether Jacinda did as sort of one of the lead  
2 solicitors, I don't know. But, again, if she didn't, then  
3 it perhaps would be her manager or possibly even again, the  
4 Chief Legal Adviser.

5 Q. And if we call out paragraph 8, and this may be more  
6 familiar to you because it's about standards of the day and,  
7 therefore, a little bit more within the realms of social  
8 work practices, rather than the legal framing. And we look  
9 at this and there has been a recommendation to engage  
10 someone independent of the department to give evidence on  
11 the standards of the day.

12           Towards the end it says, "We will probably need a  
13 multiple expert view. Brian Manchester cover a useful  
14 input". We have heard the name Brian Manchester in the  
15 letter we didn't look at but spoke about yesterday. Can you  
16 just give a very brief synopsis of Brian Manchester and his  
17 role within DSW?

18 A. I'm not sure that, from memory, I can recount all of the  
19 positions that he held over the years, but I will as well as  
20 I can. I'm pretty confident he was what was then called a  
21 Boys' Welfare Officer, so the historic equivalent to a  
22 social worker. And then he rose through the ranks, as it  
23 were, again specific positions I can't recall but at one  
24 point he went to National Office and I think, at the time  
25 when the Cutforth letter was sent, as I recall, he was a  
26 senior manager I think with responsibility for care, which  
27 may have included residential care. And then he became  
28 Deputy Director-General, if I recall correctly, I think that  
29 was the last position he held before retiring.

30 Q. So, in terms of that independent respected external  
31 evidence, he appears to fit the qualifications, in terms of  
32 his background of talking about standards of the day?

33 A. He would have, he certainly would have. Arguably, he  
34 himself wouldn't have been independent because of his  
35 background but he certainly would have had, I would have

1 thought, a very good perspective on standards. I think he  
2 began working in the 1950s, so his experience would have  
3 spanned a good number of years.

4 Q. Thank you. And looking at paragraph 9, so referring back to  
5 the paragraphs 4 and 5 we looked at earlier, it talks about  
6 "the policy direction for this litigation needs to be  
7 clearly determined. This extends to communications  
8 strategy. The communications people at MSD and Crown Law  
9 should be briefed on communications."

10 Just confirming, you didn't recall earlier being involved  
11 in that communication process. Do you recall who might have  
12 dealt with that within MSD?

13 A. I don't. I mean, it's possible that I may have provided  
14 information to anybody in the communications area who was  
15 drafting material. I don't recall the name of the  
16 communications or even how big the communications team was  
17 at that stage, to be honest. So, yes, I just simply can't  
18 remember what individual was in place or individuals were in  
19 the comms team at that time.

20 Q. That's fine, thank you. Paragraph 10, we have similar fact  
21 evidence. "This is shaping as a major issue. The  
22 evidential findings for similar fact witnesses could well  
23 influence settlement of their future claims".

24 I take it from that, that the thought in the strategy was  
25 that depending on what occurred in the White trial, you had  
26 a number of similar fact witnesses who had claims of their  
27 own with MSD and so findings, such as the physical abuse of  
28 Mr W, Mr C and Mr B, might well translate into findings in  
29 their cases or sexual abuse by Mr Ansell?

30 A. That is certainly, yeah, my reading of that paragraph.

31 Q. And just moving slightly off topic there, I don't know if  
32 you recall the Cooper Legal evidence bespoke concern that  
33 even after the findings in the White trial, and it's really  
34 more in Ms Hrstich-Meyer's evidence, but after the findings  
35 in the White trial they were not consistently or immediately

1 applied to, for example, the similar fact witnesses. Are  
2 you able to comment on, if you're taking those principles of  
3 face value, settling meritorious claims, moral versus legal,  
4 why were they not dealt with immediately, including  
5 Mr Wiffin's case, although he pulled out of being a witness?

6 A. Again, at the risk of sounding unhelpful, I can't say and I  
7 would need to look at each of those cases, you know, to make  
8 an honest opinion. But one would reasonably have expected  
9 that any findings from White that apply to any of those  
10 cases or claims would have been applied.

11 Whether, and one would assume that they may have or some  
12 of them, some of those claims may also have contained  
13 allegations outside the findings of White that may have  
14 required additional assessment, if you like. So, whether  
15 that is one of the contributing factors or not, I don't  
16 know. But I certainly acknowledge that any unreasonable  
17 time delays, if there were unreasonable time delays in  
18 managing any of those or any other claims, is certainly not  
19 something that we want to countenance.

20 Q. So, just for a process perspective, if there are allegations  
21 that similar fact witnesses have made about physical  
22 assault, for example, but they did contain other  
23 allegations, would MSD's approach be to offer an ex gratia  
24 payment on the physical assaults of any of these  
25 perpetrators and then resolve the other parts of the claim  
26 or do you leave them even though they're known to be proven  
27 until the very end?

28 A. That's not an approach that was taken, to my knowledge. The  
29 claim would have been dealt with as a whole and if an offer  
30 was to be made, there would be one offer, rather than  
31 potentially two offers; one that might have, as you say,  
32 addressed the outcomes from the White trial; and one that  
33 might have come from looking at other allegations within the  
34 claim.

1 Q. Would you accept that taking a step back and putting  
2 yourself in the claimants' shoes, not having an  
3 acknowledgment immediately it is a known fact, but having to  
4 wait for many number of years to receive acknowledgment, may  
5 not actually be a healing approach to a redress process?  
6 Early acknowledgment of a known fact would be more  
7 beneficial?

8 A. I would not disagree with that.

9 Q. And if we move on to paragraph 11 very quickly, it's really  
10 just "All witnesses should be cross-examined as to whether  
11 there has been any collusion with other witnesses".

12 Earlier you gave evidence about a general disquiet or  
13 communication about cross-examination. Do you recall  
14 whether it was in relation to collusion or just generally  
15 about how you wanted, as an organisation, the claimants to  
16 be treated at trial?

17 A. It was just a general comment/request. It didn't focus on  
18 any particular issue at all or part of their evidence.

19 Q. And if we go to paragraph 13, in this particular paragraph  
20 it says, "Crown Law advice has not changed. The White  
21 defence case is weak in parts but the precedent that a  
22 settlement would establish is not an option for the Crown.  
23 The alternative settlement options to be considered by  
24 government will likely as not be too late to affect this  
25 trial".

26 And that just reconfirms the earlier information that ADL  
27 was on its way, but it would not be in effect prior to the  
28 White trial? If by all means you -

29 A. I'm sorry, what paragraph was it because it's disappeared?

30 Q. Paragraph 13.

31 A. I'm just intrigued by that comment "the precedent that a  
32 settlement would establish is not an option for the Crown".  
33 That to me just seems at odds with the fact that settlement  
34 offers and negotiations were made. So, yeah, I'm just  
35 bemused by that, I guess.

1 Q. It is a topic that we'll look at a bit more closely shortly.

2 And then if we can turn to page 60. It is not a page  
3 that you are noted on but I just wanted to get your  
4 thoughts, particularly on the first point where it talks  
5 about "credibility, lack of honesty, opportunistic  
6 behaviour".

7 Are you able to comment on what the concern about the  
8 opportunistic behaviour might embody?

9 A. I really have no idea.

10 Q. That's fine.

11 A. Sorry.

12 Q. And, again, you weren't party to the communications but  
13 there are documents in this composite bundle that talk about  
14 the private investigator looking at investigating a range of  
15 the plaintiffs' files, the plaintiffs' ACC files, their  
16 banking records, their medical records, their Court records,  
17 their employment records, their Baycorp records. So,  
18 generally looking into every aspect of the plaintiffs'  
19 lives. Do you recall that as being something that the  
20 investigator was tasked to do?

21 A. Again, I don't have any specific recall of those areas but,  
22 again, I couldn't with absolute certainty say that some of  
23 those didn't cross my radar at some point. So, yeah, I  
24 don't have recall, but I don't want to say that I was never  
25 aware because I just simply can't.

26 Q. And if I can turn to page 71. We're now February 2007.  
27 We'll go to the bottom email first. And just to confirm  
28 that you are in the "cc" - no, actually, in the "To" list?

29 A. Yes, I am.

30 Q. So, "Garth and my teams" being Jacinda Lean "have had a  
31 meeting to discuss some White issues" and it talks about  
32 discussing the current round of witness interviews. It goes  
33 on to record that "Garth will be accompanying Chris  
34 Mathieson and Steve van der Splinter", the prior  
35 investigator?

1 A. That's correct.

2 Q. "... tomorrow to interview" and that's Mr B, is it,  
3 interview somebody?

4 A. Yeah, I don't think I was involved in interviewing him, but  
5 it would have been one of the Crown witnesses, yes.

6 Q. A couple of pages earlier there had been a suggestion of you  
7 interviewing Mr B?

8 A. Yes, he was interviewed but I don't recall that by me but,  
9 again, that might be my memory failing.

10 Q. Could I please have you read the third paragraph?

11 A. The largest paragraph?

12 Q. Yes, thank you.

13 A. "I understand that Steve had given his ICIL business card to  
14 previous witnesses. I am not that comfortable with this and  
15 would ask that witnesses continue to have direct contact  
16 with representatives from either Crown Law or MSD, rather  
17 than contacting Steve direct. Whilst I recognise that  
18 having a person with Steve's experience present at the  
19 interview will assist Kristy on issues of reliability and  
20 credibility, it may raise issues for our staff about why a  
21 private investigator is interviewing them. This has the  
22 potential to raise wider risks for the Ministry from our  
23 current staff, the unions and ex-staff who may be aggrieved  
24 if they think they are being investigated. I want to try to  
25 manage this risk as best we are able and I think that it is  
26 better that Steve is presented as part of the litigation  
27 team responding to the claims, rather than a PI in his own  
28 capacity. I am happy to discuss this further with you, if  
29 you have any queries".

30 Q. I suppose, just the question really is, was there any  
31 disquiet about presenting a private investigator as part of  
32 the litigation team, rather than being transparent about his  
33 role in these interviews?

34 A. Well, I guess, that is essentially, I think, what Jacinda is  
35 saying. She doesn't use the word "disquiet", but she has

1 clearly some issues or concerns about that. Yeah, that's  
2 apparent.

