

**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 Joss Opie, 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: 29 October 2020

TRANSCRIPT OF PROCEEDINGS

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1 **CHAIR:** Mōrena koutou, nau mai haere ma, hoki mai.
2 Tēnā koe, Ms Janes.

3 **MS JANES:** Tēnā koutou katoa. The Inquiry will hear
4 evidence today from the Ministry of Justice. It will
5 be given by Mr Brett Dooley and Mr David Howden, led
6 by Ms Wendy Aldred and Counsel Assisting Joss Opie.

7 **CHAIR:** Thank you, Ms Janes.

8

9

10 **BRETT ANTHONY DOOLEY - AFFIRMED**

11 **DAVID MACDONALD HOWDEN - AFFIRMED**

12 **EXAMINED BY MS ALDRED**

13

14

15 **CHAIR:** Good morning, gentlemen. I am required to
16 deliver the affirmation and, if you don't mind, I will
17 deliver one and ask you each to respond. Which of you
18 is Mr Howden and which is Mr Dooley.

19 **MR HOWDEN:** Judge, I'm Mr Howden.

20 **MR DOOLEY:** I am Mr Dooley. (Witnesses affirmed).

21 **CHAIR:** Thank you both very much. Good morning,
22 Ms Aldred.

23 **MS ALDRED:** Mōrena. Tēnā kōrua.

24 Q. Mr Dooley, Mr Howden, I would like you to confirm for the
25 Commissioners, please, the briefs that you have before you.

26 Mr Dooley, can you just confirm that you have provided
27 briefs of evidence to the Commission dated 27 January 2020?

28 **MR DOOLEY:** Correct.

29 Q. And a reply brief of evidence dated 6 March 2020?

30 **MR DOOLEY:** Correct.

31 Q. Mr Howden, you have provided an amended brief of evidence,
32 just updating in some material respects an earlier brief but
33 the amended version is dated the 28th of October 2020?

34 **MR HOWDEN:** Correct.

1 Q. Thank you. Just for the benefit of the Commission, I'm
2 going to largely take Mr Dooley through the briefs of
3 evidence that he has prepared, with Mr Howden being asked to
4 provide some supplementary comments to assist the Commission
5 as we go.

6 **CHAIR:** Thank you.

7 **MS ALDRED:** We will flit a bit between the briefs for
8 that purpose.

9 Q. So, Mr Dooley, if I could take you, please, to the first
10 page of your brief of evidence. Your full name is Brett
11 Anthony Dooley?

12 **MR DOOLEY:** Correct.

13 Q. Can you read from paragraph 1.1 of your brief?

14 **MR DOOLEY:** Mōrena. Tēnā koutou, e ngā maunga, e ngā
15 awa, e ngā kārangaranga maha, kei te mihi tēnei ki ā
16 koutou.

17 "My full name is Brett Anthony Dooley. I am the Group
18 Manager National Service Delivery at the Ministry of Justice
19 and hold the office of Legal Services Commissioner. I have
20 held these roles since October 2018. Prior to this, I held
21 senior leadership roles in several government agencies.

22 To the extent that I was not involved in events, that is
23 those occurring before October 2018, I have relied on
24 relevant information held by the Ministry. I have been in
25 this role for a limited time. However, both I and the
26 Ministry felt it was important for the person currently
27 holding the statutory authority to speak to the important
28 matters this Inquiry addresses. Where appropriate, I have
29 relied on research undertaken by the Ministry staff,
30 including my colleague, Mr Howden".

31 Q. Thank you. Now, if we could turn, please, Mr Howden, to
32 your brief of evidence. I will have you similarly introduce
33 yourself by reading from paragraphs 1.1-1.8 of your brief.

34 **MR HOWDEN:** Tēnā koutou tēnā koutou tēnā koutou katoa.

35 E ngā rangatira mā, e tū ake ahau ki te mihi atu ki ā

1 koutou....(inaudible), Ko clan Howden taku iwi, ko
2 David Howden toku ingoa. Kia ora tatou katoa

3 **CHAIR:** Tēnā koe.

4 **MR HOWDEN:** Nō reira tēnā koutou katoa

5 **CHAIR:** Tēnā koe

6 **MR HOWDEN:** "My full name is David Macdonald Howden.

7 I am currently employed at the Ministry of Justice in
8 the role of Senior Policy Advisor in the Criminal Law
9 Policy Team. I have held my current role since
10 November 2019.

11 Prior to this role, I was employed by Legal Aid Services
12 as a National Specialist Advisor where I also had managerial
13 responsibilities in relation to the other – up to seven –
14 National Specialist Advisors.

15 One of my several responsibilities, and also of the other
16 NSAs [National Specialist Advisors], was to provide advice
17 to Legal Aid Services staff or grants staff, and I held this
18 role between July 2011 and October 2019.

19 I had originally been appointed as a National Specialist
20 Advisor with the Legal Services Agency in 2002. I was at
21 the Legal Services Agency when it was disestablished in 2011
22 and responsibility for Legal Aid was taken over by the
23 Ministry of Justice under the Legal Services Act 2011.

24 National Specialist Advisors under both the Legal
25 Services Agency and Legal Aid Services were required to
26 demonstrate experience in at least two relevant areas of law
27 and to have at least seven years of legal practice in those
28 areas. In fact, the Specialist Advisors appointed were all
29 senior lawyers with over 15 years' experience in practice.

30 Prior to 2002, I had worked as a lawyer in private
31 practice for approximately 25 years, latterly in my own
32 practice. My practice was initially in criminal and general
33 civil litigation. As time went on, I specialised in family
34 law, including acting as Lawyer for the child and Lawyer
35 Assisting the Court. I also chaired the Wellington
36 Family Court Association for several years.

1 During my time in private practice, I was involved in
2 Legal Aid administration through the New Zealand Law Society
3 from 1988. That involvement included being a member of, and
4 also chairing, Legal Aid Committees.

5 I also held appointment as Convenor of the Wellington
6 District Legal Aid Committee which was a statutory
7 appointment".

8 **MS ALDRED:** Thank you, Mr Howden. And just to both of
9 the witnesses, as you are speaking, if you could just
10 bear in mind the signer who is keeping up.

11 **CHAIR:** And our stenographer.

12 **MS ALDRED:** And our stenographer.

13 **MR HOWDEN:** Sorry.

14 **MS ALDRED:**

15 Q. If we could turn back, Mr Dooley, to your brief of evidence
16 at page 1. You start there at section 2 giving an overview
17 of the Legal Services Commissioner role, if you could read
18 from 2.1, please?

19 **MR DOOLEY:** "The Legal Services Commissioner is
20 appointed under the State Sector Act as an employee of
21 the Ministry of Justice. In my capacity as
22 Commissioner, when performing the functions specified
23 in sections 71(1)(a)-(d) of the Legal Services Act
24 2011, I am required to act independently.

25 In other respects, I act under the direction of the
26 Minister and the Secretary for Justice. I am also delegated
27 some of the functions and powers for the Secretary for
28 Justice under section 68 of the Legal Services Act 2011.

29 In addition, my role as joint manager extends to
30 oversight of some other areas of the Ministry's activities
31 not directly related to Legal Aid.

32 Statutorily independent functions of the Commissioner are
33 granting Legal Aid in accordance with the Act and
34 regulations; determining Legal Aid repayments where Legal
35 Aid is granted; assigning a provider of Legal Aid services

1 or specified Legal services to an aided person; and deciding
2 the allocation of cases among salaried lawyers, overseeing
3 their conduct and managing their performance".

4 Q. Thank you. Now, Mr Dooley, I believe you would just like to
5 add there a little more about the independent role of the
6 Commissioner?

7 **MR DOOLEY:** Yes. Even during the process of preparing
8 submissions for the Inquiry, I have been mindful to
9 protect the independence of the Commissioner's role.
10 While a number of staff have been involved in this
11 process, only those with the appropriate delegations
12 have had access to individual files.

13 Q. Thank you. And then if you could turn the page, please.
14 And just at section 3 of your evidence, you deal with some
15 of the background to Legal Aid and if you could just read,
16 please, 3.1 and 3.2?

17 **MR DOOLEY:** "Legal Aid is government funding to pay
18 for a lawyer for people who cannot afford one and need
19 one in the interests of justice. People who get Legal
20 Aid may have to repay part or all of their Legal Aid
21 costs, as it is considered a loan.

22 Legally aided persons can apply for a write-off under
23 certain circumstances, such as serious financial hardship,
24 or other reasons deemed just and equitable".

25 Q. Thank you. The rest of that section will be taken as read
26 but if you could then turn to "General Principles of Legal
27 Aid", please, and read from 3.9 of your brief?

28 **MR DOOLEY:** "The purpose of civil legal aid is to
29 promote access to justice by providing Legal services
30 to people with insufficient means. It aims to ensure
31 people are not denied access to justice due to their
32 financial circumstances. Administering Civil Legal
33 Aid involves a balance between access to justice and
34 the responsible use of public funds.

1 Key considerations in determining whether an applicant is
2 eligible for Civil Legal Aid include: whether the applicant
3 meets financial eligibility thresholds; whether the
4 applicant is a natural person in respect of civil
5 proceedings in a New Zealand Court or certain administrative
6 Tribunals and judicial authorities; the applicant's
7 prospects of success; the applicant's interests in the
8 proceedings in proportion to the likely costs of the
9 proceedings".

10 Q. Thank you. Now, just pausing there for a moment. During
11 the evidence that we heard in phase 1, and particularly the
12 evidence of Cooper Legal, there was some discussion of the
13 interim granting process, which is the process that takes
14 place, in some cases as I understand it, before a full grant
15 of aid is considered. And that, as described by Cooper
16 Legal, was information that was required of a Legal Aid
17 provider as a prerequisite for a full grant.

18 Can you explain, Mr Howden, please, just briefly what an
19 interim grant of aid is and how that process works?

20 **MR HOWDEN:** Yes. When an application for aid is
21 received, there are a number of options available.
22 One is to grant the aid, if it's fairly clear on the
23 face of it, is to grant the application in full. The
24 other, it can be declined. But the other middle
25 option is to grant an interim grant of aid which
26 enables, which is used in practice or was used in
27 practice and I think it still is, that where there was
28 some complex matters involved either on a factual
29 basis or from a legal basis, as you will have heard,
30 the Legal Aid needs to be - one of the grounds or the
31 criteria for granting aid was being satisfied as to
32 prospects of success.

33 And that was not always immediately apparent, so an
34 interim grant would be available for the lawyer to carry out
35 investigation and be paid to carry out that investigation,

1 so that they could then provide Legal Aid with a properly
2 reasoned opinion as to prospects of success and aid could
3 then be considered appropriately with appropriate
4 information.

5 Q. Thank you. And I think it might just be useful for the
6 Commission to have you refer to a case that's also in the
7 bundle. It's, we will refer to it as L, although it's in
8 the public domain, and it's at MSC630.

9 **MR HOWDEN:** Yes.

10 Q. If I could - so just to quickly summarise, that was the
11 High Court considering appeals against effectively
12 withdrawal of aid in respect of four people?

13 **MR HOWDEN:** Correct.

14 Q. Two of which were upheld and two dismissed, is that correct?

15 **MR HOWDEN:** Correct.

16 Q. At paragraph 73 of that judgment, this was heard by Justice
17 Joseph Williams. Sorry, we're just looking for the page
18 number, the Trial Director. If we could call out 73,
19 please, Mr Howden if you could just read paragraph 73 of
20 Justice Williams' judgment.

21 **MR HOWDEN:** His Honour stated or held, "Interim grants
22 do not of their nature create any settled expectation
23 of ongoing funding. Continuation must depend upon
24 further consideration as mentioned in section
25 14(1)(b). There can be no suggestion that an interim
26 grant on the basis of early positive signs in the
27 evidence will mean that the Legal Services Agency is
28 committed until the litigation is completed. Further
29 consideration will be necessary once the purpose of
30 the interim grant is achieved".

31 And if I could just add in here, the reference, most of
32 the section references relate to the 2000 Legal Services
33 Act. The 2011 Act didn't come into force until 1 July 2011
34 but most of this correspondence and documentation is during
35 the period when the 2000 Act was in force.

1 Q. Is the process substantially the same, the statutory
2 considerations?

3 **MR HOWDEN:** It is. There are obvious differences like
4 the position of the Legal Services Commissioner is
5 established once Legal Aid came into the Ministry.

6 Q. Thank you. Now, just turning back again to the brief of
7 evidence. Mr Dooley, if you could continue reading from
8 3.11, please.

9 **MR DOOLEY:** "Unless there are special circumstances,
10 the Commissioner must refuse to grant Legal Aid to an
11 applicant whose income or disposable capital exceeds
12 the eligible thresholds or when the applicant's
13 prospects of success are not sufficient to justify the
14 grant of Legal Aid.

15 Since the 2004 High Court decision of Legal Services
16 Agency v New Zealand Law Society, Legal Aid has been
17 provided for settlement negotiations".

18 Q. Thank you. And then you turn to the history of Legal Aid
19 for historical abuse claimants, could you read from 4.1,
20 please?

21 **MR DOOLEY:** "An overview of the history of Legal Aid
22 for historic abuse claims is set out below. Ministry
23 records categorise cases by type of legal proceeding
24 which do not always refer to relevant applications as
25 being for "historic abuse". Often, historical abuse
26 claims have instead been categorised as claims for
27 "exemplary damages".

28 As a result, a precise determination of the number of
29 applications for Legal Aid for historic abuse claims is not
30 possible. However, through searching by proceeding type and
31 provider names, and cross-referencing with other sources,
32 the Ministry has provided in schedule 1 of this brief of
33 evidence the approximate number of applications for Legal
34 Aid for historic abuse claims that have been received
35 between 2000 and 2019".

1 Q. And, Mr Dooley, if I could just have you turn to schedule 1,
2 to the table that you refer to, and summarise that, please,
3 for the Commissioners?

4 **MR DOOLEY:** As noted, the table is not a comprehensive
5 list. It may not include all claimants that have been
6 categorised differently.

7 As can be seen between 2000 and 2012, 90% of the 1232
8 applications were granted. From 2013, all but one of the
9 1734 applications had been granted. Also at schedule 2 is a
10 table showing the amount of Legal Aid granted for historic
11 abuse claims. From 2002 through to 2019, some \$23 million
12 has been paid.

13 Q. Thank you. Just confirming, those figures in relation to
14 expenditure, do they apply to both aid for Court proceedings
15 and engagement with alternative dispute resolution?

16 **MR DOOLEY:** Correct.

17 Q. Thank you. And then if you could please read from, I might
18 just turn over now to page 4 of your evidence.

19 **CHAIR:** Before you move on, just a clarification.
20 These were grants for Legal Aid, were they all full
21 grants or were they interim? Do those include interim
22 grants?

23 **MR DOOLEY:** They would include both.

24 **CHAIR:** Some are interim and some are full?

25 **MR DOOLEY:** Yes.

26 **CHAIR:** I will leave the lawyers to sort that out.

27 **MS ALDRED:** Thank you.

28 Q. So, now going on with section 4 of your brief, you deal
29 with, first of all, the 2000-2006 period, and I won't have
30 you read that section of your evidence which will be taken
31 as read.

32 And you note at 4.8 that Cooper Legal and Johnston
33 Lawrence were counsel for most represented claimants by
34 2008?

35 **MR DOOLEY:** Yes.

1 Q. And until the solicitor at Johnston Lawrence retired in
2 2012?

3 **MR DOOLEY:** Correct.

4 Q. Just turning to the next period, which is 2007-2008, and
5 that heading is, "Significant judgments affected Legal Aid
6 decisions". Can I have you read, please, from 4.9?

7 **MR DOOLEY:** "Key judgments were issued in 2007 and
8 2008, in which claims for historic abuse were
9 unsuccessful. The judgments identified substantial
10 obstacles to claims succeeding under the Limitation
11 Act 1950, the Mental Health Act 1969 and the Accident
12 Compensation legislation. The claimants also faced
13 evidential deficiencies and difficulties in
14 establishing causation.

15 The impact of these decisions on the application of
16 section 9 of the Legal Services Act 2000 called into
17 question the continued funding of Legal Aid for historic
18 abuse claims. In the K v Crown Health Financial Agency
19 costs decision, when fixing costs in favour of the Crown
20 Health Financing Agency, Justice Gendall criticised the LSA
21 [Legal Services Agency] in its funding of Legal Aid for the
22 case. He said:

23 "The Legal Services Agency ought to be accountable for
24 funding litigation of dubious merit, either on the facts or
25 by reason of the Limitation Act provisions".

26 Q. Thank you. And if you could pause there and we'll just turn
27 to Mr Howden. If you could please just turn to your amended
28 brief of evidence and could you read 1.10 of your brief?

29 **MR HOWDEN:** Yes. "I note additionally, further to
30 paragraph 4.10 of Mr Dooley's primary brief, that the
31 costs judgment against the Legal Services Agency
32 referred to in that paragraph and costs awards against
33 the Agency in other cases were a factor taken into
34 account as part of the Agency's risk assessment

1 decisions regarding the funding or continuation of
2 funding for historic abuse litigation".

3 Q. Thank you. And just relating to that, could you explain for
4 the Commissioners, please, what the process is in relation
5 to costs awards against the LSA after unsuccessful
6 litigation for legally aided claimants?

7 **MR HOWDEN:** Yes. In line with normal practice, when a
8 party is unsuccessful in civil litigation, costs
9 follow the event and the unsuccessful party is liable
10 to have costs awarded against them, and that equally
11 applied to the Agency. As a consequence, whilst
12 although there is an option to award damages against
13 the claimant personally, in practice that was rarely
14 if ever used because obviously the claimants were
15 eligible for Legal Aid which meant they weren't
16 financially able to pay any substantial damages
17 awarded.

18 So, the legislation has under the 2000 Act and also under
19 the 2011 Act, a similar section, Section 40(4) which enables
20 the Judge hearing the case to make what is commonly called a
21 "but for" order which means that but for the unsuccessful
22 claimant being legally aided, the Judge would have awarded
23 costs against the Agency of X dollars. And that figure is
24 then available for the successful party to make an
25 application for reimbursement from the Agency. It is not
26 automatic that payment would be made because there are
27 criteria that the Agency is able to take into account but it
28 is fair to say that probably in many of the cases
29 compensation was paid and I have carried out a brief
30 analysis of five cases, including the White case, that were
31 held about this time and where the Judge has made these but
32 for orders, and that total comes to \$1,270,979. So, that is
33 a substantial sum.

34 Q. Does that total relate to cases that might broadly be
35 described as historic abuse cases?

1 **MR HOWDEN:** Sorry, I should have said, that is all
2 historic abuse cases. I can read those cases out, if
3 that's necessary.