3 Q. My understanding from that is her concern is that he  
4 shouldn't be identified as a private investigator because it  
5 raises concerns for staff and she's wanting him to be  
6 presented as part of the litigation team?

7 A. That's correct.

8 Q. Moving on to page 72, this is dated I think it's either - it  
9 looks like the 20th or the 26th. It's a bit hard to tell,  
10 maybe the 26th of February 07?

11 A. Yes, 26th February I think so.

12 Q. But certainly February 2007. Just looking at the last  
13 section and I'll actually take you to a much more readable  
14 document but this is just to note that within the Litigation  
15 Strategy meetings, there was an issue raised about "Steve's  
16 role - scope creep, what is his role?" We will go straight  
17 to the other document because that will be more helpful,  
18 CRL27998. This is a document that's a couple of months  
19 later. And it's a file note of minutes of the meeting with  
20 MSD. And to orientate you, it appears that you were at this  
21 meeting, you're mentioned at paragraph 5, "Mike and Garth  
22 agreed that they would go back to Paul". So, would it be  
23 fair to indicate that you were at the meeting before I take  
24 you to other matters?

25 A. Again, I don't recall this specific meeting on that date but  
26 that would suggest that I was there, yes.

27 Q. We'll then go to paragraph 2. And if I can have you read  
28 that, thank you.

29 A. "Role of Steve van der splinter and the PIs. Jacinda  
30 expressed a concern that Steve had moved beyond the tasks  
31 that he originally had been assigned and we needed to  
32 reframe his brief for the hearing. Agreed that it was  
33 something that CM would develop in conjunction with Kristy.  
34 In the meantime, we would press ahead with the work that

1 Paul was doing. Paul will be meeting with [ ] in  
2 Auckland shortly".

3 Q. Either from this particular document or your recollection at  
4 the time, what was the concern by Jacinda about the private  
5 investigator having moved beyond the tasks originally  
6 assigned?

7 A. Once again, I can't answer that. I guess, to fully  
8 understand it we would need to know what was the agreed  
9 original brief and what he had done that fell outside of  
10 that. And, again, whether there's any documentation of  
11 that, I don't know, but that's - but the specific areas that  
12 Jacinda was concerned about, I can't answer, I'm afraid.

13 Q. And, as we look at, if you could take down that paragraph,  
14 at paragraph 6, it just briefly talks about the possibility  
15 of locating the White's mother. Do you recall that there  
16 was a discussion about reaching out to the mother to see  
17 what she may be able to tell the Crown?

18 A. I don't recall that being discussed before the fact, but I  
19 did become aware sometime after the fact that he had done  
20 so.

21 Q. And you will have read in Mr Earl White's evidence that  
22 there was an approach to his eldest, the White brothers'  
23 elder sister?

24 A. I did, yes.

25 Q. Were you aware of that at the time or was that information  
26 that came later?

27 A. No, and I - well, it would appear from Mr White's account  
28 and from this, well it was always - sorry, I'm backtracking  
29 a wee bit. Are we assuming from this paragraph that the  
30 "Mrs" is Mr White's mother or a married older sister?

31 Q. I am seeing the redacted version.

32 A. And it was his mother?

33 Q. Yes, I'm positive it was the mother.

34 A. As I said, I always understood that she had been spoken to.  
35 I don't have any recollection that Mr White's sister was,

1 but Mr White clearly says that that is what happened, in  
2 addition to the mother, is what he says, yes.

3 Q. And Mr White also says that the private investigators  
4 attempted to speak to his daughter and had been watching the  
5 property; do you have any knowledge of that at all?

6 A. Mr White's daughter?

7 Q. Mr Earl White's daughter.

8 A. No, I don't have any recollection of that.

9 Q. And if we can go over the page, and over the next page, I am  
10 looking for Mr Manchester's name. Yes, paragraph 20, so  
11 just really reinforcing what you had said, "The comment was  
12 made that Manchester is meticulous about standards, very  
13 formal, does not take any shortcuts and the discussion was  
14 to consider topics for Manchester."

15 A decision was then made, if we go to CRL ending 26158,  
16 and this was 24 April 2007. Again, just looking at the top,  
17 it's an email from Michael Hodge to yourself, Jacinda,  
18 Kristy McDonald and Michael Simmons and Sally McKechnie and  
19 it talks about Brian Manchester's statement in particular.  
20 I wanted to take you to the bottom paragraph, "Others should  
21 read", if you could read that paragraph for us, please.

22 A. "Others should read his draft brief and form their own views  
23 but I agree that he should not be called. Bearing in mind  
24 that Manchester didn't hold a relevant position of authority  
25 during the early/mid 1970s anyway, and that those who did  
26 are dead, we are better just relying on Doolan for the  
27 systems that applied from the perspective of the  
28 institutions. There is too much scope for the plaintiffs to  
29 use Manchester as a vehicle for highlighting systems that  
30 could have been put in place but weren't and to demonstrate  
31 the fallibility of the systems that were in place (e.g. the  
32 issues around Mauri Howe that it appears were not  
33 satisfactorily resolved)".

34 Q. Are you able to help us what the issues around Mauri Howe  
35 were that could be referred to there?

1 A. The only issue that I recall, Mr Howe was manager of Epuni  
2 Boys' Home for many years and in the early 1970s, I think, I  
3 am not sure if he was relieved from his role for a period of  
4 time but certainly there were some questions about his  
5 effectiveness as a manager at that time. But, for whatever  
6 reason, he stayed in that position until he left. I think  
7 that was when he retired. Whether that's the issue that  
8 this specifically refers to, I'm not sure, but that's the  
9 one that I do have recollection about.

10 Q. And if we go a little bit further up the page to the numbers  
11 1, 2, 3, in fact if you include the next paragraph as well,  
12 thank you, this talks about you being one of the  
13 interviewers in paragraph 4 but these are three of the areas  
14 that have been included in the draft, which was training,  
15 and we know that he was a trainer at Head Office, so he  
16 would have been well -

17 A. Who was, sorry?

18 Q. Mr Manchester, in the Cutforth letter he talks about -

19 A. That may be the case, yes. I don't recall specifically but  
20 that may have been, yes.

21 Q. And inspections was another of the areas and National Office  
22 oversight. Again, we have the suggestion of a problematic  
23 assertion, given the documents stating National Office's  
24 lack of faith in Mauri Howe's abilities.

25 And if you could just read the final sentence or two?

26 A. "I have drafted the statement as carefully as I can around  
27 these issues, but Manchester would quickly say some of the  
28 unhelpful things just mentioned under even the gentlest  
29 cross-examination".

30 Q. You may or may not be able to answer this question, but a  
31 decision was made that he would be an unhelpful witness  
32 because he would respond straightforwardly and not take any  
33 shortcuts. Was that something, were those decisions made  
34 with the input of MSD or were those decisions about who  
35 would be called as witnesses made elsewhere?

1 A. Again, I can't answer with any certainty but, clearly, well  
2 I certainly would have thought that Kristy McDonald as the  
3 QC, Crown Law, would clearly be involved in making decisions  
4 about who was called, and I'm sure also that the Ministry's  
5 Legal Team would have been involved, one would assume, in  
6 those discussions. The extent to which they may have had  
7 any decision-making input or ability, I really don't know.

8 But it would have been amongst those three cohorts of  
9 people, if you like.

10 Q. So, those are all the events, we won't go through it, we're  
11 time constrained, but Cooper Legal gave a range of evidence  
12 about what they considered were strategies or tactics that  
13 were an uneven playing field, I think was the term, in terms  
14 of a lot of decisions about how the case would be run,  
15 taking from the evidence that you've given, those really  
16 were in the legal realm and not so much decisions you would  
17 have been involved in. So, we'll skip to the trial has  
18 occurred, the findings have been made. And if we go to  
19 CRL25722, there was a point, Mr Young, wasn't there, where  
20 MSD actually wanted to settle the White case following the  
21 High Court proceedings?

22 A. That's correct. I can't recall the exact time-frame, but it  
23 was our view that the abuse that they suffered should be  
24 recognised.

25 Q. Is there a second page to that? That's actually not the  
26 document, I suspect. Yes, this is the page I'm after.

27 So, this is a 4 June 2009 email from Crown Law, Una  
28 Jagose QC to MSD. You were included in the email  
29 recipients?

30 A. Mm-Mmm.

31 Q. But if we call out paragraph 1, "Today we discussed whether  
32 the Ministry could provide the White brothers with an  
33 apology/acknowledgment and an ex gratia payment in respect  
34 of those factual findings the Judge made. Those findings  
35 were that Paul White suffered some physical assaults, Earl

1 White sexually assaulted by Mr Ansell (not contested by MSD  
2 in the trial)".

3 We will just have to take it a couple of paragraphs at  
4 the time, so you can actually read that.

5 So, "The reason for thinking about this now, is a concern  
6 that if the Whites were not in the litigation process, the  
7 MSD settlement process would have delivered them something,  
8 based on what we now accept as facts."

9 So, can you just explain my understanding of that is had  
10 they not been on the litigation track, the ADR process would  
11 have come in and there would have been a settlement on the  
12 basis, if nothing else, of a sexual assault for Earl White  
13 and the physical assaults for both of them?

14 A. Putting it simply, that's the case, yes.

15 Q. And then it goes on to say, "The meeting reached the view  
16 that there are significant problems with such an approach at  
17 this stage - both for the Crown's broader Litigation  
18 Strategy and because what happens on appeal is an unknown  
19 factor. Once the litigation is finally determined MSD will  
20 be in the best position to decide what to do".

21 The document then goes into the pros and cons of  
22 settling, and we'll have a very quick look at those.

23 If you just quickly read those to yourself and then I'll  
24 just - I'll let you read those to yourself. (Short pause).

25 And then if we move on to the next page, the last page,  
26 it's the second paragraph. So, the recommendation from  
27 Crown Law is, "In my view it is prudent to await the outcome  
28 of the litigation and then consider the pros and cons of  
29 making any such approaches".