4 Q. No, there's no need for that. Perhaps you could read that
5 figure out again, Mr Howden?

6 **MR HOWDEN:** It is \$1,270,979.78. I should also
7 clarify that the substantial figure in that was in the
8 White case where His Honour, the trial Judge made a
9 figure or granted \$811,631 but, in fact, as a result
10 of subsequent negotiations, the successful Ministry
11 did not ask for that sum. So, although it was
12 mentioned by the Court and it could have been asked
13 for, we ended up not paying that.

14 Q. Was anything paid in the White case or was it a reduced sum?

15 **MR HOWDEN:** No, no, well not from Legal Aid. I think
16 the White brothers ended up with some compensation
17 themselves as an ex gratia payment subsequently.

18 Q. Yes. So, the figure you mentioned doesn't include, for
19 example, that \$811,000?

20 **MR HOWDEN:** Well, it does.

21 Q. It does include that?

22 **MR HOWDEN:** A number of those figures were actually
23 paid out.

24 Q. Right.

25 **MR HOWDEN:** On the face of it, when we were faced,
26 Legal Aid was faced with potentially having to pay out
27 \$811,000, which was a substantial part of Legal Aid.

28 Q. Thank you for clarifying. The other thing I wanted to
29 confirm was that you referred to section 40(4), is that the
30 reference to the 2000 Act?

31 **MR HOWDEN:** Correct. All the references I will make
32 will be to the 2000 Act.

33 Q. Thank you. Mr Dooley, if you could turn back to the brief
34 of evidence and read from paragraph 4.11.

1 **MR DOOLEY:** "The LSA anticipated that the obstacles
2 faced in the 2007 litigation would be likely to arise
3 in a large number of historic abuse claims. In
4 February 2008, LSA therefore sent a letter to all
5 providers representing historic abuse claimants,
6 requesting they provide an analysis of each individual
7 client file.

8 The primary purpose of this analysis was to assess each
9 claim's prospects of success in light of the 2007 and 2008
10 judgments. The reassessment affected hundreds of historic
11 abuse related applications for Legal Aid at the time.

12 The files were then assessed in groups, with priority
13 given to claims already filed in the Courts. National
14 Specialist Advisors, who provided expert advice on complex
15 Legal Aid files, assessed the prospects of success of the
16 claims in light of the obstacles noted above.

17 The LSA then issued individual decision letters to each
18 client and the counsel indicating whether they would
19 continue to be legally aided. LSA determined that most
20 cases would not overcome the obstacles noted in the
21 judgments discussed above and so those letters included an
22 intention to withdraw Legal Aid".

23 Q. Thank you. And then just turning again to you, Mr Howden, I
24 wonder if you could just explain, please, for the
25 Commissioners the process that followed after a Notice of
26 Intention to Withdraw Legal Aid that Mr Dooley has just
27 mentioned is sent?

28 **MR HOWDEN:** Yes. Perhaps if I could just start by
29 saying that one of the grounds for withdrawal of aid
30 is if the circumstances relating to the original grant
31 had changed. And one of those changes would be in
32 relation to prospects of success which effectively is
33 a continuum throughout the Legal Aid grant.

34 And it was considered that, as Mr Dooley has stated, the
35 series of unsuccessful cases, which I might note were fully

1 funded by Legal Aid, meant that we felt we had no option but
2 to look at the whole process.

3 Now, once the decision had been made to give Notice of
4 Intention to Withdraw Aid, that was only a Notice of
5 Intention. The lawyer for the claimants was then able to
6 respond and provide, and usually did provide, additional
7 information as to why aid should not be withdrawn. And
8 there was often a to and fro-ing for some while. But if
9 Legal Aid considered - and during this period the grant of
10 aid was still continuing, so the lawyer was able to be paid.
11 But it was at the point that Legal Aid formed the view that,
12 well they weren't persuaded that there were still prospects
13 of success and a formal notice of withdrawal of aid would be
14 given. And, at that point, the grant of aid would cease
15 but, of course, the lawyer then had a number of options.
16 They would ask for a reconsideration, which invariably
17 happened. So, a separate person from the person who was
18 involved with the original decision would then relook at the
19 case.

20 If that reconsideration did not change the outcome, then
21 the matter could be taken to the Review Panel, the Legal Aid
22 Review Panel at the time. The Legal Aid Review Panel would
23 then release their decision. If that result either did not
24 support the lawyer or more often than not did not support
25 Legal Aid, then there was a further avenue, which was to
26 take an appeal to the High Court on a matter of law. And
27 that is where a lot of these cases ended up getting into a
28 bit of a circular area because decisions were made, there
29 were then reviews, they were then sent back for review,
30 there was then a further review again. So, it did consume
31 an awful lot of resources.

32 Q. And just more generally in relation to the withdrawal of aid
33 process while we're talking about it, Mr Howden, Ms Cooper
34 in her evidence characterised the period following the 2007
35 cases as being a very aggressive withdrawal of aid. And it

1 was also noted that the timing of some of those decisions
2 had a significant impact on claims and claimants. She gave
3 as an example where aid was withdrawn shortly before a trial
4 or a hearing. Could you comment on that, please?

5 **MR HOWDEN:** Yes. Well, aid is either granted or
6 withdrawn and I'm afraid I do not understand what an
7 "aggressive withdrawal of aid" actually means. But
8 putting that to one side, once the decision had been
9 made where Legal Aid felt it had no option but to
10 start going down this withdrawal process because it
11 was not considered that the applicants still met the
12 criteria of having sufficient prospects of success,
13 then there was a large number of cases, so as they
14 were moved through, notices were given before the
15 process was commenced.

16 Now, we endeavoured to focus on cases that were already
17 in trial but I should make the point that there were a large
18 number of cases where proceedings had been filed in more a
19 pro forma form because we accepted what counsel were telling
20 us, that a number of their claimants would still meet the
21 limitation criteria for various reasons but the six year
22 period was about to run out. That time can stop running if
23 proceedings under the limitation are filed in the
24 High Court.

25 So, we agreed we would look at the case and if, on the
26 face of it, it seemed to be a prima facie ground for aid
27 being granted at this initial stage, we would fund
28 particularly Cooper Legal to file a Statement of Claim.

29 However, the document filed was often fairly rudimentary
30 and the lawyers, if the case proceeded, would file
31 supplementary material.

32 But at the time we were dealing with these cases, there
33 wasn't often that much material in front of us.

34 We also were aware that if you're looking at the
35 expenditure of aid on a litigation path, in our experience

1 the majority of expenditure happens in the last, say, third
2 of the proceedings. Once a date has been set, witnesses
3 need to be briefed, submissions are prepared. And if we had
4 formed the view, if we were just looking at a purely
5 financial ground, then it was sensible to stop that path
6 earlier, rather than later.

7 But the second and probably in some ways more important
8 aspect, was that if we had formed the view, rightly or
9 wrongly, that the proceedings would not be successful, then
10 we felt that it was not actually in the claimant's interests
11 to be retraumatised by going through proceedings where we
12 believed they would not be successful.

13 Now, that comment or that view is actually supported by a
14 number of Judges and, in fact, there's a case where Justice
15 Simon France, in a historic abuse case, stated that "an
16 arguable case should be allowed to proceed but similarly,
17 however, where there was no real prospects of success, it
18 serves no-one's interests to allow false hope or to subject
19 defendants to what is an inevitably doomed claim against
20 them".

21 And that encapsulates what we felt at the time, bear in
22 mind this is the litigation route. At about this time, the
23 other agencies started to develop Alternative Dispute
24 Resolution processes, which is quite different.

25 Q. Just one point of clarification, I think you said at the
26 beginning of that discussion that you focused initially at
27 least on what you described as cases that were already in
28 trial, do you mean that?

29 **MR HOWDEN:** Sorry, that had advanced from that initial
30 pro forma proceedings to where both parties were
31 engaged in the process and the matter was being
32 timetabled in the Courts.

33 Q. Thank you. And then, Mr Dooley, please, if you could turn
34 and read from paragraph 4.15 of your brief?

1 **MR DOOLEY:** "This process resulted in the withdrawal
2 of Legal Aid for most historic abuse claimants. This
3 led to providers applying to the LARP [Legal Aid
4 Review Panel] to review many of these decisions.

5 In early 2009, the LARP overturned some of the withdrawal
6 decisions. The LSA subsequently appealed to the High Court,
7 which resulted in the LARP and LSA being directed to
8 reconsider some of their approaches to these cases.

9 Throughout 2009, Cooper Legal continued to submit a large
10 number of requests for review to the LARP. These range from
11 decisions such as the withdrawal of Legal Aid for the
12 entirety of a claim to the amount payable for specific
13 invoices.

14 The volume of reviews, and ongoing uncertainty about
15 definitive findings on an appropriate approach to historic
16 abuse cases, placed strain on the LSA's resources and led to
17 processing delays on both existing and new files.

18 The review process was then overtaken by subsequent
19 events as outlined below, with the result that the granting
20 process for Legal Aid resumed and continued to be made in
21 respect of historic abuse cases".

22 Q. And then, I might actually just have you continue reading,
23 please, under the heading "2009: Legal Aid review", could
24 you please read from 4.20?

25 **MR DOOLEY:** "In April 2009, a review of Legal Aid was
26 initiated by the Minister of Justice, Hon Simon Power.

27 In November 2009, the final report of the review,
28 Transforming the Legal Aid System, was released. The
29 recommendations included the Government should give urgent
30 consideration to alternative ways of resolving the claims of
31 historic abuse for people who were in the care of government
32 agencies; and the LSA should be disestablished as a Crown
33 entity and its functions moved into the Ministry.

34 The report also provided commentary on the status of
35 historic abuse claims at the time".

1 Q. Now, you set out a reasonably lengthy quotation from that
2 report at paragraph 4.22 of your evidence, Mr Dooley. Can I
3 have you summarise that briefly for the Commissioners?

4 **MR DOOLEY:** The report recognised the outlines and
5 complexity of historic abuse cases - sorry, the
6 costliness and complexity of historic abuse cases.
7 The potential to place enormous pressure on LSA
8 granting process and on Legal Aid expenditure. The
9 need to consider alternative resolution options and
10 significant stress that has been placed on LSA LARP
11 relationship due to a flood of claims and associated
12 congestion.

13 Q. Thank you. If you turn the page please and read from 4.23?

14 **MR DOOLEY:** "In terms of historic abuse claims, the
15 Legal Aid system had for several years been reacting
16 and responding to wider developments, such as the
17 High Court rulings, and the increase in volumes of
18 claims as they occurred, within the statutory
19 parameters governing Legal Aid, whilst ensuring an
20 equitable approach to all Legal Aid users.

21 Following this period, as Crown Agencies developed their
22 redress system, LSA and later the Ministry began to work
23 closely with the agencies on improved approaches. The
24 volume of historic abuse claims drove efforts to find new
25 ways to improve outcomes for all parties".

26 Q. Thank you. And then you go on to deal with post Legal Aid
27 review developments in the approach to historical abuse
28 claims. Could you read, please, 4.25?

29 **MR DOOLEY:** "In April 2011, the LSA issued letters to
30 all open historic abuse claimants with claims against
31 the Ministry of Social Development [MSD] to ensure
32 they were aware of MSD's Alternative Dispute
33 Resolution Process. The LSA also advised Legal Aid
34 providers that it was writing to all relevant clients
35 regarding MSD's new process and the possibility of

1 claims being able to be resolved without resource to
2 litigation".

3 Q. Thank you. And then if I could have you, please, turn to
4 your reply brief of evidence at page 9. Could you please
5 read from - so, that deals with in a bit more detail with
6 this advice from the Legal Services Agency to claimants of
7 the availability of MSD's Dispute Resolution Process. Can I
8 have you read, please, from 5.20 of your brief of evidence?

9 **MR DOOLEY:** "Cooper Legal has expressed concern at
10 letters sent by the LSA to legally aided DSW
11 [Department of Social Welfare] clients, advising them
12 of the availability of the CCRT [Care Claims and
13 Resolution Team] process in 2011. Cooper Legal
14 suggests that these letters indicated to clients that
15 a lawyer was not needed as part of that process.

16 As I noted in paragraph 4.25 of my initial brief, the
17 letter that was sent to all current open historic abuse
18 claimants with claims against the MSD informed claimants
19 that no changes had been made to the terms of their Legal
20 Aid and explained that the CCRT process within MSD was
21 available to them.

22 I do not consider the letter to be an attempt on the part
23 of the LSA to "force all DSW clients through the CCRT
24 process" but instead I believe it was intended to inform
25 claimants that the CCRT process was available to them. It
26 did not mention whether or not a lawyer was required for
27 CCRT process but did suggest that if the client wanted
28 further information on the process then they should contact
29 their lawyer or the CCRT team directly. An MSD booklet was
30 attached to the letter which outlined the process and did
31 explain that a lawyer was not required to participate in the
32 process".

33 Q. Thank you. If you could just go on and read from 5.23?

34 **MR DOOLEY:** "Additionally, the LSA wrote to Cooper
35 Legal on 21 August 2011 confirming three things."

1 Q. Sorry, I think you said 21 August 2011?

2 **MR DOOLEY:** Sorry, "21 April – confirming three
3 things. The LSA had received an independent legal
4 opinion confirming that it was permissible for the LSA
5 to inform legally aided persons of the availability of
6 ADR [Alternative Dispute Resolution] processes".

7 **COMMISSIONER ERUETI:** Can I ask if this letter went to
8 direct claimants as well as represented claimants?

9 **MR DOOLEY:** Did it go to individuals?

10 **MR HOWDEN:** It would have gone to the individuals, not
11 to their lawyers.

12 **MS ALDRED:**

13 Q. Just to clarify things, I think the Commissioner's question
14 relates to people who aren't legally represented. I would
15 assume that Legal Aid would have had no awareness of those
16 people?

17 **MR HOWDEN:** Well, we certainly were aware that there
18 were a number of claimants whom, for example, Cooper
19 Legal acted for that weren't legally aided but we had
20 no view of those clients because the only data that
21 Legal Aid kept was on Legal Aid clients, so they would
22 be the only addresses we had.

23 Q. Thank you. Mr Dooley, if you could just keep reading from
24 (b)?

25 **MR DOOLEY:** "The LSA had therefore written to each
26 Cooper Legal client who had a grant of Legal Aid to
27 take proceedings against Department of Social Welfare
28 to inform them of the ADR process. And the LSA
29 confirmed it had not made any changes to the Legal Aid
30 grants held by Cooper Legal clients or taken any steps
31 to withdraw or amend the Legal Aid grants available to
32 them".

33 Q. Thank you. Now, I just want to pause there and if I could
34 have MSC662 brought up, please. Mr Howden, just a couple of
35 points for you.

1 **MR HOWDEN:** Yes.

2 Q. So, you'll see that this is an opinion from Francis Cooke
3 QC, now Justice Cooke, dated 14 March 2011 providing legal
4 advice to LSA.

5 I might just have you read, please, the summary of
6 Francis Cooke's advice from 3.1 at the bottom of that page,
7 if that could be called up, please?

8 **MR HOWDEN:** Yes.

9 Q. If you could read that please, Mr Howden?

10 **MR HOWDEN:** "3.1. It is perfectly permissible and
11 consistent with the LSA's functions under the Legal
12 Services Act 2000 for the LSA to advise legally aided
13 persons of the availability of Alternative Dispute
14 Resolution processes, including the MSD process."

15 Q. And then if we could turn the page, please, and call out 3.2
16 and if you could read from that too, please, Mr Howden?

17 **MR HOWDEN:** "3.2. It is appropriate for the LSA to
18 advise applicants of this avenue as part of the
19 process of approving a grant of Legal Aid. It is also
20 within the powers of the LSA to provide a grant of
21 Legal Aid to enable recipients to participate in such
22 a settlement process. But an applicant for Legal Aid
23 could not be compelled to undertake such a process
24 (although their decision not to do so could be
25 relevant to the LSA's decisions)".

26 Q. Thank you. Now, I won't take you to, that's a detailed I
27 think nine pages of legal advice on those points, so I won't
28 take you through the remainder of that advice but I wonder
29 if you could just, please, give the Commissioners some
30 background to why the Agency sought that advice from its
31 legal, external legal advisor?

32 **MR HOWDEN:** Yes. Well, we were aware of this new ADR
33 process that was being introduced and we, at the time,
34 were not confident that legally aid clients of Cooper
35 Legal were being provided with that advice. That was

1 as a result of communications we had had with Cooper
2 Legal. And we were - it wasn't - we wanted to make
3 sure that legally aided claimants were aware of their
4 options. And so, on that basis, we decided to get an
5 independent opinion as to whether it was appropriate
6 for us to take this step. And from the opinion that I
7 have read out, Mr Cooke concluded that it was
8 appropriate and we could do that, and that's when the
9 letter and attachments went out from Legal Aid as a
10 consequence.

11 Q. Thank you.

12 **MR HOWDEN:** As Mr Dooley has emphasised and it was
13 also in the letter from Ms Babbington that accompanied
14 that material, it was merely making sure the parties
15 were aware of the options. It wasn't requiring them
16 to take one path or the other.

17 Q. Thank you. And then if we can just turn back to Mr Dooley's
18 reply brief and have you read, Mr Dooley, from
19 paragraph 5.24, just to the end of that section?

20 **MR DOOLEY:** "Following this period, as Crown Agencies
21 developed their redress systems, LSA and later the
22 Ministry began to work closer with the agencies on
23 improved approaches".

24 Q. Sorry, I am wondering if we're in the right brief. So, the
25 reply brief at 5.24?

26 **MR DOOLEY:** Sorry.

27 Q. Sorry, we have three briefs floating around.

28 **MR DOOLEY:** "Prior to this period in early 2010, the
29 LSA had included information about the MSD CCRT team
30 and their ADR process in letters to claimants advising
31 that their Legal Aid would be discontinued. Cooper
32 Legal objected to the LSA including this information
33 in the letters to claimants and felt that the
34 inclusion of this information in a letter advising the

1 withdrawal of Legal Aid equated to providing their
2 clients with legal advice.

3 The LSA responded to Cooper Legal's concerns in a letter
4 on 24 March 2010 stating that the information was already in
5 the public domain, and did not "purport to provide legal
6 advice". The LSA explained:

7 "The Agency is tasked with administering the Legal Aid
8 Scheme in a cost effective and efficient manner and part of
9 the process is to support any process that "avoids or brings
10 to an end any proceedings" ... where the Agency believes
11 that the MSD process offers a viable ADR alternative to
12 litigation, but where the process does not preclude
13 continuing litigation if settlement is not achieved, the
14 Agency has an obligation to ensure its views are made known
15 to its clients. This is particularly the case where the
16 Agency is advising both you and the legally aided person
17 that aid will be withdrawn".