30 Do you recall how MSD responded, there's clearly a  
31 divergence of view about whether settlement should occur at  
32 this point in time or not. You've read the pros and cons  
33 which refreshed your memory because it has been a while.  
34 What would you say about the opportunity MSD wished to take  
35 at that time, the advice that was given, and we know

1 settlement didn't occur until 2011, some 2 years later. So,  
2 because of the interests of time, I'm sort of wrapping it up  
3 in that way, if I can.

4 A. Yep. I mean, I certainly recall, in general terms, the fact  
5 that Crown Law weren't happy, even in 2011 - "happy" is  
6 perhaps emotive - had a different view than the Ministry did  
7 on whether a payment should be made to the White brothers or  
8 not.

9 Again, I don't recall specific discussions following this  
10 advice and the nature of those, but it's self-evident by the  
11 fact that those payments weren't made for another 2 years,  
12 that, for whatever reason, the Ministry, and I don't divest  
13 myself from that, the Ministry was persuaded to wait until  
14 the Appeal Court had heard the matter further.

15 But, yeah, the specific reasons or rationale as to why we  
16 or that decision was made, I can't say.

17 Q. There seems to be a clue in that document about the Crown's  
18 wider Litigation Strategy. So, what would you say to the  
19 proposition that, once again standing back, it looks like  
20 the Whites have been sacrificed to the wider Litigation  
21 Strategy to the Crown as a whole?

22 A. Well, again, I would have thought that they're not  
23 necessarily - the Crown Litigation Strategy was to settle  
24 claims that had merit early and directly where possible, and  
25 that obviously didn't happen with the Whites for reasons I  
26 guess now that we appreciate. But, I agree, should  
27 settlement or payment, if you like, have occurred early, as  
28 in 2009, ideally, yes, but I can't resile from the fact that  
29 the Crown Law advice was essentially taken in that instance,  
30 for whatever reason.

31 Q. And I take it, were you involved in those decisions or were  
32 they taken elsewhere?

33 A. I don't - I'm sorry, I really don't mean to be evasive,  
34 Commissioners, I don't recall specific discussions about  
35 that and who made the decision that those payments would

1 have been made at that stage. Yeah, I just simply don't  
2 know who and how and under what circumstances that decision  
3 was made.

4 Q. And then there's that concern about those White findings not  
5 being used for other claimants, and you've talked about your  
6 concern about Mr Wiffin's case being not representative, but  
7 we heard from Cooper Legal that there were a range of other  
8 claimants who similarly, there was merit in their cases,  
9 there was knowledge about proven events of either physical  
10 or sexual assault and they gave examples of the victims of  
11 Mr Ngatai, the victims of Mr Ansell, Mr Moncreif-Wright,  
12 Mr Tukapua and Mr Drake. We've seen in the media about  
13 Tyrone Marks and that's been a 13-year journey for Mr Marks.  
14 How could the Commission be satisfied that where there is a  
15 body of knowledge, known facts, a moral and meritorious  
16 claim, that there will be a different system that does not  
17 treat them as these particular cohort of claimants have been  
18 treated?

19 A. I guess, well I'm not trying to convince the Commission of  
20 anything in particular, and I respect the Commission's role  
21 to examine each and every issue in the whole abuse in care  
22 and redress system. And I'm certainly not going to deny the  
23 fact that not just Mr Wiffin's claim or the White's claims  
24 could have been handled better, there are others as well.  
25 And when I said that Mr Wiffin's claim wasn't representative  
26 of all claims, I mean that. That's not to say that his is  
27 the only claim that wasn't managed satisfactorily or could  
28 have been managed in a more timely way. And I'm certainly  
29 not suggesting that as a Ministry we can cover ourselves in  
30 glory at all. I guess what I'm saying is that those claims,  
31 without diminishing the importance of them and the impact  
32 that they've had on the individuals, also need to be seen in  
33 the context of all of the claims that have been made and  
34 brought to some kind of resolution.

1           Could we have done better in those instances and in some  
2 others? Absolutely. And I believe we have been making  
3 efforts to do so since then. And I'm sure no matter how  
4 well we try to manage claims and resolve claims, whether the  
5 Ministry continues to do that or in some other kind of  
6 redress forum, without being a fatalist I suspect that not  
7 every case will be managed ideally or perfectly because, as  
8 I think everybody knows, this is an incredibly challenging,  
9 very challenging thing to be involved in, a very human  
10 thing, and with that comes all sorts of possibilities for  
11 oversights and errors and, yeah, views to impact on perhaps  
12 how things might be done. So, yeah, as I said, I'm not  
13 discounting the fact that some people have been let down.  
14 As I said, I would hope that can be seen in the context of,  
15 yeah, those claims where people have fortunately felt a  
16 greater degree of satisfaction.

17 Q. Thank you. Turning to Mr Wiffin's case, if we go to  
18 CRL27711, as it's coming up, this is a document from the  
19 27th of November 2006. It's an email from yourself to Crown  
20 Law and it talks, the subjected line is "Howe transcript".  
21 If you could call out the body of the email, please? If I  
22 can have you read the second paragraph?

23 A. The second paragraph?

24 Q. Second paragraph.

25 A. "We did not get it on tape, but at the end of the interview,  
26 Mr Howe confirmed that an Epuni House Master Mr Wright had  
27 "slipped up" and sexually abused some boys. You may want to  
28 check with Chris, but I think it will be useful to get that  
29 recorded so at least some reference to it can go in Mr  
30 Howe's draft brief of evidence".

31 Q. So, in November 2006, even if for some reason the earlier  
32 convictions in 1976, I think it was, had -

33 A. Yes, yes.

1 Q. - had not made it onto the MSD database, certainly at  
2 November 2006 it was known, I assume you would agree that  
3 this is Mr Moncreif-Wright, there's not another Mr Wright?

4 A. Yes.

5 Q. Certainly at November 2006, it was known that  
6 Mr Moncreif-Wright from Epuni had sexually abused boys at  
7 Epuni; correct?

8 A. Well, that's - and that's not absolute confirmation but  
9 certainly it suggests that's the case, yes.

10 Q. And that was the confirmation of what Mr Howe understood?

11 A. Yes, that was clearly his recollection.

12 Q. And we had seen the earlier document, so we won't go to that  
13 again in the interests of time, but it's MSD2374 in a 2007  
14 interview, this was the document you had authored on the TV3  
15 The Nation?

16 A. Of 2017, did you say?

17 Q. Sorry, this was 2007, so maybe you better bring it up. Yes,  
18 so it's a 2017 document but it talks about a 2007 interview.  
19 If you could go to Moncreif-Wright? There we are. In the  
20 second paragraph, "An ex-assistant manager of Epuni", no it  
21 must be over the page. There we are, second paragraph down.  
22 Mr Howe also said in an interview a year later "I seem to  
23 suspect there may have been something happen so he was  
24 transferred to us at Epuni", meaning something happened at  
25 Hamilton Boys' Home where he was previously?

26 A. Sorry, yes, that is a reasonable interpretation of that,  
27 yes.

28 Q. So, at the time that Mr Wiffin files his claim, which I  
29 recall is late 2006, it was known that Alan Moncreif-Wright  
30 was a sexual abuser of boys in residences, at least Epuni?

31 A. Well, certainly based on Mr Howe's comment and the time  
32 period which we had confirmation of his conviction history,  
33 I don't recall but certainly we had some information at that  
34 stage, yes.

1 Q. And just checking that at that point was there any  
2 suggestion of looking at both Epuni and/or Hamilton Boys' to  
3 see whether there were a wider cohort of victims who had  
4 also been abused by him or would you wait to see who might  
5 come forward?

6 A. In response to Mr Wiffin's claim, you mean?

7 Q. In response to this information in 2006 and 2007 and  
8 Mr Wiffin's claim.

9 A. I think, as I talked about yesterday, we didn't, as a matter  
10 of course - if we received information that a particular  
11 person may have abused a number of children in a particular  
12 home, that we would have proactively sought out potential  
13 victims of that person. But, in the case of receiving  
14 Mr Wiffin's claim, again, it was received, you said in late  
15 2006? And the way, I guess, claims were generally managed,  
16 was that they would have been dealt with in the order in  
17 which they were received.

18 I can't say, apart from the involvement that I and my  
19 team had with Mr Wiffin's claim, what, if anything, either  
20 Crown Law - well, they wouldn't have done anything but what  
21 our own Legal Team may have done when they first received  
22 Mr Wiffin's claim and the extent to which they may or may  
23 not have actively started reviewing it.

24 Because, I guess, it's only until somebody sits down to  
25 work through a claim and begin to make some assessment of  
26 it, would they then be looking to see what information we  
27 had that would inform that claim.

28 So, I guess, that is a reason, I'm not saying it's the  
29 reason but it's a reason why Mr Wiffin's claim and what  
30 information we did have about Moncreif-Wright at that time  
31 weren't necessarily connected.

32 Q. So then, if we put investigation of further victims to one  
33 side, but in November 2006 you have information from Mr Howe  
34 that Mr Moncreif-Wright has "slipped up" and sexually abused  
35 boys. We've heard your evidence that MSD will investigate,

1 interview staff against whom allegations are made. Were  
2 attempts made in 2006 or 2007 to locate and interview  
3 Mr Moncreif-Wright about those allegations?

4 A. No, they weren't.

5 Q. Is there a reason they weren't?

6 A. I think when I talk about staff being interviewed and  
7 allegations put to them, I was talking about current staff.  
8 And in the context of whether they may have presented a  
9 potential risk to the Ministry or Child, Youth and Family  
10 clients, alleged perpetrators who were not current staff  
11 members may have been interviewed when a particular claim,  
12 if the claim that they were named in was being assessed.  
13 And that wasn't always the case but in some instances they  
14 were. But I think, as I also talked about, that's not the  
15 case now. The reason Mr Moncreif-Wright wasn't interviewed  
16 in late 2006 or 2007 would again I guess go to my previous  
17 answer, that unless least Mr Wiffin's claim was being  
18 actively assessed, then no investigative or inquiry steps  
19 would have been taken at that stage.

20 Q. Given that Mr Wiffin was told that effectively his claim was  
21 the next one-off the rank after the White trial in that 2000  
22 year, would it not have been incumbent with that trial  
23 coming up to interview Mr Moncreif-Wright at that point?