18 A way forward was suggested that Cooper Legal advise the
19 LSA as to why the CCRT process would not be suitable for
20 their clients and then the LSA could work further with
21 Cooper Legal to address any ongoing areas of concern".

22 Q. Thank you. And then if you could turn back, please, to your
23 primary brief of evidence. I think we are at page 7 and if
24 you could read, please, from paragraph 4.26?

25 **MR DOOLEY:** "From 1 July 2011, the LSA was
26 disestablished and responsibility for Legal Aid was
27 taken over by the Ministry of Justice under the Legal
28 Services Act 2011.

29 The independent functions of the Commissioners were also
30 maintained".

31 Q. Thank you. And then you go on to discuss Agency
32 contributions to Legal Aid debt, could you read, please,
33 that section of your evidence?

34 **MR DOOLEY:** "If a claimant opted to accept an out of
35 Court settlement, the usual process was that they

1 might be liable to pay back Legal Aid costs out of
2 settlement monies. Claimants were able to apply
3 individually for consideration of Legal Aid debt
4 write-off. The Commissioner has a general discretion
5 under the Act to write-off Legal Aid debt under
6 certain circumstances, including where it would be
7 just and equitable to write-off the debt.

8 Rising Legal Aid debts have been identified as an
9 obstacle to claimants settling claims.

10 In December 2009, the Ministers of Justice, Health,
11 education, Social Development and Employment and the
12 Attorney-General directed Crown Law Office, the Ministry,
13 CHFA [Crown Health Financing Agency], MOE [Ministry of
14 Education] and MSD, to continue to follow the current
15 strategy of offering to forgive Legal Aid debts and
16 reimburse certain wellness related costs to claimants.

17 In October 2011, the Commissioner wrote to MSD supporting
18 the continuation of existing practice whereby MSD would
19 contribute two-thirds of claimant's legal costs and the
20 remaining third would be written-off by the Legal Aid
21 Services. The Commissioner noted that write-off decisions
22 were made on a case-by-case basis and so the statutory
23 discretion remained unfettered.

24 An agreement was also entered into with CHFA in October
25 2011, ahead of CHFA's disestablishment, whereby CHFA would
26 contribute half of the Legal Aid debt and the remainder
27 would be written off by the Ministry.

28 In 2012, approximately 330 claims were settled by CHFA,
29 of which 264 were subjected to a Legal Aid settlement.
30 Legal Aid debts were paid for and written-off according to
31 the Ministry's 2011 Agreement.

32 In July 2013, the Ministry entered into an agreement with
33 the Ministry of Health [MOH] whereby MOH would also pay half
34 of the outstanding Legal Aid debt, with the Ministry [of

1 Justice] writing off the remainder. In December 2013, the
2 same agreement was made with MOE.

3 Where the claim is settled with no settlement money
4 offered, the same principle applies, that is the claimant's
5 Legal Aid debts may still be part-repaid by the relevant
6 Agency, with the remainder written-off by the Ministry.

7 If a claimant pulls out of the process before settlement,
8 which is rare, as for any Legal Aid client, the Ministry
9 will identify the claimant's assets at the time of the
10 initial grant of Legal Aid, and whether there is liability
11 for Legal Aid debt will be decided in the usual way.

12 Where filed claims are settled or if a matter proceeds to
13 a Court hearing, then the question of whether the relevant
14 Agency would contribute to any Legal Aid debts is at the
15 discretion of the respective agencies. The Commissioner's
16 discretion to write-off Legal Aid debts remains in force
17 today in accordance with the Legal Services Act 2011".

18 Q. Thank you. And then if I could get you, please, to turn
19 again to your reply brief of evidence which deals in a bit
20 more detail with discussions about debt write-off, and if
21 you could turn to page 7, please, and read the section from
22 5.11-5.16?

23 **MR DOOLEY:** "As the Cooper Legal brief acknowledges,
24 there were also important discussions between Legal
25 Aid Services and Crown Agencies in relation to Legal
26 Aid repayments. As discussed at paragraphs 4.27 and
27 following of my initial brief, Legal Aid is granted on
28 the basis that it will be repaid. Where Legal Aid is
29 granted, one of the functions of the Commissioner is
30 to determine what repayments will be sought from
31 recipients. This function must be exercised
32 independently. However, the Commissioner may decide
33 not to recover debt or may write-off repayment of debt
34 in certain circumstances.

1 From 2009, the LSA, and then Legal Aid Services, engaged
2 with Crown Agencies who sought to develop an arrangement in
3 respect of Legal Aid costs for claimants. It was proposed
4 that the agencies could contribute to part of the Legal Aid
5 costs and the Commissioner could write-off the balance using
6 the powers under section 43 of the Act.

7 The purpose of these meetings between the LSA and Crown
8 Agencies was to discuss relevant practical considerations if
9 such an arrangement went ahead, including the proportionate
10 amounts that would be split between the agencies.

11 These discussions had no negative impact on the claimants
12 as the purpose was to seek an arrangement that would enable
13 their Legal Aid debt to be separately dealt with without
14 impacting on the claimant's financial settlement. Any
15 related legal costs were also unaffected by these
16 discussions as they were fixed and would be unaffected by
17 debt write-off for the claimant. Therefore, the interests
18 of the claimants were protected, and there was no impact on
19 Cooper Legal and their costs. I discuss in paragraphs
20 4.27-4.35 of my initial brief the agreements that were
21 ultimately entered into with each Crown Agency".

22 Q. And I think you've just outlined those when you were reading
23 from your primary brief, so just continue with 5.16?

24 **MR DOOLEY:** "As noted at paragraph 4.2 of my initial
25 brief, when the Commissioner wrote to MSD in October
26 2011, the Commissioner noted that debt write-off
27 decisions were made on a case-by-case basis. In
28 practice, Legal Aid Services "considers the facts of
29 the case" and "considers whether serious hardship
30 could result, what repayment programmes may already be
31 in place and also whether there are other
32 considerations around the merits of the case which
33 suggest a degree of write-off would be appropriate".
34 The Commissioner noted that he was not permitted under
35 the Act to provide an undertaking that he would

1 write-off debt in all historic abuse cases. This is
2 also the position with the arrangements entered into
3 with CHFA, MOH and MOE".

4 Q. Thank you. And if you could just turn back to your primary
5 brief and read just paragraph 4.36 on page 8?

6 **MR DOOLEY:** "On 11 May 2011, MSD entered into an
7 agreement with Cooper Legal whereby it agreed that it
8 would not rely on the Limitations Act 1950 in
9 particular circumstances, both in its out of Court
10 settlement process and in litigation, as detailed in
11 the brief of evidence of Simon MacPherson from MSD.
12 This agreement had positive impacts on eligibility for
13 Legal Aid as in some cases it could remove one of the
14 possible obstacles to a successful claim".

15 Q. Thank you. And then the next short section of your brief
16 deals with a decision in 2014 to waive the initial
17 application user charge, which is a \$50 fee that every Legal
18 Aid applicant was required to pay. Will you just summarise
19 your evidence in that regard, please?

20 **MR DOOLEY:** Finally, in 2014, the \$50 user charge was
21 waived. It is a small amount of money but it was
22 considered nevertheless to be a barrier that should be
23 removed.

24 Q. And that decision was in relation to the historic abuse
25 cases, is that correct?

26 **MR DOOLEY:** Correct.

27 Q. And the next part of your evidence deals with Legal Aid for
28 historic abuse claims represented by Cooper Legal and you
29 note at paragraph 5.1 that Cooper Legal has been
30 significantly involved in those claims. And since 2012,
31 have represented nearly all Legal Aid claimants, correct?

32 **MR DOOLEY:** Correct.

33 Q. And that refers do the date that Mr Chapman from Johnston
34 Lawrence retired, I understand; is that the position?

35 **MR DOOLEY:** Correct.

1 Q. So, if I could just have you summarise, please, paragraphs
2 5.2-5.4 of your evidence?

3 **MR DOOLEY:** Between 2004 and 2008, the Legal Services
4 Agency agreed to pay Cooper Legal a higher negotiated
5 rate for certain historic abuse claims, due to the
6 additional foundation work required, including
7 developing systems and templates and carrying out
8 research. The new applications filed after the 24th
9 of November 2008, Cooper Legal had been paid the
10 standard Legal Aid rate.

11 Q. If you could read from paragraph 5.5?

12 **MR DOOLEY:** "Cooper Legal has significantly more Legal
13 Aid files than any other provider apart from the
14 Public Defence Service. The Ministry generally
15 expects to recover more than half the Legal Aid debt
16 from the Cooper Legal files due to the various Legal
17 Aid repayment agreements with other agencies, as noted
18 in the previous section.

19 For a period of time, most of the decisions relating to
20 the grant of Legal Aid were challenged by Cooper Legal,
21 resulting in increasing numbers of reconsiderations and
22 subsequent referrals to the Legal Aid Tribunal. This placed
23 an additional burden on the administration of Legal Aid
24 which resulted in the delays of processing Legal Aid files.

25 While difficult to quantify specifically, the work on
26 hand for the team was unprecedented and took time to work
27 through. This was especially the case in regard to finding
28 appropriate ways to improve processes wherever possible with
29 the boundaries in which the granting of Legal Aid operates".

30 Q. Thank you. Now, Mr Howden, Ms Cooper gave some evidence in
31 phase 1 relating to a mediation that took place between
32 representatives from Legal Aid Services and Cooper Legal or
33 some mediation sessions, I believe. Are you able to comment
34 about how that came about?

1 **MR HOWDEN:** Yes, I can. I actually attended those
2 mediation sessions, along with the Manager of Legal
3 Aid Services. They were set up because there was
4 obviously a relationship problem between Cooper Legal
5 and the Legal Services Agency, in fact Legal Aid
6 generally, at that time and this was felt not to be
7 healthy and it was also the subject of some comment
8 from Judges.

9 So, what we arranged was a private mediation with a
10 private mediator, a very experienced mediator in Wellington,
11 and we had a number of sessions with Cooper Legal, with
12 Sonja Cooper, and I'm sorry I can't remember if anyone else
13 attended but there may well have been someone else from
14 Cooper Legal there as well.

15 But, as a result of those mediations or those mediation
16 sessions, the way forward was Legal Aid committed to
17 effectively appointing a relationship manager, full-time
18 relationship manager, to manage the relationship between
19 Legal Aid and Cooper Legal, and that person was in place I
20 think for approximately the next four years. And so, there
21 was regular meetings and issues of concern were raised. And
22 the evidence that has subsequently – or that Cooper Legal
23 have put forward to the Commission – shows that that process
24 was effective in improving the relationship.

25 Q. Thank you. Mr Dooley, indeed at paragraph 5.8 of your brief
26 of evidence, you explain that the relationship manager
27 position ended in 2017. If you could read from the second
28 sentence of paragraph 5.8, please?

29 **MR DOOLEY:** "At that point it was considered the
30 relationship had strengthened enough that it could be
31 adequately managed by the Ministry's usual stakeholder
32 management processes".

33 Q. Thank you. And just read from 5.9?

34 **MR DOOLEY:** "Where a claimant represented by Cooper
35 Legal had specific reasons to file a claim in Court,

1 reasons for filing are considered by the Ministry in
2 the usual way. The main reason for filing are
3 disputes over the allegations or factual aspects of
4 the allegations or because the Limitation Act
5 agreement does not or may not apply. For example, for
6 claims against MOE where no agreement on the
7 limitation period is in place, or for younger MSD
8 claimants. In many instances, Cooper Legal files
9 claims in a pro forma way that the Ministry
10 understands is principally for the purpose of
11 safeguarding the claim against a Limitation Act
12 defence".

13 Q. Then I think I will have you, Mr Dooley, summarise your
14 evidence from 5.10-5.13 which relates to variations in the
15 standard Legal Aid process for historic abuse claims since
16 2013?

17 **MR DOOLEY:** In 2013, the Ministry and Cooper Legal
18 agreed that existing historic abuse clients would not
19 need to submit a separate application. This was to
20 reduce any potential stress. The Ministry and Cooper
21 Legal also reached an agreement to streamline
22 invoicing and global billing processes.

23 Q. Thank you. If you could please also read 5.15 of your brief
24 of evidence?

25 **MR DOOLEY:** "The Ministry has agreed with Cooper Legal
26 that if a claimant has multiple legal and historic
27 abuse files and one claim settles, the settlement
28 money will not be taken into consideration when
29 assessing financial eligibility for the remaining
30 files".

31 Q. Thank you. So, just to clarify, that might apply where, for
32 example, you have a claimant with say a claim against the
33 Ministry of Social Development and the Ministry of
34 Education; is that correct?

35 **MR DOOLEY:** Yes.

1 Q. And I think we've already had a look at schedule 2 of your
2 brief of evidence which relates to total Legal Aid
3 expenditure. And I think I will take you now, please, to
4 your reply brief of evidence. I might just take you to
5 section 3 of that, please, where you make some general
6 comments which I think I will have you read, please, from,
7 we will take paragraphs 3.1-3.2 as read and if you could
8 move, please, to 3.3 and read those two paragraphs?

9 **MR DOOLEY:** "A significant factor in responding to
10 historic abuse claims is balancing a series of
11 important competing demands. From a Legal Aid
12 perspective, these include the need to ensure access
13 to justice, as well as the relevant statutory
14 parameters, the responsible use of public funds and
15 the need to ensure the independent role of the
16 Commissioner is not compromised, which I discuss
17 further below. Although Legal Aid Services operates
18 within strict legal and fiscal requirements, we work
19 to make sure pragmatic improvements wherever possible
20 to prioritise the needs of claimants.

21 I discuss below some of the initiatives that were
22 undertaken prior to my appointment, such as arrangements
23 that were put in place with Crown Agencies to write-off the
24 Legal Aid debt of historic abuse claimants subject to
25 individual review to ensure the ongoing independence of the
26 Commissioner. Other initiatives were also undertaken, such
27 as the waiver of the initial application user charge to
28 remove a disincentive that might prevent vulnerable historic
29 abuse claimants from making their claim. These are examples
30 of how Legal Aid has worked to carefully make changes where
31 possible within its legal and fiscal parameters".

32 Q. Thank you. Just turning to the next section which broadly
33 responds to the Cooper Legal brief of evidence. You speak
34 at paragraph 4.3 about the independent functions of the
35 Legal Services Commissioner and explain there, just to

1 summarise, that the functions must be independently
2 exercised, meaning that, for example, the Minister of
3 Justice and the Secretary for Justice could dictate how you
4 exercise those functions?

5 **MR DOOLEY:** Correct.

6 Q. Can you go on to read 4.4-4.6?

7 **MR DOOLEY:** "However, the requirement for the
8 Commissioner to act independently does not prevent me
9 or my delegates from seeking or receiving information
10 or advice, including from Senior Advisors, within
11 Legal Aid Services, or from external legal counsel".

12 Q. Just pause there just to clarify, when you're referring to
13 Senior Advisors, you are referring to the position that Mr
14 Howden explained was formerly called a National Specialist
15 Advisor?

16 **MR DOOLEY:** Yes.

17 Q. Sorry, just continue reading.

18 **MR DOOLEY:** "It also does not prevent the Commissioner
19 from seeking general information or engaging with
20 other agencies, so long as I make decisions on
21 individual matters independently.

22 At a practical level, there are delegations,
23 policies and information technology restrictions in
24 place that maintain the separation. For example, the
25 case management system our officers use is protected
26 to ensure that only those with Commissioner
27 delegations have access.

28 The Act also clearly outlines the delegations between the
29 secretary and the Commissioner and our support teams ensure
30 these are followed when answering correspondence, complaints
31 and media inquiries".

32 Q. Thank you. And then you speak about delays in the next
33 section, could you read from 4.7, please?

34 **MR DOOLEY:** "The Cooper Legal brief expresses concern
35 about the delays in the Legal Aid process in several

1 places. As Commissioner I accept that there were
2 delays in processing some Legal Aid applications and
3 regret that this caused distress for claimants".

4 Q. And then could you summarise for the Commissioners
5 paragraphs 4.8-4.9 of your brief?

6 **MR DOOLEY:** "There are many factors that cause or
7 exacerbate delays in processing Legal Aid. These
8 include the sheer volume of applications and reviews
9 on file, having to consider applications in light of
10 the new High Court authorities and waiting for
11 supporting documentation".

12 Q. Thank you. And then read 4.10?

13 **MR DOOLEY:** "I am pleased to report delays have not
14 been such a significant issue in recent years due to
15 the imbedding of the CCRT processes and improvements
16 Legal Aid Services has been able to make to
17 administrative processes. We continue to identify and
18 implement further improvements to our processes".

19 Q. Thank you. And then at section 5, you respond specifically
20 to the Cooper Legal brief in relation to issues arising
21 between LSA or Legal Aid Services and Cooper Legal in 2011.
22 If I could just - and the first topic under that heading is
23 "Legal Aid Services' Interaction with Crown Defendants in
24 Historic Abuse Claims", if you could read from 5.1, please?

25 **MR DOOLEY:** "In the Cooper Legal brief, concern is
26 expressed about Legal Aid Services engaging in direct
27 communications with Crown defendants in historic abuse
28 claims, namely MSD and the Crown Health Financing
29 Agency in around 2011.

30 On occasion, direct communications between Legal Aid
31 Services and Crown Agencies has been necessary for the
32 purposes of achieving legitimate objectives. In particular,
33 in 2011, I understand that the LSA/Legal Aid Services
34 communicated with MSD and CHFA, and later the Ministry of
35 Health, the Ministry of Education, in order to find out more

1 about development of Alternative Dispute Resolution
2 processes proposed by the defendants for addressing historic
3 abuse claims, so that Legal Aid Services could consider an
4 appropriate funding model for dealing with historic abuse
5 claims outside of the Court processes; and to explore
6 arrangements to address Legal Aid repayments in the event
7 claims were settled.

8 These discussions were at a general level and did not
9 involve discussions on the approaches to resolving
10 individual claims or its communication with individual
11 claimants".

12 Q. Thank you. I just have a brief question for Mr Howden which
13 we can -

14 **CHAIR:** Would you like to do that before or after the
15 break?

16 **MS ALDRED:** I think before the break. It won't be a
17 long answer, I wouldn't think.

18 Q. So, Ms Cooper and Ms Hill in their evidence in phase 1 made
19 a number of allegations about Legal Aid's independence being
20 compromised and particularly in relation to discussions they
21 say that the Legal Aid had with other Crown Agencies. Can I
22 just ask you, Mr Howden, because you were involved in Legal
23 Aid at this stage, did any representative of the Crown and
24 litigation ever have discussions with Legal Aid, to your
25 knowledge, about an individual claimant's case?

26 **MR HOWDEN:** Well, no, I can emphatically say that from
27 my knowledge, an individual claimant's case was never
28 discussed. There were certainly discussions in
29 relation, as Mr Dooley has already mentioned, about
30 the method of doing debt write-off and the right
31 processes for ADR but not getting down to the
32 specifics of an individual's case.

33 Q. There was a suggestion from Cooper Legal that these
34 discussions concern, for example, the strategy for the Crown

1 of how to deal with historic abuse litigation; is that
2 right, from your perspective?

3 **MR HOWDEN:** No.

4 Q. Were you aware of the Crown Litigation Strategy at the time
5 or -

6 **MR HOWDEN:** Well, to be frank, the first time I heard
7 of the Crown Litigation Strategy was when I was
8 preparing for this Commission hearing. I had not been
9 aware, when we were dealing with Legal Aid and at the
10 time the Legal Services Agency as an independent
11 Agency, it is not, it was not part of the Crown.

12 Q. Thank you. And there were also allegations from Cooper
13 Legal about a lack of transparency around those meetings; do
14 you have a comment on that?

15 **MR HOWDEN:** Well, I don't accept that statement and
16 there is correspondence which we probably haven't got
17 time to go to now, where it was made clear that
18 meetings that were held, we invited - well, the
19 results of those meetings were conveyed to Cooper
20 Legal. And, in fact, a number of meetings, the
21 intention was that all parties would be at the table.

22 Q. Including Cooper Legal?

23 **MR HOWDEN:** Including Cooper Legal, sorry by all
24 parties I mean Legal Aid, the relevant Agency and
25 Cooper Legal.

26 **MS ALDRED:** Thank you. I think now is a good time to
27 take the break.

28 **CHAIR:** We will take 15 minutes, thank you.

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

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MS ALDRED:

Q. Mr Dooley, we were just at your reply brief of evidence on page 6 and you had been talking about or you'd been responding to some issues raised in the Cooper Legal brief and the next section of your evidence that we come to is entitled, "Discussions between Crown Agencies about ADR/alternative processes" and if you could just read, please, from 5.4?

MR DOOLEY: "I understand that discussions between Crown Agencies, including the LSA, around a protocol for settlement of outstanding Historic Claims were actively pursued by all parties, and encouraged by the judiciary. I refer in particular to a minute of Miller J dated the 8th of June 2011, following a periodic case management conference for the Department of Social Welfare litigation. Although not a party to the litigation, the minute records that counsel for the LSA attended at short notice, at the Judge's request.

Miller J states in his minute that he requested the attendance of the LSA for two reasons. First, it was noted that the progress of these cases was being "substantially affected by the existence of a large number of Legal Aid disputes". Second "and more importantly", Miller J wished to encourage the participants to settle on a protocol under which those cases that needed to be tried were identified and brought on; and those cases that should be settled were handled outside of the Court process.

1 Miller J proposed to schedule a further conference in
2 December 2011. At the conference, one of the issues to be
3 addressed was:

4 "... whether all participants, including the Legal
5 Services Agency, can agree a protocol under which cases in
6 which settlement should be explored can be settled outside
7 the Court process. I am aware that the Ministry of Social
8 Development has already established a team which has settled
9 a number of cases. It may be that can be extended to the
10 Crown Health Financing Agency and that the Legal Services
11 Agency can find some appropriate model for funding the
12 necessary legal representation. These possibilities should
13 be explored".

14 The development of a protocol was explored, however, in
15 the meantime, MSD took steps to implement a new process for
16 resolution of historic abuse claims, which ultimately meant
17 that the need for a formal protocol lessened.

18 On 15 September 2011, representatives from Legal Aid
19 Services met with representatives from MSD. The minutes of
20 this meeting record that the reason for the meeting was "to
21 discuss in more detail the proposed MSD/CCRT processes for
22 settlement in order that Legal Aid Services can develop
23 appropriate funding models".

24 Subsequently, a letter dated 3 October 2011 was sent to
25 Sonja Cooper from a senior NSA [National Specialist Advisor]
26 from Legal Aid Services. This letter entitled "MSD
27 settlement process" followed a meeting on 23 September 2011
28 at the chambers of Francis Cooke QC which I understand was
29 attended by representatives from Legal Aid Services as well
30 as MSD.

31 In that letter, the meeting with MSD was addressed. It
32 was explained that the meeting was for the purpose of
33 gathering information about the CCRT process and it was not
34 intended to hide the meeting from Cooper Legal. In the
35 letter it stated:

1 "In relation to your subsequent email of 27 September
2 last, I regret that the meeting with MSD has caused concern.
3 That meeting was organised by Head Office and I was asked to
4 arrange for an NSA to attend. The purpose of the meeting
5 was simply to seek as good an understanding of the process
6 as we could, particularly given your criticism that we did
7 not fully understand the position and the meeting was also
8 what the communications from MSD/Crown Law appeared to
9 invite. There was not intention to hide the fact that the
10 meeting had taken place and, as you know, it was agreed that
11 you would be provided with a copy of the minutes.

12 As noted above, the intention that we participate in the
13 more significant meetings you have with MSD/Crown Law in the
14 future should assist in avoiding such misunderstandings".

15 Q. Thank you. Now, the next section of your evidence deals
16 with another category of discussions between Legal Aid and
17 other Crown Agencies, and that is discussions about debt
18 write-off, and you've already read that part of your
19 evidence for the Commission.

20 And then you go on next to deal with how Legal Aid
21 Services or the Commissioner obtains legal advice and just
22 make the point that you contract external legal counsel to
23 assist internal legal advisors.

24 And just confirming, that external legal counsel, does
25 that involve Crown Law?

26 **MR DOOLEY:** No.

27 Q. And then I'll skip through, you've already dealt with the
28 section of your evidence in relation to advising claimants
29 of the availability of the Alternative Dispute Resolution
30 process through MSD, so I will take you now to page 10 of
31 your evidence which responds to a suggestion in the Cooper
32 Legal brief that in around 2011 Legal Aid Services was
33 refusing to fund litigation for the DSW claimants, and if
34 you could just read from 5.30 of your brief.

1 **MR DOOLEY:** "Ms Cooper's view that there would be a
2 small number of cases unsuitable for entry into the
3 CCRT process was acknowledged. Legal Aid Services
4 confirmed it would need to be satisfied on the usual
5 criteria that continuation of Court proceedings had
6 merit and that prior approval would be sought".

7 Q. We will have paragraph 5.31 taken as read and if you could
8 read from 5.32.

9 **MR DOOLEY:** "Where Cooper Legal was able to satisfy
10 Legal Aid Services that a case was not suitable for
11 CCRT then Legal Aid for litigation was granted".

12 Q. I will have the remainder of your reply brief of evidence
13 taken as read, Mr Dooley, and we'll go back to your primary
14 brief of evidence. But, first of all, I have a couple of
15 points that I would like to have clarified or corrected in
16 relation to the evidence given so far.

17 The first point is a point of clarification for Mr
18 Howden. Mr Howden, when you were talking about Legal Aid
19 debt and the costs orders that could be made against Legal
20 Aid in respect of unsuccessful litigation, you mentioned,
21 just as part of that general discussion, that you were aware
22 that the White brothers in that particular litigation had
23 received a payment in the form of an ex gratia payment after
24 the unsuccessful litigation.

25 Can you just tell the Commissioners, was any part of that
26 ex gratia payment the subject of any claim by Legal Aid?

27 **MR HOWDEN:** No, it was not.

28 Q. Thank you. The next thing, I just wanted to clarify that
29 because it was something you touched on, and the next thing
30 that I just wanted to do, was to take you, Mr Dooley, back
31 to your primary brief of evidence at paragraph 4.15.

32 I believe you have a correction to make to that
33 paragraph?

34 **MR DOOLEY:** Yes. I would like to apologise to the
35 Commissioners, that first sentence in paragraph 4.15

1 is not correct and we are just collecting the correct
2 statistics now. It indicates in that paragraph that
3 most historic abuse claimants had their Legal Aid
4 withdrawn. That is not the case and we are just
5 clarifying the exact numbers to confirm that for you.

6 **MS ALDRED:** Just to update the Commission, we have
7 received some figures and I think that Mr Dooley will
8 be able to give the number of broadly how many Notices
9 of Intention to Withdraw Aid were given; how many
10 notices would that have been?

11 **MR DOOLEY:** 1,151.

12 Q. And would that have been – Mr Howden might be able to
13 respond to this – was it the case that a notice was given in
14 respect of all or pretty much all of the historical abuse
15 cases, to your knowledge?

16 **MR HOWDEN:** The ones that were in existence at that
17 time, yes.

18 Q. So, the figure we do have is 1,151 Notices of Intention to
19 Withdraw Aid. Mr Dooley has confirmed that it wasn't the
20 case that most grants were subsequently withdrawn and we're
21 just in a process, we've asked the Ministry of Justice to
22 just be able to confirm the numbers for the Commission
23 during the course of the evidence today. So, if the
24 Commissioners are prepared to indulge us and without
25 inconveniencing Mr Opie –

26 **CHAIR:** That's fine, if that suits Mr Opie?

27 **MR OPIE:** That's fine.

28 **CHAIR:** In terms of those numbers, we've heard that
29 there was the Notice of Intention, then there were
30 some withdrawals and then there were challenges to
31 those withdrawals and various appeals and whatnot.

32 So, just to be clear on the numbers that we're going to
33 get, are they going to be the number withdrawn after going
34 through all the processes or is it the number withdrawn
35 initially which then led to the appeals etc.?

1 **MS ALDRED:** What we will provide or what we should be
2 able to confirm are the number that were actually
3 withdrawn by LSA at the time.

4 **CHAIR:** Yes.

5 **MS ALDRED:** Or Legal Aid Services. The number of
6 those which were being subsequently reinstated
7 following either reconsideration or one of the other
8 processes. Are those the figures that you think would
9 be helpful?

10 **CHAIR:** That would be right, yes, because it was a
11 movable feast, in a way, wasn't it?

12 **MS ALDRED:** Yes.

13 **CHAIR:** It would be good to get both of those.

14 **MS ALDRED:** Thank you.

15 Q. There was just one further supplementary matter that I want
16 to ask Mr Howden to comment on, sorry a couple of further
17 supplementary matters.

18 The first one relates to the Cooper Legal evidence which
19 raises numerous, I think it's fair to say, potential
20 arguments that aren't settled law in New Zealand, and that's
21 certainly recognised or expressed in Ms Cooper's evidence.

22 I just wanted Mr Howden to address the Commissioners on
23 the point of these sorts of claims which might be regarded
24 as novel or difficult or not settled law. Does Legal Aid
25 refuse to fund those less certain causes of action or what's
26 the approach that Legal Aid will take?

27 **MR HOWDEN:** Perhaps if I start by saying that if a
28 claimant lawyer is able to establish to the
29 satisfaction of Legal Aid that they have an arguable
30 case, and that is usually in reliance upon New Zealand
31 law but hypothetically if there's a very persuasive
32 case from Australia or overseas which is on point,
33 then that would be of relevance to Legal Aid.

34 However, as has been held by a number of Judges, and if I
35 could perhaps quote from a judgment of Justice Keane in a

1 2009 case of MA v Legal Services Agency where His Honour
2 endorsed an earlier comment from Justice Wylie, which I will
3 read:

4 "The Agency and the Review Panel are not charged with
5 responsibility for overseeing the development of law.
6 Rather, they are charged with overseeing the provision of
7 funds from the public purse to assist people who have
8 insufficient means to pay for the Legal Services to
9 nevertheless have access to them."

10 So, what, from a practical point of view, that meant that
11 Legal Aid needed to have a reasonably solid foundation laid
12 before we would grant on what could be called a novel set of
13 proceedings.

14 Q. Thank you. And then just one further minor point which
15 really goes to the discussion we had earlier about the Legal
16 Services Agency writing directly to clients of Cooper Legal
17 advising about the availability of the Ministry of Social
18 Development's Alternative Dispute Resolution process. That
19 was characterised – a point I meant to ask you I think to
20 deal with earlier – that was characterised by Cooper Legal
21 as an attempt to discourage claimants from using lawyers.
22 Was that the intention behind that correspondence?

23 **MR HOWDEN:** No. Well, from my perspective, no. The
24 purpose, as I said previously, there was concern that
25 the material was not getting to the Legal Aid clients
26 and we were concerned to ensure that all the relevant
27 material was before the claimants, and that's the CCRT
28 process or ADR process.

29 And, as was made clear in both the covering letter and in
30 the brochure that accompanied the letter which is part of
31 the bundle, Legal Aid, we weren't encouraging either path,
32 it was merely an information-sharing exercise. And it was
33 made clear that aid would be available for whichever route,
34 in other words alternative dispute resolution or litigation,
35 depending on the decision of the particular claimant,

1 although they would still then, depending on what route they
2 went down, the usual criteria for Legal Aid eligibility
3 would continue to apply.

4 Q. Thank you. So, now I'd just like to take you to the end of
5 your primary brief of evidence, Mr Dooley, and if you could
6 please turn to section 7 which is at page 11 and read please
7 that section for the Commissioners?

8 **MR DOOLEY:** "The Ministry acknowledges that there have
9 been challenges in the past with processes in enabling
10 access - "

11 Q. Sorry, Mr Dooley, I think we need to go to - you might be in
12 the wrong brief. Can I just take you to your primary brief,
13 it's right at the end, paragraph 11, headed "Future
14 opportunities".

15 **MR DOOLEY:** 7.1?

16 Q. Yes.

17 **MR DOOLEY:** "The Ministry took over responsibility for
18 the provision of Legal Aid in 2011 and acknowledges
19 that there have been challenges in the past with
20 processes in enabling access to Legal Aid quickly and
21 equivalently for historic abuse claims. In response
22 the Ministry has continually reviewed and updated
23 procedures, and will do so as part of continuous
24 improvement.

25 The focus started with a focus funding litigation, as
26 agencies became willing to engage in ADR, Legal Aid became
27 available to fund it.

28 Some recent changes to our processes include updating
29 application forms in order to make them more
30 customer-centric which has made the application process
31 quicker.

32 We have also introduced improvements to our granting
33 processes, such as creating a triage system to enable more
34 timely determinations to be made.

1 We are committed to the principles of the Crown response
2 to the Royal Commission, including meeting our obligations
3 under Te Tiriti o Waitangi, and look forward to the findings
4 where it may relate to any recommendations for improvement
5 to Legal Aid provision for historic abuse claimants".

6 Q. Thank you, Mr Dooley. Now, I don't have any further
7 questions for either of you but if you could remain and
8 answer questions from Mr Opie.

9 **CHAIR:** Thank you, Mr Opie.

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3 **BRETT ANTHONY DOOLEY**
4 **DAVID MACDONALD HOWDEN**
5 **CROSS-EXAMINED BY MR OPIE**
6
7

8 Q. Good afternoon. Mr Dooley, just a question at the very
9 beginning for you, paragraph 4.8 of your initial brief you
10 say that between 2000 and 2006 there were many Legal Aid
11 providers acting for historic abuse claimants?

12 **MR DOOLEY:** Yes.

13 Q. But by 2008, it was pretty much just Sonja Cooper and Roger
14 Chapman?

15 **MR DOOLEY:** Yes.

16 Q. And then by April 2012, just Sonja Cooper because Mr Chapman
17 had retired?

18 **MR DOOLEY:** Correct.

19 Q. Why did other Legal Aid providers stop acting, do you know?

20 **MR DOOLEY:** No, I'm sorry, I don't.

21 Q. Do you know, Mr Howden?

22 **MR HOWDEN:** Well, anecdotally, it's a complex area of
23 law. There was a lot of work involved and unless you
24 were doing a lot of the cases, as were Cooper Legal
25 and Johnston Lawrence, it was - well, it was a
26 difficult area to be in and, frankly, on Legal Aid, so
27 a lot of people withdrew from the process.

28 Q. When you say "frankly on Legal Aid", you mean on the Legal
29 Aid rates?

30 **MR HOWDEN:** Yes, Civil Legal Aid, yes.

31 Q. Just leaving to talk about the withdrawal of aid process,
32 Mr Dooley's brief said at 4.11 that the LSA anticipated that
33 the obstacles faced in the 2007 litigation would be likely
34 to arise in a large number of historical abuse claims. Is

1 that reference to the 2007 litigation, is that to the K and
2 the White cases?

3 **MR HOWDEN:** Well, yes, it is. In fact, well, there's
4 at least five substantive cases.

5 Q. In 2007, it was just White and K at that stage?

6 **MR HOWDEN:** Yes, sorry.

7 Q. And you agree with that statement by Mr Dooley?

8 **MR HOWDEN:** Yes, although there is a larger context.

9 **CHAIR:** Reference to a name, is that the problem?

10 **MR OPIE:** Yes.

11 **CHAIR:** Do we need to do anything in particular? The
12 case is normally referred to as K.

13 **MR HOWDEN:** Yes.

14 **MS JANES:** If we may just stop the livestream and
15 excise that.

16 **CHAIR:** Do you need time to do that? Should we
17 adjourn briefly?

18 **MS JANES:** I think we can carry on, I'm advised.

19 **CHAIR:** All right, thank you. Nothing to do with you
20 at all, so don't feel concerned, there's just a little
21 flurry.

22 **MR HOWDEN:** I understand.

23 **MR OPIE:** My apologies.

24 **CHAIR:** We have interrupted your flow, it's about the
25 White and K cases.

26 **MS ALDRED:** Just on that point because it might
27 assist, I think if the administrators could just be
28 mindful that that name first cropped up in the
29 question, rather than from the witness.

30 **CHAIR:** Yes.

31 **MS ALDRED:** So, it needs to be taken back to that
32 point.

33 **MR OPIE:**

34 Q. In 2007, the litigation we're talking about is the K and the
35 White litigation, and the evidence is that the LSA had

1 anticipated that the obstacles faced in that litigation
2 would arise in a large number of cases; is that right?

3 **MR HOWDEN:** Yes, although I see the White case I've
4 got is 2008 but it wasn't just those cases because we
5 were dealing with the issue of reasonable
6 discoverability and when would a claimant first become
7 aware of the link between the previous abuse and their
8 current circumstances. There were a number of other
9 cases that we took into account, although not so much
10 on point as the ones you have referred to.

11 Q. Right. Can I go to document MOJ193, please.

12 **MR HOWDEN:** Yes, I am aware of that case.