24 A. That would have been a decision for whoever was involved in  
25 managing that claim. And certainly, at a later date, as I  
26 recall, there was consideration given to interviewing  
27 Mr Moncreif-Wright but he wasn't but that was, yeah,  
28 certainly somewhat later than certainly 2006-2007.

29 Q. And we heard Mr Wiffin's evidence that effectively Crown Law  
30 told him the reason they were not talking to  
31 Mr Moncreif-Wright was because he had a Police  
32 investigation, he had made a complaint to the Police and he  
33 then talked about the fact that he cleared the obstacles  
34 because what he wanted most was for MSD to talk to  
35 Moncreif-Wright. So, what happened and why did

1 Mr Moncreif-Wright not get spoken to once Mr Wiffin had  
2 withdrawn his Police complaint specifically so that  
3 interview could take place?

4 A. I am not - I know that Mr Wiffin has said that that was his  
5 understanding or that's why he withdrew his complaint. I'm  
6 not aware, and don't recall from the time, that, if you  
7 like, Crown Law or the Ministry took that as a condition or  
8 understood that if he withdrew or didn't pursue his  
9 complaint with the Police, that Mr Moncreif-Wright would be  
10 interviewed.

11 But, again, I simply don't know if there was any specific  
12 reason why Moncreif-Wright wasn't interviewed. As I said,  
13 my recollection is that consideration was given to that.  
14 There may be some speculation about why it wasn't done, and  
15 I think I saw somewhere that it perhaps was because a  
16 settlement offer was in the near future. But, beyond that,  
17 I'm sorry, I just can't say.

18 Q. So, in terms of separate processes, you've got Crown Law who  
19 is pursuing the litigation and they may or may not interview  
20 a witness. Is there any impediment that would, in that  
21 process, have meant MSD couldn't itself locate and speak to  
22 Mr Moncreif-Wright in terms of assessing the wider cohort of  
23 claims that would have related to Mr Moncreif-Wright outside  
24 of the litigation?

25 A. No, I wouldn't have thought there was any impediment, other  
26 than perhaps if there was some kind of Police investigation  
27 imminent. But, beyond that, there's no impediment that I  
28 can think of.

29 **MS JANES:** Time to take the break.

30 **CHAIR:** I think it is time to take the break, we will  
31 take 15 minutes, thank you.

32

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

34 **CHAIR:** Yes, Ms Janes.

35 **MS JANES:**

1 Q. Where still with Mr Wiffin and his case and it being a  
2 litigation trial case, would it be correct that MSD, you and  
3 your team, discovery requests, you would assemble documents  
4 available and provide them to Crown Law or direct to Cooper  
5 Legal?

6 A. At that stage, discovery would have been carried out by the  
7 Legal Team, rather than anybody in my team. Our  
8 administrator may have helped with searching for files but  
9 the process of going through and discovering those documents  
10 were relevant would have been done by the Legal Team and  
11 possibly in conjunction with Crown Law.

12 Q. And so, assembling the information such as the '72 and '88  
13 conviction information relating to Alan Moncreif-Wright,  
14 where would responsible for extracting that information from  
15 the database and moving it to legal or Crown Law lie?

16 A. I'm not sure if there's one answer but let's say the Legal  
17 Team did ask the historic claims administrator to carry out  
18 a search, then assuming at the time that the information  
19 about Mr Moncreif-Wright's convictions was suitably recorded  
20 and stored in our files, then it should have been located in  
21 such a search.

22 Yes, as I said, without knowing who might have requested  
23 a search and who might have carried that out, I can't say  
24 definitively how it might have been or whether it was  
25 discovered, identified and discovered.

26 Q. You may or may not be able to help me with this particular  
27 point, it may lay elsewhere, but in early 2007 Crown Law  
28 requested the conviction records from the Ministry of  
29 Justice. They received them on the 10th of July 2007 and  
30 then you will recall that in the response to Cooper Legal  
31 they were told that there was no information relating to  
32 Alan Moncreif-Wright or abuse. So, trying to untangle  
33 knowing at that point in 2007 the information is known at  
34 the very latest, if not earlier, a specific question is  
35 asked by Cooper Legal on behalf of Mr Wiffin about staff

1 files and any other information relating to Alan  
2 Moncreif-Wright but the answer comes back there is nothing;  
3 how could that happen?

4 A. I tried to give some explanation yesterday and I am not sure  
5 that I can add any more to it. But you're quite correct,  
6 Crown Law received the information about - the conviction  
7 information about Moncreif-Wright in 2007. We have a copy  
8 of that on file. The date that we received that, I don't  
9 know if that's ever been identified, I can't recall it.  
10 And, yes, it was early 2008, wasn't it, that the Official  
11 Information Act request was made and responded to.

12 But assuming we did have a copy of that conviction  
13 information at that time, I simply can't give a good  
14 explanation of why it wasn't identified and provided in  
15 response to that. A couple of reasons might be the way in  
16 which or the location that that information was filed, and  
17 that wasn't picked up during the search or any searches for  
18 the OIA request. Yeah, that I suppose is the best  
19 explanation that I can give. But, beyond that, I simply  
20 can't give an explanation that I would like to be able to  
21 give, both for myself and, also, for Mr Wiffin and for the  
22 Commission.

23 Q. In hindsight, how comfortable do you feel about your  
24 response, given that you had been the interviewer of Mr Howe  
25 in 2006, there was the information in 2007, there was the  
26 conviction summary in 2007? How comfortable with you about  
27 the lack of accuracy that was provided to Cooper Legal and  
28 Mr Wiffin?

29 A. Not comfortable.

30 Q. What processes are in place now that could reassure the  
31 Commission that similar oversights on multiple occasions is  
32 not likely to be happening to other claimants?

33 A. I think, as I alluded to yesterday, we have certainly a  
34 vastly better data management system than we did then. And  
35 I don't say this in any way as excusing those oversights and

1 inaccuracies, but I recall in 2006 being aware that we  
2 didn't have any specific type of data or information  
3 management system, specifically asking for one to be  
4 developed in some way for us. That didn't happen and at  
5 least two subsequent attempts over the years to do something  
6 similar progressed a certain distance but nothing ever  
7 eventuated. And, again, I stress that I'm not using or  
8 saying this as a defence, but we didn't exactly have the  
9 best tools.

10 And I was reflecting again last night that if the Crown  
11 had put the resources that have gone into this Commission,  
12 we're very, very grateful that that has been done and that  
13 Inquiry is underway, but if anything like that resource had  
14 been put in place to address claims by the Crown 15 years  
15 ago, then I suspect we would be in a very different place to  
16 where we are now.

17 Q. Because it seems inexplicable that two years go by, from  
18 Crown Law having the advice about the convictions, assuming  
19 they would have passed it on relatively proximately to MSD,  
20 if you didn't already have it, because Mr Wiffin is very  
21 clear in his evidence and he says at page 34 of his  
22 transcript, "I would not have accepted this offer at all had  
23 I known what I have since heard about the extent of Alan  
24 Moncreif-Wright's offending".

25 So, specific to Mr Wiffin, in that he feels he was  
26 deprived of highly relevant information material to his  
27 claim; and I don't take you to not agree that that is  
28 unacceptable?

29 A. And I would repeat, I think, what I've already said, that we  
30 did not manage Mr Wiffin's claim or expectations at all  
31 well, and I have apologised for that and I am very happy to  
32 do so again.

33 Q. But the bigger concern, Mr Young, is that whole issue of  
34 informed consent, particularly where you've got a process  
35 that wraps all the allegations up in one, it's full and

1 final settlement, can't really come back from that, and then  
2 you find that material, highly relevant information has been  
3 withheld from you.

4 So, if we take it away from Mr Wiffin briefly, if you  
5 look at, say, the Ngatai claimants where they were settled  
6 for a number of years on the basis of no acceptance of  
7 sexual abuse. There have been three cases that I am aware  
8 of that have been accepted on the basis of sexual abuse.  
9 All of those previous claimants are likely to feel very much  
10 like Mr Wiffin should they find out. What would you say to  
11 them?

12 A. What would I say to them in respect of why the abuse by  
13 Mr Ngatai wasn't acknowledged?

14 Q. And what can be done about it now that relevant information  
15 has within uncovered or accepted?

16 A. Well, I guess a couple of comments. One is that, yes,  
17 settlements have been made for people who have made  
18 allegations against Mr Ngatai, and I hasten to add I'm not  
19 suggesting that he wasn't abuser. But I guess one  
20 difference is that we, to my knowledge, have never received  
21 any confirmation in the same way as we have about  
22 Moncreif-Wright or Ansell and others, that he was abuser.  
23 To my knowledge, he wasn't charged on convicted. As I said,  
24 auto I'm not suggesting he wasn't but at the time of those  
25 initial allegations against Mr Ngatai, then we were  
26 operating, I guess, in a vacuum of information about him and  
27 the extent of which he was a confirmed perpetrator.

28 So, yes, I can understand those earlier claimants where  
29 their claim didn't acknowledge an abuse by him to feel in a  
30 similar way perhaps to Mr White or Mr Wiffin who, I think  
31 someone used the term first cab off the rank.

32 Whether there is any scope to go back to those people or  
33 not, is a decision I suspect that's beyond me. But, again,  
34 my personal view is that that would be a good thing to do if  
35 it were possible.

1 Q. And where would the decision-making for that type of  
2 revisiting settlement lie?

3 A. Without putting my colleague Linda in the hot seat, I  
4 imagine it would be at Linda's level or above. And I  
5 suspect, dare I say it, Crown Law may also have a view.

6 Q. And just very briefly because we heard from Cooper Legal  
7 that MSD has declined to give a reason for its change in  
8 position in relation to Mr Ngatai, relying on the fact that  
9 the Royal Commission was in place and there needed to be a  
10 joint response, are you able to help us at all as to what  
11 the change of position is?

12 A. It's not something that I was intimately involved in, but my  
13 understanding is that it is that we haven't received any  
14 smoking gun, as it were. There's no new information that,  
15 you know, confirms in some way that Mr Ngatai was abuser.  
16 My understanding is that simply the number of allegations  
17 and the nature and, presumably, the similarity of those  
18 allegations that have been made against him, that it's got  
19 to that point where it's difficult, if not impossible, to  
20 deny.