13 Q. And in this document is a memorandum by you dated 15 January
14 2008?

15 **MR HOWDEN:** Correct.

16 Q. And that is about the K case?

17 **MR HOWDEN:** Yes.

18 Q. Could we please go to -

19 **MR HOWDEN:** Sorry, yes, I didn't see the K, it was a
20 little unclear which case this referred to because -

21 **CHAIR:** It's been redacted, hasn't it?

22 **MR HOWDEN:** Yes.

23 **CHAIR:** Will you take it from Mr Opie that it is about
24 the K case?

25 **MR HOWDEN:** Yes, I will.

26 **MS OPIE:**

27 Q. Can we please go to page 3 of that document, and if we could
28 call out paragraph 6, please? Mr Howden, you're advising
29 there that the factual background to this claim was unusual
30 and the Judge's findings on the facts would accordingly be
31 confined to this particular case and should not have any
32 wider impact?

33 **MR HOWDEN:** That is correct.

34 Q. And then could we call out paragraph 7? If you could just
35 read paragraph 7?

1 **MR HOWDEN:** "I further accept that the Judge's
2 comments regarding the limitation issues are based on
3 his finding as to when Mr K would first reasonably
4 have made the association between the alleged earlier
5 offending and his subsequent behaviour. Although the
6 point was not made by Mr Chapman, I am of the view
7 that based on the wording of the judgment, there were
8 grounds by which the Judge could reasonably have
9 reached a contrary conclusion but I note that no
10 appeal has been filed to date. I nevertheless accept
11 the submission that the Judge's comments on this point
12 can also be reasonably confined to the circumstances
13 of this particular case".

14 Q. And then could we call out paragraph 8. You say here that
15 Justice Gendall's findings can be largely confined in this
16 case and, again, that your view is they will accordingly
17 have little if any adverse effect on the other psychiatric
18 claims. And then you say, "There is also the point that
19 there is no certainty that the Agency would have reached a
20 different granting decision", and what do you mean by that?

21 **MR HOWDEN:** Well, context is important and the earlier
22 part of that memorandum refers to a number of areas
23 where Legal Aid was not informed as to what we
24 considered or what was considered in retrospect to be
25 very relevant material in relation to prospects of
26 success for a grant of aid. But it was concluded
27 that, there was no certainty that the Agency would
28 have reached a different granting decision, even if
29 all the information set out in paragraph 5 above had
30 been properly disclosed.

31 Q. Because you still might have reached the view that it had
32 reasonable prospects of success?

33 **MR HOWDEN:** We might have but that would be
34 speculation at the time.

1 **MS ALDRED:** I just want to make sure that Mr Howden
2 has got the whole document available to him in front
3 of him? It is in the bundle.

4 **MR HOWDEN:** Yes, I know the document.

5 **MS ALDRED:** Would it be of assistance for you to have
6 it in front of you? I am not sure whether -

7 **MR HOWDEN:** Having written it -

8 **MS ALDRED:** You are okay with it?

9 **CHAIR:** There is a more general point here. Other
10 witnesses have been favoured by the presence of one of
11 our solicitors to sit there with the documents and
12 should you need the whole document we can make that
13 available. So, I think I will invite Ms Wills to come
14 up and sit unobtrusively behind you and be available
15 to provide you, should you need it. I appreciate in
16 this case you are familiar but there might be others
17 you are not.

18 **MS ALDRED:** Perhaps Ms Wills could be asked to
19 identify the document in every case so it can be
20 offered to the witness.

21 **CHAIR:** Sure. It is just to make sure that whenever
22 you are referred to a document, you have the full one
23 available in hard copy, should you need it.

24 **MR HOWDEN:** Thank you, I now have the full document in
25 front of me and I don't know whether - I mean, this is
26 a case-specific memorandum and, I mean, there were
27 issues in here that caused Legal Aid some concern but
28 I don't know whether they are relevant to the
29 Commission. The earlier parts of that memorandum
30 explain the concerns.

31 **MR OPIE:**

32 Q. But overall, what you're saying is that the outcome in K can
33 be confined to its facts?

34 **MR HOWDEN:** Well, certainly in relation to the facts
35 which were very unusual but the Judge in that case

1 nevertheless still went on to make a number of
2 findings, not the least being critical of Legal Aid.

3 Q. Yes. And if we could go now down to paragraph 10, and there
4 you're asking that Mr Chapman provide the Agency with
5 analysis on all the other psychiatric files in order to
6 satisfy that reasonable prospects of success still exist;
7 that's right?

8 **MR HOWDEN:** Correct.

9 Q. And then could we go to the next page, page 4, in
10 paragraph 11 there, is it correct to say that in this
11 paragraph you're saying the sum set out in it has been spent
12 on Legal Aid but we have to think more widely about what was
13 going on in that case?

14 **MR HOWDEN:** Correct.

15 Q. And at a. you refer to the purpose of the Legal Services Act
16 being to provide access to justice.

17 **MR HOWDEN:** Yes.

18 Q. And at b. you say that the threshold for reasonable
19 prospects of success are quite low to grant Legal Aid?

20 **MR HOWDEN:** Yes, well, it is low because the strike
21 out is quite a low threshold, strike out test.

22 Q. And in paragraph d. you say, "I do not accept that this
23 result should be the basis of criticism of the Legal Aid
24 grant by third parties". Who was criticising at that stage?

25 **MR HOWDEN:** Well, I am sure I was not referring to the
26 Judge at the time but it's a bit hard to remember now.
27 I think there were some commentators making comments
28 in articles but - I'm sorry, with the passage of time
29 I can't actually specifically recall who I was
30 referring to there, other than the fact that I think
31 it was criticism that Legal Aid was funding a case
32 that failed.

33 Q. So, it wasn't third parties within government? It was
34 external parties?

1 **MR HOWDEN:** No, no. I mean, I've subsequently been
2 aware that in the background there were these sorts of
3 comments but we, in Legal Aid I was not aware of any
4 of that.

5 Q. At paragraph e. of the memorandum you talk about there being
6 over 300 other cases pending, why are you saying - why is it
7 relevant to note there are over 300 other cases pending
8 there?

9 **MR HOWDEN:** Because at that point, when that
10 memorandum was written, there had been no successful
11 further argued historic abuse case that I was aware
12 of. In fact, as the years progressed, that to my
13 recollection was the position. There was a subsequent
14 significant case in 2011 that had been fully argued,
15 another one in 2009 where all the problems for
16 claimants trying to take the litigation route were not
17 able to surmount the problems, and this is one of the
18 reasons why there was pressure to move into
19 alternative dispute resolution.

20 Q. Although, by that stage the White case had been decided,
21 hadn't it?

22 **MR HOWDEN:** Yes, well not -

23 Q. November 2007?

24 **MR HOWDEN:** Sorry, it was in - oh, sorry, in my note
25 here, that's when the order, the costs order was made
26 which was subsequent 2008, yes, you're right, in 2007
27 the actual judgment, yes.

28 Q. So again just to summarise, you're saying, and I realise
29 this memorandum is restricted to the K case, but you're
30 saying, well, it turned on its facts and the Agency
31 shouldn't take the decision as being one which means we
32 should not continue with aid for the other Psychiatric
33 Hospital cases?

34 **MR HOWDEN:** I think because - well, that is correct
35 because it was such an unusual case but there were a

1 whole lot of leave cases where the parties were also
2 unsuccessful.

3 Q. But those - the date of this memorandum, the leave cases had
4 not been decided yet, had they?

5 **MR HOWDEN:** There were some but, anyway, I take the
6 thrust of what you're saying, I agree with it.

7 Q. And now if we could go to document MSC497.

8 **MR OPIE:** Ma'am, I am noting that document is not
9 adequately redacted.

10 **CHAIR:** Okay. Let's take it down then. Mr Howden, do
11 you have a hard copy of that document?

12 **MR HOWDEN:** 497, yes. Oh, no, unfortunately, I'm
13 sorry, I hadn't picked that up either. It refers to
14 White which is - but not the pseudonym, not the K
15 case.

16 **MR OPIE:**

17 Q. That's all right. If you've got the document in front of
18 you?

19 **MR HOWDEN:** I have.

20 **MR OPIE:** Commissioners, do you have a hard copy of
21 that document there?

22 **CHAIR:** We don't have a hard copy but we can look at
23 it on a limited basis. Do you need some time,
24 Ms Janes?

25 **MS ALDRED:** Excuse me, just to be clear, I just wanted
26 to make sure that it appears the Commissioners don't
27 have the full copies of the documents that are being
28 referred to.

29 **CHAIR:** We do.

30 **MS ALDRED:** They are available to you in full?

31 **CHAIR:** Absolutely available to us, we just don't have
32 them here on the desk at the moment. The table might
33 not withstand the weight of them.

34 **MS ALDRED:** Thank you for that clarification.

1 **CHAIR:** There's no doubt we've got all the documents.
2 Just to confirm, we are going to be shown the
3 document. Do you have it there, Mr Opie?

4 **MR OPIE:** I know what it says.

5 **CHAIR:** Mr Howden, you are the most important one, do
6 you have it?

7 **MR HOWDEN:** I do.

8 **CHAIR:** Shortly we will get it and then we can
9 proceed. Right, we are in business, thank you.

10 **MR OPIE:**

11 Q. This letter is from you to Sonja Cooper, isn't it?

12 **MR HOWDEN:** Correct.

13 Q. Dated 17 January 2008?

14 **MR HOWDEN:** Yes.

15 Q. Two days after the memorandum we've just been looking at.
16 In the first line you write, "The Agency considers that the
17 judgments in White and K obviously raise significant issues
18 that potentially affect all the DSW and psychiatric claims"?

19 **MR HOWDEN:** Correct.

20 Q. That's quite different to what you said in your memorandum
21 about the K case, isn't it?

22 **MR HOWDEN:** On the face of it, it does seem, I agree,
23 it seems a little different but the original
24 memorandum was written for internal purposes to an
25 officer. And the K - the K case, apologies, I've just
26 mentioned the name - but the K case is not, it wasn't
27 just about the facts. There were other factors that
28 were of relevance and I think it was more, what we
29 were particularly referring to was the fact that a
30 fully argued case had failed. Whilst the actual
31 reasoning was specific to the case, it was the outcome
32 we were looking at.

33 Q. But we've just been through your memorandum where you said
34 quite definitively, your view was that the K case was
35 confined to its facts and should not affect all of the other

1 psychiatric claims, yet in this letter two days later you
2 seem to be taking the opposite position?

3 **MR HOWDEN:** No. I would say that the K case was, in
4 fact, the outcome was, I mean you can't ignore the
5 outcome. It did not succeed. Now, the reasons why it
6 did not succeed were something that we would not be
7 applying to other cases but it was one of a growing
8 number which, not at that time but as time passed, of
9 cases that failed.

10 Q. I'm not talking about - I'm just talking about the two cases
11 we are looking at that are referred to in your letter, which
12 is White and K, and those were the two cases that have been
13 decided as at the date of that letter; weren't they?

14 **MR HOWDEN:** Well, in relation to the fully funded
15 historic abuse cases, yes.

16 Q. I'm just trying to understand why your view changed from
17 saying White should be confined on its facts, sorry K should
18 be confined on its facts, to K obviously raises significant
19 issues which potentially affect all the other cases?

20 **MR HOWDEN:** I think, I agree there seems to be a
21 slight inconsistency there but the context of my
22 earlier memorandum was concerns about the way that the
23 provider or the lawyer had divulged or not divulged
24 information to the Agency and that was the primary
25 focus of the memorandum. But we also - I also went on
26 to say that the facts were specific and they
27 wouldn't - it wouldn't be applied to other cases.

28 Now, I accept that the letter that you're referring to
29 does go on to say that it is a matter we will take into
30 account but obviously, Ms Cooper is an experienced lawyer,
31 if she felt there were issues that were specific and she
32 disagreed, she would have raised it. Well, I don't believe
33 she did.

34 Q. We can take that one down now, thank you.

1 And on 8 February 2008, that was when the High Court gave
2 judgment in the J case?

3 **MR HOWDEN:** Yes.

4 Q. And the plaintiff was unsuccessful overall in that case?

5 **MR HOWDEN:** Correct.

6 Q. So, how did that judgment affect your thinking?

7 **MR HOWDEN:** Well, again, it was another one of a
8 series of cases where, unfortunately for the claimant,
9 they weren't, despite the facts, and some fairly
10 harrowing facts for Ms J in that case, she was not
11 able to get across the statutory hurdles in her way,
12 so that is why that was another case that we felt was
13 relevant when we were considering the overall process.
14 Bear in mind, this is the litigation route we were
15 looking at.

16 Q. And you talked in your evidence-in-chief today about the
17 costs awards?

18 **MR HOWDEN:** Yes.

19 Q. And you gave the total figure of about \$1.2 million but you
20 said that the Agency did not in fact pay any costs in White?

21 **MR HOWDEN:** Correct.

22 Q. Can you recall which cases it did pay costs in?

23 **MR HOWDEN:** Yes. I think - certainly there were costs
24 paid in the K case. Just excuse me, I'll just check
25 my records here. I think I've got - [short pause].
26 Yes, I think in the K case \$140,843 was paid. And -

27 Q. If you can't find it -

28 **MR HOWDEN:** I'm sorry, I think there was another
29 \$120,000 paid, I believe it was in the P case, it was
30 P v Attorney-General.

31 Q. That is much later, isn't it?

32 **MR HOWDEN:** Yes, that was 2010 but at the time it was,
33 well we didn't actually end up paying it in the White
34 case but it was still a fairly chilling finding that
35 \$811,000 was potentially payable.

1 Q. And so, it's fair to say that the costs awards were a
2 significant factor in the Agency's decision-making about not
3 to - or about to withdraw aid?

4 **MR HOWDEN:** I wouldn't say significant but it was a
5 factor.

6 Q. Well, in your evidence-in-chief you talked about being very
7 concerned, if I recall you correctly, and you can correct
8 me, about being very concerned because the costs award in
9 White represented about 1% of the annual budget?

10 **MR HOWDEN:** I think it was actually more than that
11 but, yes, it was a significant sum and it caused some
12 considerable discussion in Legal Aid.

13 Q. Is it fair to say it was a significant factor then in the
14 costs awards?

15 **MR HOWDEN:** Well, a sum, bear in mind that was the
16 highest amount by a long way but any amount is an
17 unbudgeted for payment.

18 Q. The Crown approach in those cases of seeking but for costs
19 awards against the plaintiff, was that something that the
20 Crown commonly did with legally aided claimants?

21 **MR HOWDEN:** I'd have to say for a period, yes, but not
22 in every case. The Crown made an assessment but, yes,
23 they would generally ask for costs.

24 Q. For cases other than historic abuse cases?

25 **MR HOWDEN:** Oh, sorry, you're referring to Civil Legal
26 Aid?

27 Q. Generally in the Civil Legal Aid.

28 **MR HOWDEN:** Well, Civil Legal Aid is an area where
29 costs are considered and whether it is the Crown or
30 any other successful party, yes, often they do make
31 applications.

32 Q. No, I'm not asking about any other party, just about the
33 Crown. In your experience at the time, was the practice of
34 seeking but for costs awards something the Crown commonly
35 did against Legal Aid?

1 **MR HOWDEN:** The answer would be yes, there did seem to
2 be a policy change, there were more applications.

3 Q. For other than historic abuse claims?

4 **MR HOWDEN:** Well, I'm primarily giving evidence in
5 relation to historic abuse claims. In relation to
6 general civil claims, I'm just trying to think what
7 other categories of cases a Crown Agency would be
8 involved, which wouldn't be that common. I mean, it
9 was quite common in -

10 Q. If I could put the question another way. Before these costs
11 applications were made, you weren't personally aware of many
12 other costs application by the Crown in Civil Legal Aid?

13 **MR HOWDEN:** No, that would be correct.

14 Q. And in the White case, the Crown sought an order against
15 Paul White personally?

16 **MR HOWDEN:** Correct.

17 Q. And you said in your evidence-in-chief that that was very
18 rare?

19 **MR HOWDEN:** Correct because usually the - however
20 aggrieved the successful party may have been with the
21 legally aided party, from an economic point of view
22 there was little merit in pursuing that because the
23 legally aided person had no resources to meet any such
24 order.

25 Q. So, was the Agency surprised when they discovered that step
26 had been taken?

27 **MR HOWDEN:** That would be fair comment, yes.

28 Q. And in terms of the Agency's subsequent decision-making
29 about the claims, if the Crown hadn't sought costs in those
30 cases we've been discussing, that would have been a
31 significant factor when the Agency was trying to decide what
32 to do?

33 **MR HOWDEN:** Well, it would have been a factor but
34 bearing in mind that the original threshold is
35 prospect of success, that doesn't really go to

1 prospect of success, that's more a consequence of the
2 proceedings. If there had been an agreement that the
3 Crown wouldn't seek costs against a legally aided or
4 against Legal Aid in those circumstances, yes, it
5 would have been a factor.

6 Q. And the Crown relying on the Limitation Act defence, that
7 was also a significant factor in the Agency's
8 decision-making?

9 **MR HOWDEN:** Definitely, yes.

10 Q. When the White, K and J case, when aid was granted, the
11 Agency obviously thought there was reasonable prospects of
12 success for those cases?

13 **MR HOWDEN:** Yes.

14 Q. And was the Agency surprised by the losses?

15 **MR HOWDEN:** Well, in litigation it's rarely surprised,
16 it's what happens, what happens.

17 But it's fair to say that the White case, we had been
18 persuaded and agreed with counsel that there were
19 reasonable, more than reasonable prospects of success and
20 there was psychiatric, supporting psychiatric evidence and
21 so the outcome, well, I suppose you could call it surprising
22 but it was not what was anticipated. In the K case, the
23 outcome was not anticipated but, as was apparent from the
24 memorandum that has already been referred to, if we had been
25 aware of all the earlier relevant information, then - well,
26 it may not have been that case would have ever got to trial,
27 certainly on Legal Aid.

28 Q. But what you're saying is that going into litigation, the
29 Agency is aware that the outcome may not be successful?

30 **MR HOWDEN:** Yes because prospects of success is not
31 that you're going to win in parlance. I mean, it is
32 just that you - there is a reasonable hearing of the
33 issues and relevant factors for the party can be put
34 before the Court.

1 Q. And at the time, what did you understand the strategy of
2 claimant counsel to be? What were they trying to do with
3 these cases?

4 **MR HOWDEN:** Well, in the White case it was to have
5 recognition that both brothers had been abused
6 significantly in care and that an appropriate redress
7 arrangement would be put in place for both of them
8 because it was significant that their lives had been
9 significantly affected as a consequence.