21 Q. And just quickly looking at a topic that we looked at yet in  
22 terms of the transfers, and particularly in relation to the  
23 Wiffin case. There was the interview from Mr Howe  
24 suspecting abuse at Hamilton Boys', transfer to Epuni. What  
25 could or should MSD do when that type of information comes  
26 to it because, as I understand, there were nine claimants  
27 settled at Epuni. Do we know how many allegations there had  
28 been made against Mr Moncreif-Wright at Hamilton Boys'?

29 A. I certainly can't tell you off-hand. There was obviously  
30 one that was referred to in some of the documents yesterday  
31 but, yes, we would need to look or someone would need to  
32 look to see whether he's been named by anybody that was at  
33 Hamilton Boys'.

1 Q. And, as an internal process, when that information comes to  
2 light, should it be, if it wasn't, standard practice to join  
3 the dots at the time of the information receipt?

4 A. Information about?

5 Q. So, you've got the suspicion about Mr Moncreif-Wright at  
6 Hamilton Boys', you've got the information that he "slipped  
7 up" at Epuni, we know that he has worked across those two  
8 organisations. At what point does MSD undertake appropriate  
9 analysis of the information it has available to it to  
10 proactively make sure that risk and victims and claims are  
11 assessed as fully as possible?

12 A. Well, I think using that example of that claim that was  
13 settled I think 2013, was it, I think from the documents  
14 yesterday, suggests that those dots were joined up. That  
15 the claimant alleged he was abused by a Mr Wright at  
16 Hamilton Boys' Home. The assessment of his claim clearly  
17 identified that Mr Moncreif-Wright worked there at the time.  
18 We knew about Mr Moncreif-Wright. So, for the purposes of  
19 that claim, those dots were joined.

20 Q. So, without naming another claimant, there were the three  
21 victims relating to the 2011 conviction and one of them was,  
22 I won't use - one of them was interviewed and found to be a  
23 very credible witness, very similar allegations.

24 So, looking at those principles but the claim was not  
25 settled, so looking at your principles, you've got all of  
26 the knowledge about Alan Moncreif-Wright, you've got  
27 information about the residences, you've had a claimant who  
28 has been interviewed, found to be very credible, details are  
29 very accurate; and I can get a document number if that's  
30 helpful so it can be later reviewed. That's MSD2353, it's  
31 July 2007, so exactly in the same timeframe. It's an  
32 interview of somebody else, Mr Peter Scarhill, who also  
33 gives similar information.

34 So, really exploring the proposition that you're  
35 assessing claims, it would be efficient and expeditious, I

1 put it to you, when you get a claim, look at the time  
2 periods, seek out what other claims relate to those  
3 residences' time periods perpetrators, and deal with them  
4 using all of the information you have to resolve them as  
5 quickly as possible.

6 So, why does that not happen?

7 A. Well, I think it does but not necessarily - I guess, the  
8 reality is that we have always, and unfortunately, been  
9 working with a backlog. So, if a claim arrives on our desk  
10 today and includes some of the features you've summarised,  
11 yes, you're right, it would seem expeditious to identify any  
12 of those elements of the claim that we have information and  
13 confirmed facts about but, to be fair to the perhaps 500  
14 claimants that came before that person and are still yet to  
15 be assessed, is it fair to them for that person to jump the  
16 queue? As I mentioned earlier, there may well be elements  
17 of the claim that we can effectively tick off but there may  
18 be other elements that are unique and novel to that claim  
19 that need to be assessed as well.

20 So, I guess it's about how any agency best manages some  
21 of those competing interests, I guess. But, yes, and, you  
22 know, I guess one of the purposes of this Commission is to  
23 think about and identify the kinds of processes that can  
24 bring about the most efficient resolution of claims that is  
25 done in an effective and timely way.

26 We have made some efforts to do that, to improve that  
27 over the years, with mixed success but, yeah, I think one of  
28 the issues certainly is that there are constraints within  
29 which we work. Going back to your proposition, I would  
30 agree, it would be expeditious to do some things in a  
31 different way. But is it always possible, is I guess an  
32 open question.

33 Q. So, it's that competition between the timely resolution and  
34 your prioritisation policy which makes the mandate order,  
35 with some exceptions?

1 A. Yes, and, yes, it is, there are - Mr MacPherson talked about  
2 it in perhaps a slightly different context but there are  
3 inherently, I think, some compromises and trade-offs in  
4 these kinds of processes that don't necessarily always  
5 meet - best meet the needs of an individual claimant.

6 Q. And just looking at the circumstances in which Mr Wiffin's  
7 claim came to be reassessed. The evidence has been that  
8 that arose out of the Gallen report. I am just trying to  
9 find the reference. There was actually a meeting, there was  
10 a claims resolution meeting in 2000 - I'll just find this,  
11 where in the same meeting minutes it talks about the Gallen  
12 review but it also refers to the CLAS Judge Henwood report  
13 and it talks about UN matters. Here we go. It's MSC340,  
14 it's Claim Strategy Group minutes for the 18th of January  
15 2010. At item 4 you will see it says "Wiffin to be  
16 re-reviewed in light of Gallen's comments in his report".

17 But if we can then go to the next page, and down to the  
18 next page. I'll quickly find it, I haven't got the item  
19 number. Item 7, thank you.

20 So, if we call out item 7, it talks about Carolyn  
21 Henwood's report in the second bullet point. And we know at  
22 around the same time there is the Vaughan documentary that  
23 screened in late 2009, August I believe. And we've got the  
24 UNCAT recommendations also referred to.

25 So, Mr Wiffin's view or suspicion was that there was a  
26 congestion of factors that actually precipitated the review  
27 and it does seem that in this particular meeting, certainly  
28 the Gallen review was a material element but there were  
29 perhaps also these other influences because Judge Henwood,  
30 as we heard from Mr Wiffin, had advocated strongly on his  
31 behalf as well.

32 Can you recollect whether it was just a factor or  
33 influenced by these other factors that may have converged to  
34 say this is a case that we need to have a closer look at?

1 A. As to Judge Henwood's advocacy, I can't say that she didn't,  
2 but I don't have any recollection that she advocated to us  
3 or to the Ministry on behalf of Mr Wiffin. That's not my  
4 recollection of it and I know Mr Wiffin, I've seen obviously  
5 and heard his evidence about his feeling that there were, as  
6 you say, that convergence of other issues that he thought  
7 may have influenced.

8 I can't - I don't see the connection, I should say, with  
9 UNCAT and Mr Wiffin's claim or a review of his claim.

10 I can't say that the 60 Minutes programme wasn't swirling  
11 around in my mind or the minds of other people, whether that  
12 may or may not have influenced. But, I think as I said  
13 yesterday, from the outset I felt some unease about the way  
14 his claim was dealt with and the settlement offer, if you  
15 can call it that, that was made.

16 Certainly, the interview that I had with 60 Minutes  
17 reinforced, if you like, some of the questions that I had  
18 about that. And I just can't remember the exact timing of  
19 it but I also suspect that was probably one of the reasons  
20 that Mr Wiffin's claim was one of those that was included in  
21 the claims that Justice Gallen was asked to review.

22 Q. As I understand it from Mr Wiffin's evidence, you had said  
23 to Mr Vaughan that you would reopen the case and that was  
24 August and then the Gallen report was -

25 A. I was looking at some notes of the transcript of that  
26 interview and, again I don't mean to split hairs or be  
27 pedantic, I don't think I said reopen but I said on maybe  
28 one or two occasions that we would be happy to review it.  
29 So, I think, as I said, that or the fact that I was  
30 questioned and challenged on that issue, and that Justice  
31 Gallen obviously also had some concerns about his claim,  
32 that, yeah, I would still say that was the primary reason,  
33 Justice Gallen's comments that is, were the primary reason  
34 that we undertook that review.

1 Q. Just going to the first offer that Mr Wiffin received, it  
2 was \$4,000 for services. And, as I understand your evidence  
3 at paragraphs 7.9-7.10, that type of offer is given  
4 effectively where there's a moral claim but no real  
5 acceptance of the allegations as such. How could that  
6 possibly apply to Mr Wiffin, given at that stage there was  
7 the acceptance of the physical abuse in the Moncreif-Wright,  
8 there was the acceptance and knowledge of the sexual abuse  
9 of Mr Moncreif-Wright, how could he be offered \$4,000 for  
10 services for the first offer?

11 A. I can't qualify my discomfort and unease with this claim.

12 Q. And when you then went back, and you allocated to a senior  
13 social worker, just out of interest, who was the person who  
14 dealt with Mr Wiffin's claim in 2009?

15 A. Fiona Wilson.

16 Q. And given that Ms Wilson had identified that she believed  
17 the allegations as described, and we spoke about the apology  
18 letter yesterday, was there any particular reason that MSD  
19 felt unable to specifically acknowledge the physical assault  
20 and the sexual abuse in his letter which would have, we've  
21 heard from Mr Wiffin, been meaningful?

22 A. In her subsequent apology letter?

23 Q. Yes, in the final letter.

24 A. I think I said yesterday, I'm not sure whether it was to  
25 you, Ms Janes, or Ms Aldred, that some of the things I  
26 personally, and I'm sure people like Ms Wilson might want to  
27 see in an apology letter, aren't always the same as others  
28 and the advice that we might get, and I think that, yeah,  
29 comes down to, dare I say, managing risk.

30 **CHAIR:** Risk to whom, Mr Young?

31 A. To the Crown.

32 **CHAIR:** By acknowledging specifically wrongs to  
33 survivors?

34 A. Yes, I think, look I might be taking it a bit far but, yes,  
35 I think there was some sense that we shouldn't be admitting

1 specific liability for specific abusers by specific  
2 perpetrators.

3 **CHAIR:** Do you want to follow-up on that, Ms Janes?

4 **MS JANES:** I'm happy for you to do that, Madam Chair.

5 **CHAIR:** Yes, right. Why not?

6 A. Um -

7 **CHAIR:** If wrong has been done to a human being by a  
8 named human being, isn't it the just and right thing  
9 to acknowledge that?

10 A. Absolutely.

11 **CHAIR:** To the person who has been wronged?

12 A. Absolutely, I absolutely agree. And then I guess, you know,  
13 perhaps I'm - yeah, if it was up to me personally, I would  
14 do that.

15 **CHAIR:** But you are, in fact, surrounded by the weight  
16 of the Crown machine -

17 A. We are and I guess also, you know, another consideration,  
18 and again not defence, is that it's one thing obviously to  
19 acknowledge a specific perpetrator by name where there is  
20 confirmed evidence that that abuse took place. Where there  
21 isn't that same level of confirmation, then obviously there  
22 are some risks about -

23 **CHAIR:** That is obviously true. There's a natural  
24 justice provision in there, which you have  
25 acknowledged is one of your principles.

26 A. Yes.

27 **CHAIR:** But absent the name of the perpetrator?

28 A. Yeah, likewise, it's my personal view that there is much  
29 more good than harm in acknowledging specific abuse and I  
30 think there have been probably some instances where we have  
31 done that, but that has perhaps changed at times.

32 **CHAIR:** Thank you for the acknowledgment and I do note  
33 that you're doing that in a personal capacity.

34 A. Thank you.

1     **CHAIR:** I appreciate you're under some constraints in  
2 terms of being a public servant, so I appreciate your  
3 frankness.

4 A. Thank you.

5     **CHAIR:** Yes, Ms Janes.

6     **MS JANES:**

7 Q. And just really rounding out that topic though, is there any  
8 impediment not naming the person but to acknowledge that it  
9 is representative and acknowledging both sexual and physical  
10 abuse, so that the claimant has a genuine sense of having  
11 been listened to, acknowledged the breadth of the  
12 experience, rather than just abuse which is not terribly  
13 meaningful in terms of a reflection of what they had  
14 actually experienced and suffered?

15 A. Again, my view is that there shouldn't be an impediment to  
16 doing that.

17 Q. Just quickly rounding out, because I'm conscious I want to  
18 leave time for the Commissioners and also your own counsel,  
19 but you may or may not be able to assist on this but  
20 Ms Hrstich-Meyer, her reply brief at paragraph 4.7 notes  
21 that attempts were made by MSD to locate Mr Moncreif-Wright.  
22 Were you aware of or involved in those attempts and why that  
23 did not happen?

24 A. You're talking about subsequent to 2009, as I recall? I  
25 think I referred earlier to some discussions about that.  
26 And, yes, again timeframes escape me but, yes, I was  
27 involved because that was one of those occasions I used a  
28 private investigator to try and confirm where  
29 Moncreif-Wright lived. So, yes, attempts were made. I even  
30 remember phoning who I thought - a man who I thought was  
31 him, and I suspect was him, but he was evasive - was your  
32 question also why it wasn't pursued?

33 Q. Yes, but it sounds like it was pursued, so can you just  
34 clarify the use of the private investigator to try and find  
35 him and when that occurred?

1 A. It's in my brief, I think.

2 Q. You talked about looking for a witness, yes, looking for a  
3 witness in the Wiffin trial, you didn't -

4 A. Yes, sorry. I think it was in 2010, I could be corrected on  
5 that.

6 Q. So, just confirming the reference in your brief is  
7 actually -

8 A. Yes, yes, sorry, yes, I forgot that it wasn't named, if you  
9 like, or it didn't identify that person.

10 Q. Was the private investigator not able to - but you spoke to  
11 somebody, you weren't able to ascertain if that actually was  
12 Mr Moncreif-Wright?

13 A. I think the sequence of events was that we found a telephone  
14 number for a person of that name. I attempted to speak with  
15 him and then I think it was after that, that because I or we  
16 weren't certain that that was Moncreif-Wright, and I think  
17 it was after that that we asked the private investigator if  
18 they were able to confirm whether that was the right person  
19 at that particular address.

20 Q. And without in any way making this very quick segue  
21 diminishing the importance of the topic, because it is a  
22 hugely important topic, and I will take it up with  
23 Ms Hrstich-Meyer, but I thought I'd better ask you in case  
24 you are the right person to ask. In terms of the Treaty of  
25 Waitangi, which has obviously been in existence for the  
26 entire period of the Historical Claims Unit, in the time  
27 that you were involved in that unit, what reference to the  
28 Treaty and tikanga Māori was given in terms of internal  
29 training, utilising those principles or applying those  
30 principles to claims that you were assessing?

31 A. It sometimes feels like just making a succession of  
32 apologies but, yeah, the lodging of those claims, the  
33 Waitangi Tribunal claims in 2017?

34 Q. 2017.

1 A. Was a challenge, and an absolutely rightful challenge to us.  
2 And it's always a bit sobering when one looks back and  
3 thinks about how you should have done something different.

4 Having said that, you know, as you know and as I've  
5 talked about, the senior social work advisers who formed  
6 part of the team, and in an increasing way, were all  
7 registered social workers with many years of experience.  
8 So, one of the expectations - not expectations, one of the  
9 conditions, if you like, of registration and competence, is  
10 being able to work cross-culturally. So, inherent I guess  
11 in the work that they were doing in particular because they  
12 were front facing with our claimants, then there was the  
13 expectation that they would work with people from different  
14 cultures, and particularly Māori, in a way that was  
15 respectful and acknowledged their culture. But I accept  
16 that that is somewhat different to having any kind of overt  
17 acknowledgment of the Treaty or of te ao Māori in any of the  
18 policy material that we might have had.

19 I would like to think that we did work in a way that was  
20 culturally appropriate and responsive to people's needs,  
21 while accepting that it was an area that we could certainly  
22 have given much greater specific consideration to.

23 Q. So, in 2006 when it was reflected that the claimant cohort  
24 consisted of probably 64, I think it was 64-75% Maori, was  
25 there any reflection at that point about the particular  
26 needs that may underpin their experience, loss of language,  
27 loss of culture, disconnection from whanau, or were they all  
28 treated as claimants based purely on the allegations they  
29 were making?

30 A. I think, to be fair, that we did look at claimants as a  
31 diverse group of people who would have - some, many of whom,  
32 would have a variety of needs that we were, at that stage,  
33 hopeful of supporting in some way. But, no, I don't think  
34 we did give the kind of specific thought to those specific  
35 cultural needs.

1 I know certainly, and again I can't timeframe it but I  
2 think at various times over the years, and again coming from  
3 a social worker's perspective, was that awareness of, and  
4 again coming from claimants who we were meeting with and  
5 talking with, they might not necessarily have specified it  
6 in their claim as such, but who certainly talked about that  
7 disconnection that they had from their culture, from their  
8 language.

9 And that was something that the senior advisers, I know,  
10 were conscious of, you know, how - is there a way that that  
11 can be addressed? And including, I guess, in the claims  
12 context, is that something, was that something that should  
13 be acknowledged in a similar way as an abuse, as an assault  
14 should be acknowledged. I don't think we ever got to an  
15 answer.

16 Q. That was the next question, what conclusion did you reach?

17 A. Yeah, and I think it's one that is still a very open  
18 question, and one that needs to be really given some serious  
19 consideration, because certainly, that dislocation is  
20 certainly a very real issue for many people. You know, and  
21 one of the things I think that a piloted wraparound process  
22 will aim to do, is to address some of those disconnections  
23 and hopefully work with people to reconnect. So, it's  
24 perhaps a very small step in the right direction but there's  
25 clearly still a lot that can be done.

26 **MS JANES:** And I was going to ask about records and  
27 redactions, but I suspect that I need to concede time  
28 to the Commissioners and to Ms Aldred.

29 **CHAIR:** If we could give you, say, 10 minutes on that?

30 **MS JANES:** Yes. How are you - that's fine?

31 **MS ALDRED:** Yes.

32 **CHAIR:** We agree that records and redactions are  
33 really important, but we do have some questions, so if  
34 you could get that out, we would be very pleased if  
35 you can do that.

1 **MS JANES:** And likewise, without diminishing the  
2 importance of that because they are big topics in  
3 their own rights and be assured that the Commission is  
4 looking at them.

5 A. Sure.

6 Q. I will just put some very short propositions, if I can, to  
7 you. Without traversing the N v Attorney-General case but  
8 it was very clear at that stage that there should be minimum  
9 redactions? All relevant information should be provided to  
10 claimants, not just because they needed to be able to  
11 formulate and understand their lives but to reconnect with  
12 wider family, if it that's possible? And you'd accept that  
13 there are a large number of reasons it's important to get  
14 the fullest possible records if you're a claimant?

15 **MS ALDRED:** Excuse me, before Mr Young answers that,  
16 could Ms Janes please just clarify with Mr Young that  
17 the decision that she's talking about is a decision of  
18 the High Court relating to redactions made in  
19 discovery material and not in relation to the  
20 alternative dispute resolution process or Privacy Act  
21 records.

22 **MS JANES:**

23 Q. Let's very quickly cover filed claims which is a different  
24 process, because it's the High Court discovery process and  
25 the N v Attorney-General relayed to that.

26 So, we've heard from Georgina Sammons, that she was in  
27 the litigation path. And irrespective of that, she got 45  
28 out of the 90 pages of records that she got were redacted,  
29 and that was difficult for her to understand and very  
30 distressing because one doesn't know what those 45 pages  
31 relate to.

32 And I understand that there are guidelines about  
33 redactions. Can you just briefly describe, both for the  
34 filed and unfiled claims, what the approach, in terms of

1 provision of records to claimants specifically, rather than  
2 the Cooper Legal discovery?

3 A. So, essentially, provision of records under the Privacy Act?  
4 That's your question, is it, how that's - yeah. Just an  
5 initial comment, as I think I said earlier, I had  
6 responsibility for overseeing Privacy Act requests in the  
7 early years of the Historic Claims Team but, again, I'm  
8 having difficulty time framing it, but haven't for a good  
9 number of years now, so that's outside my realm, so I can't  
10 speak to how they are managed currently.

11 But I have absolutely no issue in agreeing with your  
12 proposition that, firstly, the law entitles any person,  
13 including claimants, to a copy of their records, subject to  
14 the provisions of the Privacy Act. I mean, that's the short  
15 and the long of it.