10 And there was also looking for compensation as well.

11 Q. Was there a wider overall strategy of trying to get a number
12 of wins which would then put the claimants in a better
13 negotiating position?

14 **MR HOWDEN:** You mean the wider pool of claimants?

15 Q. Yes.

16 **MR HOWDEN:** Well, when the White litigation went to
17 Court, there were a lot of areas that were not
18 established law, and I've referred to reasonable
19 discoverability and other factors.

20 And so, I know there was a discussion about test cases,
21 I'm not sure everyone agreed that these were test cases but
22 with these cases going through, that would provide guidance
23 for the rest of the cases.

24 Q. Well, what I'm asking and you're saying maybe you don't
25 think this was the case but wasn't it the strategy, you have
26 a large number of cases and of those large number of cases
27 to get a number of wins which would then put you in a solid
28 negotiating position with the Crown?

29 **MR HOWDEN:** Well, if these cases had been successful,
30 well obviously that would have put them in a stronger
31 position, so that would follow. But you can't
32 get - well, no-one can get away from the fact that the
33 volume of claims and behind each one of these claims
34 is an injured party. So, there were a lot of damaged
35 people out there and they needed addressing and that I

1 think provides, the fact that there were large numbers
2 of claims led to this impetus for alternative dispute
3 resolution.

4 Q. I guess what I'm asking is whether or not alternative - it
5 seems after the three losses the Agency said, "We're not
6 going to have it anymore, it's too hard"; is that fair?

7 **MR HOWDEN:** No, we never said it was too hard. What
8 we said was we weren't satisfied that going down the
9 litigation route a claimant would, in the majority of
10 cases, be able to satisfy that there were sufficient
11 prospects of success for the claim to proceed, not
12 that it was too hard.

13 Q. Sorry, not that it was too hard but you knew there were all
14 of these other cases out there?

15 **MR HOWDEN:** Correct.

16 Q. And, as set out in the K memorandum, you seemed to have a
17 solid understanding that many of these cases would turn on
18 their own facts?

19 **CHAIR:** Sorry, Mr Opie.

20 **MR OPIE:** I said it again, my apologies.

21 **CHAIR:** Are we okay to proceed?

22 **MS JANES:** Yes.

23 **CHAIR:** Thank you.

24 **MR OPIE:**

25 Q. So, you knew that the cases could turn to a substantial
26 degree on their own facts and you had a large number waiting
27 in the wings; is that right?

28 **MR HOWDEN:** Well, I wouldn't quite categorise it like
29 that. I mean, the facts of a case, the individual
30 facts of a case are always important but it is in the
31 context of the relevant law and if there is
32 psychiatric evidence as well, the strength of that.

33 So, the facts are certainly a significant part but not
34 the only part.

1 Q. If I could go now to document MSC503, just blow that up,
2 please.

3 Just prior to that, are you aware in about March 2008
4 Cooper Legal advised you of a possible Alternative Dispute
5 Resolution process for the DSW and Psychiatric Hospital
6 claims?

7 **MR HOWDEN:** Yes, I was.

8 Q. And just in the second paragraph of that letter, you are
9 saying, "the Agency does not accept that ADR is an automatic
10 substitute for the litigation process"?

11 **MR HOWDEN:** Correct.

12 Q. If we could just go down in that document, you say in the
13 middle paragraph, "We would already anticipate that as part
14 of the ADR process in relation to a claim, the Crown would
15 have acknowledged that abuse has occurred and limitation and
16 causation issues will not be raised in order to stop the
17 resolution process". And you're going on and saying, well,
18 we need to have the Crown acknowledge these things for the
19 Agency to fund ADR, is that right?

20 **MR HOWDEN:** Perhaps ineloquently expressed but what
21 the letter expressed concern about was that the reason
22 why the litigation process was proving problematic was
23 the rules are statutory barred. And if in the ADR
24 process those statutory bars are still going to be
25 maintained, then it's difficult to see how an
26 Alternative Dispute Resolution process would be any
27 more successful, so that's why we were wanting to get
28 confirmation that in the ADR process those statutory
29 bars would not be relied upon.

30 Q. But then you also are saying you want to have the Crown
31 acknowledge that abuse has occurred?

32 **MR HOWDEN:** Well, I accept that's what was said at the
33 time. Maybe in retrospect, that was a little bald
34 statement, in the sense that, but I guess what it was
35 getting at was that - had there been acceptance that

1 there had been some abuse or was the very fact of
2 abuse going to not be acknowledged at all? So, where
3 was the ADR process going to lead to?

4 I mean, I accept that part of an ADR process is
5 establishing the extent of the abuse but I guess what we
6 were trying to tease out was whether the Crown would
7 acknowledge that some abuse had occurred at the beginning
8 before the ADR started.

9 Q. It's very stringent criteria, isn't it, to go into a
10 settlement process with the Crown to say, "We're not going
11 to fund settlement unless the Crown acknowledges part of
12 your case upfront"?

13 **MR HOWDEN:** Well, yeah, with the benefit of hindsight,
14 I will agree that particular paragraph does seem a
15 little black and white but I'm just explaining it
16 wasn't - that was the purpose of asking that question.

17 Q. And if we just go to page 2 of the letter and just call out
18 the last paragraph, please.

19 **MR HOWDEN:** Yes.

20 Q. So, you refute Cooper Legal's allegation that the Agency is
21 intending to "close down" all the claims and you say, "The
22 Agency has made a principled decision based on the uniformly
23 negative outcomes from the fully funded recent test cases",
24 which were the cases that you were referring to then?

25 **MR HOWDEN:** That letter was in July 2008, so it would
26 be the White cases but also the K case. Now, you
27 know, this raises the previous issue you've already
28 addressed to me but there were also, I mean, again in
29 retrospect, what we were really saying was, it was
30 historic abuse claims via litigation, not that the
31 claimants would not have any other avenues, but I
32 accept the letter does say - Legal Aid at no stage
33 said it was going to close down all the historic abuse
34 claims and I think the data that is going to come
35 forward is going to show that the actual number of

1 cases that were actually closed down were a percentage
2 only of the total cases that were given Notice of
3 Intention to Withdraw.

4 Q. And were you aware at this time of the W v Attorney-General
5 and S v Attorney-General cases in 1999 and 2003?

6 **MR HOWDEN:** Yes, we were aware of the S case and, yes,
7 also the W case.

8 Q. In broad terms, both of those cases were successful historic
9 abuse claims, weren't they?

10 **MR HOWDEN:** They were but, again, well, I don't know
11 if we have time to debate those cases but I know the S
12 case, for example, involved a finding of specific
13 sexual abuse which meant that there was - reasonable
14 discoverability did not apply because of the
15 particular issues. So, they were factors that were
16 taken into account as well but there were a number of
17 other cases where the Courts looked at this delayed
18 connection being made in relation to historic abuse.

19 Q. It doesn't seem in that letter though that you're giving any
20 weight to those previously successful cases?

21 **MR HOWDEN:** Well, we make a decision based on the
22 cases, the current cases we think are important,
23 bearing in mind the lawyer concerned has always then
24 got the opportunity to come back and provide us with
25 more information as to why that initial decision was
26 felt to be wrong and I'm sure that Ms Cooper would
27 refer to those cases.

28 Q. There was also a previous case in 2006, the A v Roman
29 Catholic Archdiocese, do you recall that decision?

30 **MR HOWDEN:** I remember the name but to be honest, the
31 facts, I'd have to look it up, I can't remember the
32 details.

33 Q. Did you take that into account when making your decision?

34 A. Well, I suppose what is not before you is actually our
35 letter. When we wrote indicating to withdraw, we actually

1 referred to all the relevant material. We would have
2 referred to the cases that we thought were relevant to the
3 particular application before us.

4 Q. How could the W and S cases not be relevant? They were
5 historic abuse cases which had been successful?

6 **MR HOWDEN:** Well, again, I'm afraid I have not, I mean
7 I can certainly read those cases over lunch and
8 probably can give you a better response but all I can
9 say is, the White cases, those cases I think were
10 raised in the White case, from memory, so there were,
11 they were certainly considered.

12 Q. They were considered?

13 **MR HOWDEN:** I'm sorry, I'm just going on my memory
14 now. I think - I thought they were referred to in the
15 White case but I can go back and check that.

16 Q. It's just that you seem to be taking a very negative view of
17 the cases because you refer in the letter to "uniformly
18 negative outcomes from the recent test cases"; that's right?

19 **MR HOWDEN:** Yes.

20 Q. But you don't seem to be giving any weight to the?

21 A. No, we are saying future funding on each file is accordingly
22 being assessed on its individual merits. If the factual
23 situation turned up like the S case that I am familiar with,
24 it would be unlikely aid would be withdrawn. And if a case
25 did not have, for instance, the Limitation Act did not apply
26 because of the age of the applicant, that would also not
27 apply.

28 So, the individual merits would enable these sort of
29 factors you are referring to, to be specifically addressed.

30 Q. And so, again, the outcomes in each case, they are very
31 fact-dependent, aren't they?

32 **MR HOWDEN:** Well, they are but obviously in the
33 context of the law and, well, the law and the
34 application of the law to the particular facts.

1 **MR OPIE:** We can have a break now. I just wonder, to
2 make sure we get through today, would it be possible
3 for a slightly shorter lunch of 45 minutes or would we
4 like to take the hour? I can speed things up if we
5 need to.

6 **CHAIR:** You are concerned about timing, are you?

7 **MR OPIE:** Slightly.

8 **CHAIR:** Does anybody else want to comment on that?
9 Ms Aldred?

10 **MS ALDRED:** No, I think that would be all right. I
11 mean, just as long as that's going to allow some time
12 potentially for any further questions by the
13 Commissioners.

14 **CHAIR:** That is what we're trying to achieve by having
15 a little bit of extra time. Does any of the other
16 counsel wish to comment on that? Ms Janes? Let's
17 take a slightly shorter lunch adjournment, strictly
18 one hour, so that we make sure that we - is that
19 suitable? We will take the adjournment, thank you.

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22 **Hearing adjourned from 1.05 p.m. until 2.05 p.m.**

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1 **MS ALDRED:** I have consulted over the break with
2 Counsel Assisting and Mr Opie has kindly agreed that
3 now is a good point for Mr Howden to read into
4 evidence the result of the inquiries that have been
5 made over the figures in relation to the withdrawal of
6 aid process.

7 **CHAIR:** That is a good idea to get that done at the
8 moment.

9 **MS ALDRED:** Mr Howden, if you could read from or speak
10 to the document?

11 **MR HOWDEN:** Thank you. The advice received from the
12 Ministry is that 1151 letters of Intention to Withdraw
13 Legal Aid was sent. Submissions were then provided
14 which resulted in approximately 200 applications being
15 withdrawn or 200 files or cases being withdrawn. 93
16 of the 200 were then reinstated, either through the
17 review, the Legal Aid Review Panel and appeal process,
18 or Legal Aid being given for ADR rather than
19 litigation.

20 So, out of the 1151 cases, 107 grants of aid were
21 withdrawn and not reinstated.

22 Following that, 9 of those 107 reapplied for a fresh
23 grant of aid which was accepted. And so, the overall result
24 is that 96 of the 1151 claims lost their grant of aid and
25 did not receive a subsequent grant as a result of the review
26 of aid process.

27 And, as a general comment, these numbers are based on
28 what the Ministry's system currently shows. It should be
29 noted that at the relevant time, the system did not record a
30 chronological account of aid decisions in every case.

31 So, while the Ministry cannot be sure that these figures
32 are 100% accurate, they are expected to be fairly accurate.

33 **CHAIR:** Fairly accurate, thank you.

34 **MS ALDRED:** Thank you.

35 **MR OPIE:**

1 Q. Just a question about those numbers. Mr Howden, is it right
2 that the withdrawals and reinstatements, to get these
3 figures, that process occurred over a number of years?

4 **MR HOWDEN:** It certainly would have been over time.
5 I'm not quite sure how long it would have taken but
6 you're correct, it wouldn't have been an overnight
7 process.

8 Q. Some more questions for you, Mr Howden. If I could go to
9 document MSC507. This is a 24 November 2008 letter from you
10 to Cooper Legal?

11 **MR HOWDEN:** Correct.

12 Q. If I could call out paragraph 1a, this is refer to a
13 previous letter of yours and you're saying, "We advised
14 because of the Agency's expressed concerns regarding the
15 merits of the proceedings" and then you go on to say you're
16 not going to continue with the global granting arrangement;
17 is that right?

18 **MR HOWDEN:** Yes, that's correct.

19 Q. And you can put that down. And then in the remainder of the
20 letter you refer to two other arrangements you have in place
21 with Cooper Legal, a higher hourly rate and an additional
22 fee arrangement?

23 **MR HOWDEN:** That is correct.

24 Q. Is it fair to say that these arrangements were advantageous
25 to Cooper Legal?

26 **MR HOWDEN:** Yes, that is correct.

27 Q. And so, in November 2008, the Agency was withdrawing aid and
28 it's removing these advantageous arrangements for Cooper
29 Legal, and we discussed before your requirement that the
30 Crown accepted abuse had occurred before it would fund ADR,
31 so why do all of that at once?

32 **MR HOWDEN:** Okay. The background to the letter was
33 that the higher hourly rate and the global granting
34 process was put in place during the initial period of
35 these cases and it was accepted that Cooper Legal was

1 going to have to do a lot of one-off and - well,
2 unusual amounts of work at the beginning. And one of
3 the grounds in our policy for giving the highly hourly
4 rate was the particular circumstances around the
5 particular case and it was felt that that qualified
6 for the higher hourly rate. Global granting was to
7 also assist as far as billing - the administration of
8 the billing was concerned.

9 But it was felt by the time that a succession of cases
10 were coming through that we felt were not advantageous to
11 the claimants, that with the preliminary work having been
12 completed, the justification for these more exceptional
13 arrangements being in place no longer existed or the grounds
14 for having them, and that's why that letter was sent. I
15 mean, that was - although my name is on it, it was obviously
16 a management advice coming from that.

17 But I guess these were - also, around about this time we
18 were also withdrawing aid and there didn't seem any logical
19 process for paying someone, making arrangements in relation
20 to cases where aid was potentially going to be withdrawn.

21 Q. So, Mr Dooley's evidence was that the reason why the higher
22 hourly rate was withdrawn is because the additional
23 foundation work had been completed; is that right?

24 **MR HOWDEN:** That's effectively one of the grounds that
25 I was saying, yes.

26 Q. One of them, but the other is as set out in your letter,
27 isn't it, your concerns about the merits of the proceedings?

28 **MR HOWDEN:** Correct.

29 Q. So, if all of these arrangements were withdrawn, that has
30 the effect of making the work less attractive for Cooper
31 Legal?

32 **MR HOWDEN:** Well, it would bring the work in line with
33 all other Legal Aid granted.

1 Q. Yes, but before you had the more advantageous arrangements,
2 now you're saying they wouldn't apply, the effect is it
3 makes it less attractive, the work of Cooper Legal?

4 **MR HOWDEN:** From a financial point of view, that could
5 well be correct.

6 Q. One view of that is - you've said the figures that you
7 provided, that the 1151 letters of intention to withdraw
8 Legal Aid was sent but then, in fact, only about 200 grants
9 were withdrawn; is that right?

10 **MR HOWDEN:** At the end of the day, yes.

11 Q. At the end of the day?

12 **MR HOWDEN:** Yes.

13 Q. And so, you've still got a large proportion of work
14 continuing; that's right?

15 **MR HOWDEN:** Correct.

16 Q. But the Agency has said, even though this work is
17 continuing, we're not going to pay you the same that we did
18 before?

19 **MR HOWDEN:** No - well, yes, that's correct but the
20 reason for making that decision was, as I have stated,
21 all that preliminary grunt work, if I can call it
22 that, of researching the law etc., had already been
23 undertaken and the cases then became more aligned to
24 usual Civil Legal Aid cases. And so, the reason for
25 having this disparity, we felt, had disappeared.

26 Q. But the arrangements were in place for 4 years. It's a long
27 time to have foundation work done, isn't it, 4 years?

28 **MR HOWDEN:** Well, not really because during - I mean,
29 the White trial took quite a long time and the K case
30 also took a considerable period. There was also other
31 cases running in parallel to this that hadn't got to a
32 judgment stage but there was a lot of preliminary work
33 and we felt that, though, the cases from this point
34 onwards were now orthodox civil litigation and didn't

1 merit or no longer merited any particular dispensation
2 from the usual Legal Aid granting.

3 Q. And the point that the Agency reached that decision was when
4 it was concerned about the losses that had occurred?

5 **MR HOWDEN:** That was one of the factors, yes, but not
6 the only factor. It was also, as Mr Dooley stated,
7 was the lots - a lot of the foundation work had been
8 completed and been explored in Court.

9 Q. Can you see how those sorts of decisions, though, could
10 create a perception that the Agency is trying to discourage
11 the work?

12 **MR HOWDEN:** Well, the point is that this - the rate
13 and the other arrangements were very much an
14 exception. Lawyers that do Legal Aid work do it
15 knowing what the rates and arrangements are, and this
16 was very much an exception and that once that period
17 had passed, and you could argue it probably could have
18 happened earlier but it was done at that November 2008
19 period, it moved this litigation or these cases back
20 in line with the rest of Legal Aid granting.

21 Q. Did the Agency at the time feel under pressure because of
22 the losses that had occurred?

23 **MR HOWDEN:** Well, if you mean external pressure, no.
24 But internally, yes, from the point of view that we
25 have to or had to continuously assess prospects of
26 success. So, yes, when there were unsuccessful cases,
27 we had to look very carefully about whether aid should
28 continue, and there was some pressure on us in that
29 regard.

30 Q. If I could go now to document MoJ124, page 5 of the pdf,
31 please. This is a letter from the Attorney-General to the
32 Minister of Justice and it refers to legal advice that the
33 Legal Services Agency had received but it had come into the
34 possession of Crown Law. And if I could call out, it's not
35 numbered but paragraphs 3 and 4 of that advice. It states,

1 "The advice appears to confirm the suspicion that the Crown
2 has held that the initial grants of Legal Aid may not have
3 been made following the proper enquiry".

4 Were you aware that the Crown held this suspicion?

5 **MR HOWDEN:** No, no, I was not, the first time
6 because - no, I was not aware of that. And if I could
7 just add, because I don't think, even if someone had
8 expressed that to me, I would have hopefully disabused
9 them of that belief because it's not correct.

10 Q. And then the next sentence, "I provide this to you for you
11 to consider in the context of the wider review of services
12 for which Legal Aid funding is granted". Is that the April
13 2009 review which led to the Bazley report referred to at
14 4.20 and 4.22 of Mr Dooley's original brief?