16 And they are entitled to that as of right or as according  
17 to that legislation, and clearly for some of the reasons you  
18 outlined.

19 Certainly, when I had some responsibility for managing  
20 and overseeing Privacy Act requests, whether they were  
21 for - and it made no difference whether it was Cooper Legal  
22 or another lawyer requesting the files on behalf of their  
23 client, or if it was somebody who requested those directly  
24 to us, it made no difference. And, to the best of our  
25 ability and to the best of our understanding and  
26 interpretation of the Privacy Act, we released the records  
27 accordingly.

28 Q. I'm just going to pull up a document because I think that  
29 may assist us.

30 A. Yes.

31 Q. So, this is MSC ending in 549. It's a document, I have a  
32 date of 14th of September 2007. I'm not quite sure where I  
33 got that date from, but can you just have a look at this  
34 guidance. Does that look familiar to you?

1 A. Yes. Again, I saw it in preparation for the hearing. The  
2 date sounds about correct. I couldn't be more specific than  
3 that. And it's a document that I think was largely drafted  
4 by one of the lawyers from the Child, Youth and Family Legal  
5 Team who was, at that stage, doing some part-time work and  
6 assisting my team. And one of the things that she was doing  
7 was giving us some advice and guidance on how to manage  
8 privacy requests.

9 Q. So, it's not something that was drafted by you and your  
10 team, but did it inform how you and your team approached the  
11 release of information to claimants under Privacy Act  
12 requests?

13 A. Yes, yes, that was the purpose of it.

14 Q. And if we can just move, you will need to actually go  
15 through the pages and I will tell you when to stop. There  
16 is a particular - because we're doing this shorthand, when  
17 we look at this document - this is the one, thank you.

18 So, if I can call out the first two paragraphs up to the  
19 bullet point, it says, "Bear in mind whilst we prefer to  
20 provide requestors with a good level of information about  
21 the reasons for them coming into care, what happened during  
22 their time in our care and why the care ended; we need to be  
23 aware of the legal basis for that release to ensure that all  
24 interests are protected, including ours ..." and then it  
25 says:

26 "If in doubt, leave it out" - it is safer to withhold  
27 too much". It also at the bottom says, "Also, there could  
28 be a finding that we have breached the provisions of the  
29 Act - best avoided!!".

30 Reflecting on, you can't talk for other people who are,  
31 apart from a general policy perspective, but was this  
32 something that you are aware of within MSD that this "if in  
33 doubt, leave it out" and ask the claimant to come back for  
34 more if they are minded to?

1 A. As you say, I can't speak to anything beyond my experience  
2 but - yes, "if in doubt, leave it out" could be viewed in a  
3 number of ways, couldn't it? But I think what it is saying  
4 is that, and again, I'm not trying to minimise or justify  
5 this, that if there is some doubt, and despite advice about  
6 whether some things should be released or redacted, then I  
7 think the basis of that comment is that if it is redacted,  
8 then, yes, potentially, and it shouldn't have been, then,  
9 yes, it can potentially be released later. But I accept  
10 that that also means that the claimant or their solicitor or  
11 whoever would need to request that.

12 If it is something that should have been redacted and is  
13 released, then clearly I guess that is when a breach  
14 potentially occurs.

15 You can't undo a breach, whereas it is perhaps somewhat  
16 easier to release more information.

17 I don't know whether it is any assurance or provides any  
18 assurance, but regardless of the content of this guidance,  
19 there were two, I guess, overriding messages that I gave to  
20 all of those who were managing or actually doing the  
21 requests, and that was, one, the absolute right that people  
22 had to their information, and they needed to have that so  
23 that they could have a full understanding of their  
24 experience in care, from the perspective of the records of  
25 course.

26 And secondly, that if there was anything even approaching  
27 suggestions of harm, ill-treatment, abuse, regardless of how  
28 that may have made the Ministry look, then there was to be  
29 absolutely no question that that is information that should  
30 be released.

31 So, again, I guess what I'm trying to say is that I have,  
32 and I would like to think those that I had responsibility  
33 for who were managing it, always appreciated the importance  
34 of people having access to their records. And it concerned  
35 me to hear Mr White in his evidence to this hearing talk

1 about the fact that he, when he received his records, and I  
2 think he received them through one of the Child, Youth and  
3 Family Officers, as opposed to us, but they were difficult  
4 to work through, difficult to understand, seemed to be out  
5 of order, and he even suspected that that had been  
6 deliberately done to perhaps confuse him.

7 I can absolutely understand his frustration. I would  
8 like to think that there would be absolutely no way that  
9 they would have been deliberately put out of order but I,  
10 myself, who have looked at goodness knows how many records  
11 and have a very good understanding of the nature of those  
12 records, can still find some of them very confusing to  
13 follow. They are not necessarily always in chronological  
14 order.

15 And I know at times, well, at a time we even talked about  
16 whether we could actually take the records apart and try and  
17 put them in some kind of better chronological order so that  
18 they would make better sense to the reader.

19 Our advice was that they had to be released in the form  
20 in which they were held.

21 Similarly, we were conscious that, you know, if there  
22 were large amounts of redactions being made, and sometimes  
23 that might be a whole page, you know and assuming those  
24 redactions were proper, we were conscious that, you know, a  
25 person like Ms Sammons might get 50 pages that are just  
26 blank, and that raises a lot of questions, if not  
27 suspicions.

28 So, a consideration around that was, should we not  
29 provide those blanked out pages, so at least the person is  
30 not confronted with however many pages. But, again, the  
31 advice was, and I think it's probably the correct advice,  
32 no, they had to be provided because that shows that, you  
33 know, X pages were redacted.

34 So, I guess, we've always been aware of how, yeah, I  
35 guess of the consequences of redactions, you know, when

1 they're done according to the law, that that is not always  
2 easy for people to understand and, as I said, can raise  
3 questions and suspicions.

4 And I would like to think that when people are provided  
5 with their records, that there is a decent and  
6 understandable explanation given to them as to why  
7 redactions are made, so that perhaps to allay them of some  
8 of those concerns.

9 Having said that, that also doesn't say that at times  
10 errors will undoubtedly be made and information that should  
11 have been redacted may be released and the reverse may also  
12 happen.

13 Q. Just a very quick final question, would you understand that  
14 somebody who's not legally represented receiving the  
15 redacted documents may not understand that they have a right  
16 to challenge or come back and request more information?

17 A. They may do but, again, I think in every instance where  
18 someone who isn't legally represented is given a copy of  
19 their records, it's made very clear in the covering letter  
20 that they have that right to either come back to us and/or  
21 to go to the Privacy Commissioner.

22 **MS JANES:** Thank you very much.

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1  
2 **ERNEST GARTH YOUNG**  
3 **QUESTIONED BY COMMISSIONERS**  
4  
5

6 **COMMISSIONER ALOFIVAE:** Mr Young, thank you for your  
7 evidence today and really in light of the comments  
8 that you made to our Chair, just a follow-up.

9 You were shown a document yesterday, it was actually,  
10 Ms Janes, it was an analysis that you'd done, but of the  
11 figures that had been provided in terms of some Crown  
12 documents, and you commented that actually, in your own  
13 assessment there were three organisations that kind of  
14 really rose to the top. There was Epuni, Hokio Beach and  
15 Kohitere?

16 A. Yes.

17 **COMMISSIONER ALOFIVAE:** And, in light of your comments  
18 around risk to the Crown about admitting to certain  
19 things, would you say now that you see a pattern of  
20 endemic abuse or systemic abuse, in light of  
21 everything that you know today, reflecting back?

22 A. Across the care system?

23 **COMMISSIONER ALOFIVAE:** Yes.

24 A. Well, um, I don't want to admit to stupidity, but I'm not  
25 entirely sure what is meant by "systemic". I mean, it's  
26 without doubt that many, many children and young people in  
27 care, whether it was in residences or in foster care or in  
28 family homes, wherever, were harmed in all sorts of ways.  
29 Many children who didn't come into care were harmed in their  
30 own homes and we failed to protect them from that.

31 I would certainly like to think that not every child who  
32 came into care suffered some kind of harm. That would be  
33 unconscionable.

34 But I guess the fact that many obviously were suggests  
35 that at least there perhaps wasn't, at various times anyway,

1 the right checks and balances that might have ameliorated  
2 that somewhat.

3 But, as I understand the Commission's Terms of Reference,  
4 you know, one of the things you'll be trying to, I guess,  
5 get a much better sense of, is the extent of abuse within  
6 the care system over the years and I truly hope that you are  
7 able to come to some better understanding of that because  
8 I'm not sure that we have been able to do that as yet.

9 But, yeah, clearly, many were abused in all sorts of ways  
10 and that suggests that not enough was done to clearly keep  
11 children safe.

12 **COMMISSIONER ALOFIVAE:** That as far back as 2007 there  
13 were these emerging patterns, numbers are on the  
14 increase, systems that didn't talk to each other.  
15 It's not a criticism, just a reflection of the reality  
16 of the system you were working with at the time, that  
17 there were endemic and systemic issues that were  
18 rising that should have put you on high alert?

19 A. Yes, I think it's - perhaps, I think probably what we were  
20 focused on was the changes before us and in trying to  
21 address those and deal with those and the people who were  
22 bringing them to us, rather than giving any attention to  
23 necessarily how widespread that past abuse was or indeed  
24 current abuse. And, yeah, I suspect that wasn't just the  
25 Ministry, but the Crown as a whole, and accepting that, you  
26 know, the Ministry certainly would have been relying on  
27 advice, but advice from agencies. But, yes, I think it is  
28 the case that we - that our focus was in one place and not  
29 necessarily another.

30 **COMMISSIONER ALOFIVAE:** Thank you. No further  
31 questions.

32 **COMMISSIONER ERUETI:** Tēnā koe, Mr Young. Could I ask  
33 a follow-up question in a way, it's about the  
34 independence of the MSD ADR process. So, this  
35 question of whether there's systemic, evidence of

1 systemic or endemic abuse across the system seems to  
2 be connected to this question about whether or not  
3 there should have been a global settlement like the  
4 settlement that they had at Lake Alice, right, which  
5 could or could not have involved - which likely would  
6 have involved an independent or a third party  
7 adjudicator and assessment of the evidence and so  
8 forth. There could have actually been, as you say, an  
9 Inquiry such as this 16 years or so ago, but that  
10 didn't happen because of, you know, the lack of  
11 evidence of a systemic abuse across the care system.