15 **MR HOWDEN:** I'm afraid I can't really assist on that
16 because I don't recall actually seeing this opinion
17 previously so it wasn't one that the Specialist
18 Advisors would have been involved in. As an aside,
19 I'm surprised that a legal opinion to the Agency ended
20 up with the Minister and then the Attorney-General but
21 that's another story.

22 Q. Do you know whether Crown Law notified the Agency that it
23 had come into receipt of that opinion?

24 **MR HOWDEN:** No, I don't.

25 Q. If you could look at - this letter is March 2009 and then if
26 you could look at Mr Dooley's brief, the initial one at
27 4.20-4.22?

28 **MR HOWDEN:** Sorry, which letter are we looking at?

29 Q. Mr Dooley's brief, 4.20-4.22.

30 **MR HOWDEN:** Okay. Yes, I've got Mr Dooley's brief in
31 front of me.

32 Q. So, just 4.20 says, "In April 2009, a full review of Legal
33 Aid was initiated by the then Minister of Justice"?

34 **MR HOWDEN:** Yes.

1 Q. It's likely that this letter is - the wider review of
2 services for which Legal Aid funding is granted is referring
3 to this full review; is that right?

4 **MR HOWDEN:** I don't know but it's a reasonable
5 assumption.

6 Q. This could be a question for either of you, if you feel
7 whoever is best placed to answer, but did the changes that
8 were implemented following the Bazley report, were there any
9 changes to the funding for Historic Claims, new limitation
10 constraints or anything like that?

11 **MR HOWDEN:** I am not aware, being personally aware at
12 the time, I am not aware of any such changes because
13 Legal Aid is not capped in this area. It is on a
14 case-by-case basis.

15 Q. If I can turn to document MoJ131. This document is - there
16 are a series of documents relating to a 20 February 2009
17 letter by Sonja Cooper to the Minister and various replies
18 from the Minister. If I could go to page 5 of the pdf, is
19 there any way we can blow that up?

20 This is a handwritten note and it appears that the note
21 is from the Minister's private secretary, Minister of
22 Justice's private secretary, but it doesn't really matter
23 for the purposes of my question.

24 Can you see there that the note says, "The
25 Attorney-General has indicated that he wishes to discuss
26 this matter with you in the context of a discussion on
27 limitation law. Ms Cooper apparently received over
28 \$2.8 million from Legal Aid etc. Limitation reform could
29 prevent this sort of cost to the Crown".

30 Assuming that the Attorney-General did hold those views,
31 was the Agency aware of them at the time?

32 **MR HOWDEN:** Well, my role was not involved at the time
33 in meeting with the Minister and so I was not aware of
34 this note or the Minister's views.

1 Q. Take that one down, thanks. And then I have some more
2 questions about the withdrawal of aid process.

3 So, there was litigation over the withdrawal, including
4 in the High Court; that's correct?

5 **MR HOWDEN:** Yes.

6 Q. And the Agency had - the Agency's decisions in some regards
7 were upheld in that litigation?

8 **MR HOWDEN:** Yes.

9 Q. And is it fair to say, on the other hand, that in various
10 cases the High Court found that the Agency didn't analyse
11 sufficiently the facts of each case to determine whether aid
12 should continue?

13 **MR HOWDEN:** Yes, that is correct.

14 Q. If we could go to document MSC011, page 28. MSC630 -

15 **MR HOWDEN:** I have the case in front of me but not on
16 the screen.

17 Q. That's all right, we can keep going to the next one, MSC630,
18 page 21. This is the judgment of Justice Joseph Williams
19 which Ms Aldred referred you to earlier today.

20 **MR HOWDEN:** Yes, I now have that.

21 Q. If we could pull out paragraph 83. There, the Judge is
22 saying, "Virtually identical and extremely low detail
23 applications lodged by Ms Cooper in all four of these
24 applications speaks to this work being mishandled. On the
25 other hand, LSA's virtually identical responses to all four
26 applications with widely differing merits is just as
27 disturbing" and then it says "time for applicants' counsel
28 to lose its sense of entitlement and time for LSA to adopt a
29 less negative approach".

30 Is it fair to say, the overall findings of the High Court
31 were that the losses in the cases that we have been
32 discussing, they were not enough in and of themselves to
33 justify the withdrawal of aid?

34 **MR HOWDEN:** No, I don't accept that. We're talking
35 about cases going down the litigation route. We're

1 not talking about claimants not having an avenue to
2 get recompensed for the abuse that occurred to them.
3 I mean, where there has been a succession of cases
4 that were unsuccessful in relation to historic abuse
5 for various reasons, then Legal Aid has a
6 responsibility to look at ongoing prospects of
7 success. It is taxpayers' money and money is only
8 part of it but it's an important part.

9 Q. What the High Court was saying, was that the Agency in
10 making its decisions was not looking carefully enough at the
11 facts of each case?

12 **MR HOWDEN:** Well, that is correct and, I mean, if I
13 could just - there are two points about this.

14 One is that I think this was the beginning of a process
15 that no-one - well, I certainly wasn't - I think most people
16 were not aware of how big it was going to get, how many
17 claims were involved and there was a lot of learning as to
18 the best way to deal with these things. Sometimes the
19 decisions made by Legal Aid were not upheld and other times
20 they were.

21 But the second point is, when you make a - when you're
22 dealing or looking at an application for aid, you go on the
23 basis of the information that is in front of you. And if,
24 in fact, we were being presented with a very thin basis for
25 the application, then we would respond in the best way we
26 could.

27 Now, it may be that we should have spent more time, and
28 certainly the Judge's view is that we should have spent more
29 time, and frankly we did after this. We certainly didn't
30 ignore what the Court was telling us, but we can only go on
31 what information was put in front of us.

32 Q. Before these judgments though, it's fair to say that the
33 Agency had made a general decision that it did not want to
34 fund historic cases down the litigation path because it
35 didn't think they had reasonable prospects of success?

1 **MR HOWDEN:** No, we did not make such a blanket
2 decision. It was that there were a lot more obstacles
3 for an applicant going down the litigation route but
4 if appropriate grounds were made out, then we would
5 fund that litigation. In fact, there is some
6 litigation continuing to be funded as we speak.

7 Q. In your evidence-in-chief, though, this morning, I think
8 that you said that after the losses in K, White and J, the
9 Agency felt it had no option but to withdraw aid?

10 **MR HOWDEN:** No, we had no option but to give Notice of
11 Intention to Withdraw Aid. I'm sorry if I wasn't
12 clear but by giving Notice of Intention to Withdraw
13 Aid, that gave the lawyer the opportunity to respond
14 and advise why the grant of aid should continue.

15 Q. Coming through into June 2010, you mentioned the P v
16 Attorney-General case, that case wasn't successful, was it?

17 **MR HOWDEN:** No.

18 Q. Was there a costs award in that case?

19 **MR HOWDEN:** I'm sorry, I can't remember, there may
20 have been, but I don't want to - I'm sorry, I can't
21 remember that one.

22 Q. In April 2011, there was another High Court judgment, if we
23 could go to document MSC629. It doesn't really matter,
24 there was just one line I wanted to ask you about, Mr
25 Howden.

26 **MR HOWDEN:** Okay, I'm sorry, I don't have it in front
27 of me.

28 Q. You can say if you don't recall it, but the Court there said
29 it had the impression that the Agency -

30 **CHAIR:** Can you identify what the document is?

31 **MR OPIE:** This is a case, April 2011, JMM v Legal
32 Services Agency, High Court judgment -

33 **MR HOWDEN:** I am sorry, what was the reference again.

34 **MR OPIE:** We have got it, that's useful.

35 Q. It's up on your screen now.

1 **MR HOWDEN:** All right, okay, I'll go off that.

2 Q. And if we could go to page 6, you will see paragraph 8
3 there, call that out, the Judge is saying, have you got it
4 there, Mr Howden?

5 **MR HOWDEN:** Yes I now do, thank you.

6 Q. "I cannot avoid the impression that all those responsible
7 for progressing this potentially overwhelming volume of
8 historic abuse claims have indeed been overwhelmed by the
9 sheer scale of their tasks". Did you feel overwhelmed by
10 the volume of work at that stage?

11 **MR HOWDEN:** Not necessarily overwhelmed but I
12 certainly would say everyone involved in the process
13 felt under considerable pressure because there was
14 just such a large volume of material coming through,
15 often on one day we'd get a whole bunch of stuff, so
16 there was a lot of pressure.

17 Q. Had the Agency ever had to deal with so many cases of a
18 particular type in the past?

19 **MR HOWDEN:** No.

20 Q. You can take that one down. I just want to talk about the
21 settlement possibilities in 2010. Mr Dooley said at 3.12 of
22 his initial brief that Legal Aid has been provided for
23 settlement negotiations since 2004?

24 **MR HOWDEN:** Yes, I see that.

25 Q. And at 5.24 of his initial brief he said, "In early 2010,
26 the Agency had included information about the MSD ADR
27 process in letters to claimants advising that their Legal
28 Aid would be discontinued"?

29 **MR HOWDEN:** Sorry, I am just finding it. Yes, I've
30 got that paragraph.

31 Q. Then "This ADR process was one means by which settlement
32 could occur"?

33 **MR HOWDEN:** Correct.

1 Q. Is it the case then that when the Agency withdrew Legal Aid
2 from any claimants, it knew that the claimants could
3 potentially negotiate a settlement through the ADR process?

4 **MR HOWDEN:** Well, we knew that the ADR was available
5 but bearing in mind a grant of Legal Aid relates to
6 particular proceedings. So, you would get a grant of
7 aid for the litigation route but if you decided to
8 stop the litigation route and go down the ADR route,
9 Legal Aid would require a new application. So, that's
10 why you would then get a separate grant because
11 different considerations would apply, for instance
12 prospects of success are different for an ADR route at
13 the time than a litigation route.

14 Q. Isn't it always possible in civil litigation though that you
15 will try to settle at some stage?

16 **MR HOWDEN:** Well, of course, but if there is, for
17 instance, like a judicial settlement conference or
18 settlement arising in the course of litigation, that
19 is covered under the original grant of litigation aid.
20 But if you are going down a completely separate and
21 purpose-defined ADR route that is not connected
22 directly to the litigation, Legal Aid required at the
23 time, a separate grant of Legal Aid would need to be
24 made. You could not extend the litigation grant to
25 cover the separate ADR route.

26 Q. But - you said the ADR will not be connected to the
27 litigation but it would be seeking to resolve the claim for
28 which the person had Legal Aid, so it's intimately
29 connected, isn't it?

30 **MR HOWDEN:** It was obviously related and I'm just
31 explaining what was the policy at the time, which was
32 that where you had a grant of aid for litigation, you
33 needed a separate grant of aid if you were going to
34 follow a separate ADR route. And it was basically
35 that, you know, we didn't want to fund - because

1 potentially we could still - if we left the litigation
2 grant open, you could still be getting invoices for
3 the litigation grant, when in fact - I'm not saying it
4 necessarily happened but potentially then all the work
5 has been carried out on ADR which is a separate
6 process and it became difficult for grant staff to
7 manage. So, it was felt neater to have separate
8 grants of aid.

9 Q. And so, when the litigation grants or the intentions to
10 withdraw the litigation grants were issued, did the Agency
11 advise claimants that they could apply for a settlement
12 grant?

13 **MR HOWDEN:** I'm afraid I don't recall but certainly in
14 the case of Cooper Legal, they would have been well
15 aware that a separate grant of aid was available and I
16 believe some of my correspondence refers to granting
17 being available for ADR. So, there is - the important
18 thing was that whilst one route may have been
19 potentially closed, there was another route that was
20 available that lawyers could also be involved in.

21 Q. So, if the litigation grants were withdrawn and then
22 settlement discussions occurred, if the claimant wanted to
23 go back down the litigation route they would have had to
24 apply for another litigation grant?

25 **MR HOWDEN:** To be frank, I'm not sure, but my
26 recollection is that if the ADR process failed, then
27 although aid may have been withdrawn, there would be
28 an application to reopen the litigation grant.
29 Because, I mean, you were trying not to put too much
30 administrative requirements on either the claimant or
31 the lawyers concerned, so that would be - but I'm not
32 certain on that point. That's my assumption.

33 Q. Would the Crown as the opposing party going into
34 negotiations know that the litigation grant had been
35 withdrawn, probably?

1 **MR HOWDEN:** I would think so and that went back to the
2 questions you were asking me on that earlier letter,
3 as to we wanted some confirmation from the lawyers
4 about the stance of Crown Law in an ADR process.

5 Q. Doesn't it reduce a claimant's bargaining power a lot if
6 it's going into a settlement process and the other party
7 knows that there isn't a credible threat of litigation?

8 **MR HOWDEN:** Well, it's just one of the possible
9 elements to take into account. The Crown would have
10 been as aware as we were about the failure rate in
11 relation to the litigation and would be aware,
12 presumably, in general about how Legal Aid made its
13 assessments, but we did not ever discuss this with the
14 Crown, but I am assuming they would have made similar
15 assumptions.

16 Q. Just talking about meetings and correspondence between the
17 Agency and the Crown between 2009 to 2011. It's correct
18 that there were various meetings between those dates about
19 Historic Claims?

20 **MR HOWDEN:** Sorry, which dates are we talking?

21 Q. It's probably easier if I start with - have we got document
22 MSC340? This is a document dated 18 January 2010 and if we
23 could go to page 2, paragraph 4.5.

24 **MR HOWDEN:** I have that, yes.

25 Q. That there refers to a meeting with Robin Nicholas of the
26 Legal Services Agency?

27 **MR HOWDEN:** I see that, yes.

28 Q. And says, "The Agency is keen to settle claims and is happy
29 with MSD's approach of passing on its settlement offers to
30 LSA."

31 Why did the Agency want MSD to pass on the settlement
32 offers?

33 **MR HOWDEN:** Because - well, for a start, I was not
34 part of that discussion, so until I read this material
35 I hadn't been aware of that meeting. But my memory is

1 there were difficulties in obtaining settlement offers
2 or details of settlement offers from the lawyers
3 concerned, which we regard as a critical part of a
4 grant, in that if the legally aided person gets a
5 settlement offer, then Legal Aid needs to be informed
6 of that offer.

7 Q. You might not have personal knowledge of this then, but was
8 that concern that the Agency had, did it communicate that to
9 Cooper Legal and Mr Chapman?

10 **MR HOWDEN:** I'm casting my mind back. I remember
11 some, shall I say, spirited discussions on that
12 subject, and counsel's view was that Legal Aid was not
13 entitled to receive that material and we disagreed.

14 Q. And was there no mechanism in your contract with the
15 providers that you could require them to give it to you?

16 **MR HOWDEN:** Well, in retrospect there was but I
17 don't - because at the time, the 2000 Act had a
18 provision that enabled or a section that enabled Legal
19 Aid to utilise the powers of a Commission of Inquiry,
20 section 99, and we could have used that to get that
21 material. But, in fact, it was not regularly used -
22 well, it was never actually used in practice and we
23 never called upon it but we did - the fact that it was
24 there was usually a basis for if we introduced it in
25 the conversation people would give us the material.

26 Q. Because doesn't the direct interaction with one of the
27 defendants, it does give rise to the perception that the
28 Agency is trying to takeover in some way from the lawyers?

29 **MR HOWDEN:** No, I agree there's a number of ways you
30 could look at this but my take is that it was a way of
31 ensuring that Legal Aid became aware of any settlement
32 offers that were made by MSD. And then the normal
33 discussions would take place with the claimant's
34 lawyer.

1 But, I mean, we certainly weren't, I didn't read this
2 that we were in any way saying that that offer would be
3 accepted and we certainly weren't stepping into the lawyer's
4 shoes in that regard.

5 Q. Just the next sentence there which I will read and then it
6 goes on to the next page, "LSA believes that Garth can offer
7 to meet claimants, not in a legal capacity/context, but in
8 his CCR role and this would not be a breach of professional
9 conduct". And then, "LSA has included Garth as a contact
10 person in their letters informing claimants of the
11 withdrawal of their Legal Aid".

12 Does that look like the Agency advising MSD how it could
13 resolve claims directly with claimants?

14 **MR HOWDEN:** Well, I'm not sure because I wasn't aware
15 of this at all, so I don't - other than for Legal Aid
16 wanting to ensure that they were aware of settlement
17 offers, I don't know that I can unfortunately help you
18 much more on that.

19 Q. In Mr Dooley's initial brief at paragraph 5.8 -

20 **MR HOWDEN:** On page 10?

21 Q. Sorry, I may have the wrong - sorry, it's the reply brief, I
22 apologise.

23 **MR HOWDEN:** Okay.

24 Q. It refers there to a 15 September 2011 meeting between Legal
25 Aid and MSD?

26 **MR HOWDEN:** Yes.

27 Q. Were you at that meeting? You can't remember?

28 **MR HOWDEN:** Well, I certainly had a meeting with MSD,
29 and I think there's a letter on the record to this
30 effect. Legal Aid was criticised by Cooper Legal that
31 we didn't know what the process, what this ADR process
32 was all about, and this related to the amount of
33 funding that we were granting to that.

1 So, there was a meeting that I attended with - I think it
2 was with Mr Young, where he explained how the CCRT process
3 worked but that was the purpose of the discussion.

4 Q. Did Legal Aid advise Cooper Legal that it was going to have
5 these meetings before they occurred?

6 **MR HOWDEN:** Not the specific meeting but, I mean, when
7 we're faced with the criticism that we didn't know
8 enough about it and, as I recall, there was an - I
9 don't know about an invitation but a presumption that
10 meetings would take place, there was no need to - I
11 didn't see or we didn't see the need to involve Cooper
12 Legal in the process because previously we had tried
13 to get information, and some information was supplied
14 but we felt not a sufficient amount of information
15 about the process, so we thought we'd go to the
16 horse's mouth, to the people who were running the
17 process.

18 Q. Isn't it always going to give rise to suspicion on the part
19 of the claimants' lawyers, for them to discover that the
20 Agency is having meetings without them with the defendant
21 agencies?

22 **MR HOWDEN:** Not when there is - effectively, we
23 regarded that we had an invitation to have a meeting
24 to find out how this process actually worked. Cooper
25 Legal were subsequently informed as to the outcome of
26 that meeting. And, no, I mean, as I think Mr Dooley
27 said in his brief, Legal Aid meets with a lot of
28 different agencies and we don't - unless there is a
29 specific reason to do so, you don't involve counsel
30 for a party.