12 So, instead, what we see has developed is the ADR process  
13 and it seems from listening to you over the last two days,  
14 that there's, I think you said something like the  
15 fundamentals are in place or that you have - it's a much  
16 better, more robust process than it's ever been, it seems.  
17 You have the staff there. You know, there's changes, it's  
18 not perfect, there are things that can be done to it. But  
19 the question for me, you talked about whether or not it was  
20 in or outside the agency but the question for me is, this  
21 question of independence that survivors keep bringing up.  
22 Irrespective of this question of whether there's evidence of  
23 systemic abuse or not, we have an ADR process which is  
24 processing thousands of claims. It's, as you say, fairly  
25 robust but it's not independent. And so, you know, my  
26 question essentially is, to your mind, should it be - what's  
27 your response to survivors saying that it should be an  
28 independent process?

29 A. Well, firstly, I totally get survivors' view that it isn't  
30 independent and should be, and that's not a new criticism  
31 either from survivors or from counsel.

32 I guess, we have thought though that our process, while  
33 not being independent, is impartial. But, again, I also  
34 acknowledge and understand that survivors, in particular,  
35 might not see that to be the case.

1 But, again, a personal opinion is that, notwithstanding  
2 some of the practical issues that Mr MacPherson spoke of,  
3 personally if claims are to be managed independently, then  
4 that's not something that I have any difficulty with.

5 Mr MacPherson obviously raised the question or the issue  
6 that presumably nothing can be entirely independent of the  
7 Crown if it's relying on Crown funds but certainly, and I  
8 guess the Confidential Listening and Assistance Service is  
9 an example of something that was not independent of the  
10 Crown but obviously independent of the agencies who had care  
11 responsibilities.

12 So, hopefully that answers your question. Yes, I can  
13 certainly understand the wish and the desire for an  
14 independent body.

15 **COMMISSIONER ERUETI:** Yes. And when you say it's at  
16 least impartial, what do you mean by that?

17 A. I guess, what I mean by that, is that there was a couple of  
18 things. Some separation, structurally if you like, between,  
19 you know, in the earlier days, and it was less separated but  
20 while Child, Youth and Family who was a part of MSD, at  
21 least the historic claims function, sort of sat outside the  
22 Child, Youth and Family Service line. Since, gosh, yes,  
23 since 2006, sorry timeframes, MSD and Child, Youth and  
24 Family, what am I talking about, anyway, there has been,  
25 yes, greater separation, sorry, of the two organisations.  
26 So, there is more of a split, if you like, between those of  
27 us who are dealing with historic claims and those who are  
28 providing care services.

29 I guess the other aspect of impartiality is that those of  
30 us who have been working in the Historic Claims Team, I  
31 think it goes to some of my comments about hopefully being  
32 non-judgmental, bring an impartial mind to the claims.

33 **COMMISSIONER ERUETI:** Yep.

34 A. But, again, I acknowledge that that doesn't necessarily fit  
35 or would be seen in that way by survivors.

1 **COMMISSIONER ERUETI:** I understand. Just a quick  
2 question on the Treaty.

3 So, 2006, you're starting, you're all getting together  
4 and you're thinking about what you're going to build, what  
5 the waka is going to look like. The puzzle for me is why  
6 there's no active engagement with Māori. It's not just this  
7 point about ensuring that there's a response that recognises  
8 a kind of cultural disconnect. It's more about the fact  
9 that in 2006 Treaty principles are well established,  
10 partnership, engagement with iwi who have an interest, it's  
11 clear the numbers are high, 65-70%, and your formulating  
12 principles in 2010 which have these source you're ruminating  
13 about this since 2006 and so forth but no evidence of  
14 thinking about the Treaty, despite the number of Māori who  
15 were in the claims process. It's a real puzzle for me and I  
16 don't know why it took so long for this to come up and it  
17 seems to have been prompted by the Tribunal claims 10 years  
18 later, so can you help me with that?

19 A. I don't know that I can satisfactorily help you, I'm sorry.  
20 And if I think back to early 2007 when there was a workshop  
21 that involved, you know, a huge number of agencies, and that  
22 I guess sort of come up with that, the principle or the  
23 suggestions, the recommendations of CLAS and of the  
24 Litigation Strategy, firstly that didn't include  
25 representatives from Te Puni Kōkiri. Why? I simply don't  
26 know. Were Treaty principles considered at that workshop?  
27 I certainly don't have any memory of them and I don't have a  
28 satisfactory answer for why. That's clearly something that  
29 should have crossed our threshold but didn't.

30 **COMMISSIONER ERUETI:** How many Māori were on staff at  
31 that time? In 2006 the team were very small, at what  
32 stage did you see more Māori representation?

33 A. In the Historic Claims Team?

34 **COMMISSIONER ERUETI:** Yes.

1 A. Our team administrator was Māori and in the period of time,  
2 up until relatively more recently, I'm sorry to say we only  
3 had one senior social work adviser who was Māori.

4 **COMMISSIONER ERUETI:** No more questions. Thank you  
5 for your time, kia ora.

6 **CHAIR:** I just have one area, but I want to check  
7 first that by going past 5.00 are we putting anybody  
8 to any particular inconvenience, I am thinking  
9 especially of our stenographer and interpreters. This  
10 should only take another 5 minutes or so. Are you  
11 happy to proceed?

12 Mr Young, your colleague, Mr MacPherson, yesterday spoke  
13 about building a system by getting feedback from survivors,  
14 changing it and various iterations to try and build a  
15 process by which their claims could be dealt with outside  
16 the Court system. So, there is a sense in which this has  
17 been an iterative process, building up the ADR system to  
18 what it is today.

19 An example that you particularly refer to, was the  
20 question of wellness payments, and it's just one example of  
21 how policy and the practice changed over the years.

22 So, you talked about the wellness payments early and  
23 tended to be the wraparound and then at various stages it  
24 went by the wayside and then it came back.

25 So, just taking that as one example of many, I think,  
26 where things have changed, that have affected the  
27 entitlement of survivors. It obviously leaves a discrepancy  
28 and a lack of consistency between what survivor A might get  
29 in one year compared with survivor B when the policy changes  
30 a few years later.

31 My question for you, given all of that, is, do you have  
32 any ideas or thoughts or have you given thought to how these  
33 inconsistencies can be ameliorated, can be somehow made up?  
34 Is there a way in which survivors can come back to you and

1 say, "Hey, they got wellness programmes before, I didn't get  
2 it"? Do you have anything to say about that?

3 A. We're talking about people who have had their claims settled  
4 in the past?

5 **CHAIR:** Yes, that's right.

6 A. I think I maybe briefly alluded to that earlier but, again,  
7 speaking for myself in principle, that's not something that  
8 I see as unreasonable, if you like. I guess, how it might  
9 be done in a practical way, would obviously need to be  
10 thought through and identifying - I suppose one task would  
11 be to identify, and how you identify those that may have  
12 missed out on something that they otherwise might have been  
13 entitled to.

14 But - sorry, I was just giving some thought, I suppose,  
15 to what some survivors may have missed out on and, yeah,  
16 sorry.

17 **CHAIR:** Yes, it also comes about, doesn't it, I mean I  
18 think there was reference to the nah tie or the claims  
19 about Mr Ngatai where information has come to light  
20 since settlements have happened?

21 A. It's a similar.

22 **CHAIR:** It is another example, isn't it?

23 A. It is a similar conundrum, yes.

24 **CHAIR:** I think it's one of the challenges, and I am  
25 really just putting it out there that one of the  
26 challenges of the Commission to grapple with is this,  
27 to give survivors of abuse a sense that they have been  
28 dealt with in an even-handed way?

29 A. And I think more than anything and, you know, again it's a  
30 really interesting process to go through to reflect back on  
31 the past years and, you know, hopefully we learn from  
32 experience, but I think the one thing that could have been  
33 done, and which I suspect that the Commission will be doing,  
34 is, it's actually setting up that framework from the  
35 beginning, so that the basis on which claims are going to be

1 assessed, the basis on which payments are going to be made,  
2 the basis on which other services, how survivors are going  
3 to be supported, is well understood and well-known, so that  
4 you are able to ensure that there's consistency over time.

5 We have, I think, tried our best to ensure that there's  
6 been consistency of payment, but I acknowledge that is only  
7 one part of the redress process and the extent to which we  
8 have been successful in that, again I would like to think we  
9 have been okay but, yes, I think the best possible scenario  
10 is having a very clear process. Process isn't always the  
11 best word but from the beginning, yeah, yeah.

12 **CHAIR:** A clean start maybe?

13 A. Tabula rasa, a clean slate, yes.

14 **CHAIR:** Thank you, Mr Young. Are there any questions  
15 arising from any of the Commissioners' questions?

16 **MS ALDRED:** No.

17 **MS JANES:** Just to rectify an oversight, could I  
18 produce that document, Commissioner Alofivae reminded  
19 me, if I could produce my statistical analysis as  
20 Exhibit 5.

21 **CHAIR:** Yes, we will note that as Exhibit 5.

22

23 **Ms Jane's statistical analysis was produced as Exhibit 5**

24 **MS JANES:** Otherwise that concludes the evidence for  
25 today.

26 **CHAIR:** Mr Young, you have had a gruelling couple of  
27 days and we very much appreciate your contribution to  
28 the work of the Commission. It's been important to  
29 have the insight of somebody who's been working for so  
30 long, so thank you very much on behalf of the  
31 Commission.

32 A. It hasn't been too gruelling and thank you, Ms Janes, for  
33 being very pleasant. I truly hope it has been helpful to  
34 the Commissioners and I thank you for the opportunity and  
35 commend you for your future work.

1     **CHAIR:** Thank you very much, Mr Young.

2

3                     (Closing waiata and karakia)

4

5

6

**Hearing adjourned at 5.15 p.m.**