31 So, where - well, that's the way - I mean, obviously, if
32 it related to a client-specific matter - well, we wouldn't
33 have had the meeting in the first place - but the lawyers
34 would be involved.

1 Q. The claimant counsel had a general interest in understanding
2 what the defending agencies were saying about the ADR
3 process on offer, wouldn't they?

4 **MR HOWDEN:** Well, yes, and if they had provided a
5 fulsome amount of information to us, we wouldn't have
6 needed to have followed that up, but that was not the
7 case.

8 Q. But you still could have got the information that you were
9 wanting to get by attending the meeting and inviting Cooper
10 Legal as well?

11 **MR HOWDEN:** In retrospect, we could have but what we
12 wanted - we'd already tried to get the information
13 from Cooper Legal and it hadn't turned up in
14 sufficient detail for us to be satisfied that we had
15 all the details and so we had a meeting about process
16 with the other Ministry.

17 Q. At 5.9 of the brief in reply, it refers to another meeting
18 on 23 September 2011 between Legal Aid and MSD?

19 **MR HOWDEN:** Oh, yes, that was at Francis Cooke's
20 chambers, yes.

21 Q. And then paragraph 5.10 says that Cooper Legal was informed
22 of that meeting after it had occurred?

23 **MR HOWDEN:** Yes and - yes, that is correct.

24 Q. And so, again, wouldn't it simply have been better to have
25 invited Cooper Legal also to come to the meeting?

26 **MR HOWDEN:** Well, with the benefit of hindsight,
27 possibly, but I'm afraid I can't now recall all the
28 matters that were discussed at the meeting and there
29 may have been some that weren't appropriate
30 because - I'm not sure but suffice to say that the
31 advice - we effectively apologised to Cooper Legal and
32 said that from now on we will ensure that all such
33 meetings will involve Cooper Legal. So, you know, as
34 I say, there was an unfolding process and it's fair to
35 say Legal Aid didn't always get it right.

1 Q. Because you can see also it does give rise to the
2 perception, doesn't it, that Legal Aid is looking to take
3 over from the lawyers?

4 **MR HOWDEN:** Oh, well no, we have never - as a lawyer
5 myself, I'm fully aware of your professional
6 obligations in that regard and I would not ever
7 presume to get between a client and their lawyer but
8 we, as Legal Aid, we were a funder and so there were
9 different criteria that needed to be brought into
10 account. And I think where there were
11 misunderstandings, I believe they were appropriately
12 addressed.

13 Q. If I could take you now to another document, MSC529. This
14 is a letter dated 13 September 2011 which you're writing to
15 Ms Cooper and in it you address a discussion you had in
16 December 2010 with the Crown Health Financing Agency?

17 **MR HOWDEN:** Yes.

18 Q. The Financing Agency had advised you that there was the
19 possibility of a global settlement offer for all existing
20 psychiatric claims?

21 **MR HOWDEN:** Yes.

22 Q. And the possibility of extending the offer to clients whose
23 grant of aid had been withdrawn?

24 **MR HOWDEN:** Correct.

25 Q. And if you could call out paragraph 4, please. If you could
26 read that out, please?

27 **MR HOWDEN:** "As this was a preliminary discussion
28 regarding a possible global settlement and there was
29 no guarantee that it would translate into a firm
30 offer, there was no need to take the matter any
31 further. I confirm that no further action was taken
32 by the Agency in relation to the matters raised. As
33 you are aware, your clients were not contacted by the
34 Agency in relation to this matter".

1 Q. You didn't inform Ms Cooper at the time of the discussion
2 you had had with the Financing Agency?

3 **MR HOWDEN:** No.

4 Q. Shouldn't you have informed Cooper Legal at the time?

5 **MR HOWDEN:** Well, at the time the view was taken that
6 there was nothing, apart from the approach - the Crown
7 Health Financing Agency was exploring this and we
8 presumed that when something became more formal, then
9 there would be a discussion with Cooper Legal but,
10 apart from the fact that there was a discussion, it
11 wasn't like we were receiving offers or anything like
12 that.

13 Q. If you had advised Cooper Legal of the possibility, they
14 could have followed up with the Financing Agency themselves,
15 couldn't they?

16 **MR HOWDEN:** Well, when you read the last paragraph of
17 that letter, that's exactly what happened because I
18 state "you will continue to have discussions with the
19 Crown Health Financing Agency in order to get the best
20 results" and that's where I invited Cooper Legal to
21 have direct discussions in order to finalise the
22 amount of any resulting write-off.

23 Q. But those discussions occurred quite some time later because
24 this letter is dated September 2011?

25 **MR HOWDEN:** Correct.

26 Q. You had the discussion with the Financing Agency in December
27 2010?

28 **MR HOWDEN:** Well, all I can say is that nothing
29 happened in the interim.

30 Q. But if Cooper Legal had known about it, then they could have
31 tried to make a firm offer materialise, couldn't they?

32 **MR HOWDEN:** I am not aware of the date when the Agency
33 first contacted Cooper Legal about this proposal.

34 Q. I think that Ms Cooper says that she was not aware of it
35 until July 2011.

1 **MR HOWDEN:** Okay. All right, well, at that point she
2 received further - a lot more information than we had
3 received leading up to that letter of September 2011
4 because it was preliminary advice. Again, with the
5 benefit of hindsight, perhaps it would have been
6 helpful but I am not sure that that would have
7 necessarily speeded up the process.

8 Q. If we could just put that one down and then just highlight
9 the fourth paragraph again. You're saying there that there
10 was no guarantee that there would be a firm offer. Did you
11 take any steps to advance the possibility of a firm offer
12 being made?

13 **MR HOWDEN:** Well, no, because it was totally within
14 the gift of the Crown Health Financing Agency to make
15 any offer. It was not for Legal Aid. I mean, Legal
16 Aid could get involved if we were talking about any
17 write-offs and if that would assist the Agency or the
18 Financing Agency but not to progress other matters.

19 Q. But, again, had Cooper Legal known earlier, it could have
20 taken steps to progress them themselves?

21 **MR HOWDEN:** Well, in theory, but I would be surprised
22 if there weren't discussions happening between the
23 Crown Health Financing Agency and Cooper Legal in the
24 interim months.

25 Q. It just seems that one view of the matter, unconsciously
26 perhaps, but you had information which was relevant to the
27 conduct of the claims and yet you didn't pass it on to
28 Cooper Legal in a timely way?

29 **MR HOWDEN:** I think we would agree to disagree. We
30 had a preliminary advice and it was left with the
31 Crown Health Financing Agency that they had to carry
32 out further work at their end and then if something
33 was to emerge, then we would find out about it, and
34 that's what happened.

35 **CHAIR:** Can I just ask a question?

1 **MR HOWDEN:** Yes.

2 **CHAIR:** At this stage, were the clients granted Legal
3 Aid for the purposes of ADR at this stage?

4 **MR HOWDEN:** My recollection is yes, yes Judge.

5 **CHAIR:** So, they were already -

6 **MR HOWDEN:** They were being funded.

7 **CHAIR:** Funded to do the ADR process?

8 **MR HOWDEN:** Yes.

9 **CHAIR:** At this time?

10 **MR HOWDEN:** Yes.

11 **CHAIR:** Thank you.

12 **MR OPIE:**

13 Q. If I can take you to - you can put that letter away.

14 Cooper Legal has said in its evidence that although the
15 Agency knew of this possibility, it continued to submit to
16 the Legal Aid Review Panel and to the Courts that the
17 Psychiatric Hospital cases didn't have sufficient prospects
18 of success. Do you want to go to your evidence in that
19 regard?

20 **MR HOWDEN:** No, no, I remember that.

21 Q. What do you say to that?

22 **MR HOWDEN:** Well, the first point is that this is - we
23 were talking about the litigation route and that there
24 was still, maintaining there was not sufficient
25 prospects of success to go down the litigation route.
26 And bearing in mind what I said before about the two
27 routes of Legal Aid granting, one being for litigation
28 and the other one being for ADR, I was referring to
29 the litigation route as where prospects of success
30 were not positive for the claimants.

31 Q. Right. So, those submissions were made but you are saying
32 that the reason for that was because the Agency didn't think
33 there was sufficient prospects of success down the
34 litigation route?

35 **MR HOWDEN:** Correct.

1 Q. Aren't you saying that again, the Agency's view as a general
2 proposition at the time was that there were not prospects of
3 success to fund the litigation route?

4 **MR HOWDEN:** For many of the cases, not all of the
5 cases. Some of the cases were funded but - well, yes,
6 that's what is being said.

7 Q. Which cases were funded at that point down the litigation
8 route?

9 **MR HOWDEN:** Well, I'm sorry, I can't remember - well,
10 I don't want to get into names, in any event, but
11 there were a number of cases where Cooper Legal stated
12 that for evidential reasons or other reasons they
13 weren't appropriate for the ADR route and Legal Aid
14 accepted those submissions, that there was reasonable
15 prospects of success for continuing litigation
16 funding.

17 I'm sorry, I haven't got the numbers in front of me but I
18 know there were a number.

19 Q. Can we have document MSC522? This is the Legal Services
20 21 April 2011 -

21 **MR HOWDEN:** Yes.

22 Q. - letter advising that the Agency had written to claimants
23 and to advise them of the CCRT process, and you talked about
24 this with my friend. Was getting the legal opinion on
25 whether you could communicate directly, you did that because
26 this was an unprecedented step?

27 **MR HOWDEN:** Well, Legal Aid correspondents directly
28 with claimants quite often in relation to debt and
29 there are other various areas where, for financial
30 reasons, you contact direct. But to actually initiate
31 a general correspondence drop on claimants was
32 certainly unusual and I - well, out of an abundance of
33 caution, we thought we should get a legal opinion.

34 Q. And you said in your evidence-in-chief that the reason why
35 you did this is because you weren't confident that Cooper

1 Legal was giving advice to its clients about the MSD ADR
2 process?

3 **MR HOWDEN:** Well, rightly or wrongly, that was the
4 view we had held and this would be our way of ensuring
5 that everybody had - the claimants had publicly
6 available material because they could have gone on the
7 Department website and got this information but this
8 was a way of ensuring that they all actually got this
9 material.

10 Q. Did you advise - so, those issues again about whether or not
11 Cooper Legal is passing on information, you're not sure
12 whether those concerns that the Agency held were raised with
13 Cooper Legal?

14 **MR HOWDEN:** Oh, I'm confident they were but it's
15 difficult to be specific after this length of time,
16 but I know there were discussions about the question
17 of information about ADR being made available to
18 Cooper Legal clients and there was some - there were
19 reasons given why this was not thought to be
20 appropriate from the Cooper Legal end and we formed
21 the view that this was something that all Legal Aid
22 clients should know about.

23 Q. In the end, couldn't you have said to Cooper Legal, "We want
24 you to write to your clients and advise them on the
25 availability of this process and then confirm with us that
26 you've done that", rather than writing direct?

27 **MR HOWDEN:** We could have but it's fair to say that at
28 that time the relationship between Cooper Legal and
29 Legal Aid was not a particularly good one. And whilst
30 that has subsequently been resolved to a large extent,
31 at the time this is the route we decided to go down.

32 Q. Knowing that the relationship was difficult, taking this
33 step was probably unlikely to assist with it?

34 **MR HOWDEN:** Well, we made an assessment that it was
35 better for legally aided parties to have the full

1 information about all methods of redress in front of
2 them and we just wanted to make sure that they
3 actually got that information.

4 Q. Are you able to say how long it was after the withdrawals of
5 some of the litigation grants that then settlement
6 negotiation grants were given?

7 **MR. HOWDEN:** No, I can't be specific but there was
8 often an overlap, in that there was still a current
9 litigation grant and then the parties decided to go
10 into the ADR or CCRT route and that's where the
11 litigation aided grant would stop, would come to an
12 end.

13 Q. And at the time you're saying that you would have considered
14 cases for litigation but is it fair to say the Agency had a
15 strong preference for settlement?

16 **MR. HOWDEN:** Well, as a general comment I would suggest
17 that any litigator has a preference for settlement
18 because - but, I mean, we were very mindful that under
19 each one of these cases there was an individual who
20 had been through a very stressful and abusive time,
21 and we were motivated to get to an outcome as soon as
22 possible or to assist them getting to an outcome as
23 soon as possible, and obviously working with the
24 lawyers in that regard. But it is fair to say that
25 the - I mean, our understanding was that the - as the
26 process kicked in, the ADR process achieved a much
27 more rapid outcome and with a greater wraparound of
28 redress than was generally available through
29 litigation.

30 Q. And you said just now that in most litigation, settlement
31 may well be a good option, and that's true. But to have a
32 negotiating position, don't you need to have the threat of
33 litigation? If the other party knows that it's very
34 unlikely that you're going to litigate or you won't, then
35 you haven't got much of a bargaining position?

1 **MR HOWDEN:** Well, I don't necessarily accept that
2 because you're overlooking what we view as the moral
3 duty of the Crown to appropriately deal with young
4 persons or abuse of young persons that have been
5 placed in State care. I mean, our view was that if
6 the Crown was negotiating in good faith, that those
7 sorts of considerations should not be prominent.

8 Q. Given the results in the litigation, the barriers to
9 litigating these claims, is it fair to say the Crown had
10 quite a lot of latitude in what it wanted to offer because
11 it knew that litigation was a difficult option?

12 **MR HOWDEN:** Well, we were certainly aware that
13 litigation was a difficult option but the other thing
14 to bear in mind is that there is the context of all
15 the settlements that had been reached in the Lake
16 Alice cases and there was some fairly significant sums
17 in that regard and that could well have been a
18 benchmark as well.

19 Q. Did the Agency know when it was preferring settlement that
20 the Lake Alice would not be used as a benchmark?

21 **MR HOWDEN:** No, we would not have known that. All we
22 knew was there was a significant body of people who
23 had been abused were compensated. We knew of no
24 reason why those settlements would not have been
25 relevant.

26 Q. And subsequently after the ADR process began, has the Agency
27 become aware of, for example, the settlement categories that
28 are applied in the Crown Agency's processes?

29 **MR HOWDEN:** Are we talking about historic abuse?

30 Q. Yes, quantum of payments.

31 **MR HOWDEN:** Yes, in fact, they were discussed between
32 Legal Aid and Cooper Legal.

33 Q. They are generally quite a lot lower than the Lake Alice
34 payment?

35 **MR HOWDEN:** Correct.

1 Q. In Cooper Legal's evidence, they refer to the Agency, the
2 Legal Services Agency and other state agencies, taking a
3 co-ordinated approach to the historic abuse claims being
4 dealt with outside of the Courts. Is it fair to say there
5 was a co-ordinated approach?

6 **MR HOWDEN:** Well, all I can say is from my
7 perspective, that wasn't my understanding. I'm now
8 aware, having read all this material, that there were
9 a lot of departmental meetings but that was the Crown,
10 not a separate Legal Services Agency and I was not
11 aware that there was some such co-ordinated approach.
12 We dealt with applications as they came across the
13 desk, not in light of any other government
14 Department's view on it.

15 Q. You were having - sorry, not you personally, but Agency
16 personnel were having a number of meetings with the Crown
17 Agencies to work out possible details for an ADR process?

18 **MR HOWDEN:** Yes, certainly - and I actually was
19 involved in some of those discussions with the Crown
20 Health Financing Agency but that was in relation to
21 getting agreement on the percentage of their payment
22 and Legal Aid's write-off, so it was a bit of a moving
23 feast until we settled on the percentage.

24 Q. But you were also advising the claimants of MSD's ADR
25 process, you were asking for settlement - sorry, the Agency
26 was asking for settlement offers to be passed on from MSD?
27 You were having negotiations with MSD because you thought
28 that this was a good potential avenue for the claims to go
29 down?

30 **MR HOWDEN:** Well, by saying "good", it was from the
31 point of view of the claimants because if agreement
32 was reached in relation to their Legal Aid debt, their
33 statutory debt that would otherwise apply, then that
34 then ringfenced any settlement they got, so that had
35 to be to the claimant's advantage.

1 Q. Yes, but all I'm saying is that you were involved with a
2 number of agencies in promoting the settlement path,
3 including by debt write-offs?

4 **MR HOWDEN:** Yes.

5 Q. I understand you're saying that's to the advantage of the
6 claimants, but you were promoting that option?

7 **MR HOWDEN:** I don't know about promoting. We
8 certainly were participating in it and felt that it
9 was a good alternative method of getting an outcome
10 for the claimants.

11 Q. The Courts had also given some strong indications that they
12 wanted an alternative process?

13 **MR HOWDEN:** Yes.

14 Q. And in 4.22 of Mr Dooley's initial brief, he refers to the
15 Bazley report?

16 **MR HOWDEN:** Yes.

17 Q. And that also encouraged alternative ways of resolving the
18 claims, didn't it?

19 **MR HOWDEN:** Yes, and she also strongly supported
20 finding some other way to resolve these cases.

21 **CHAIR:** Mr Opie, would that be a good time to take the
22 break?

23 **MR OPIE:** Yes.

24 **CHAIR:** We will take the afternoon adjournment.

25

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

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1 **MR OPIE:**

2 Q. If I could just ask Mr Howden to look at schedule 2 to
3 Mr Dooley's initial brief?

4 **MR HOWDEN:** I have that.

5 Q. Those figures there in 2009-2011, it's recording relative to
6 the other figures a reasonably consistent level of
7 expenditure on historic abuse claims; is that right?

8 **MR HOWDEN:** Sorry, from 2011?

9 Q. 2009-2011.

10 **MR HOWDEN:** Yes, it was ranged from \$1.7 million to
11 \$1.3 million in 2011.

12 Q. And is it right that in that period there isn't litigation
13 going on or minimal litigation?

14 **MR HOWDEN:** Well, certainly I think it's fair to say
15 there wasn't something the equivalent of the White
16 cases but there was the AB case where a lot of
17 expenditure occurred but that was - yeah, I think it's
18 fair to say that it probably, it had reduced.

19 Q. And do those figures include, do you know, the costs of the
20 High Court litigation about the withdrawal of aid or would
21 there have been a different funding?

22 **MR HOWDEN:** No, that would have included, those groups
23 of appeal cases you're referring to?

24 Q. Yes.

25 **MR HOWDEN:** That would have included those figures.

26 Q. And in 2018 and 2019, you've got the \$1.7 million figures,
27 and maybe this might be a question for Mr Dooley, but are
28 those figures mainly related to settlements?

29 **MR HOWDEN:** We're not quite sure. Certainly, it's
30 fair to say, my comment would be from about certainly
31 2012 or 2013 most of the expenditure would relate to
32 the ADR process but there would have been a minority
33 that related to litigation.

34 Q. Right.

1 **MR DOOLEY:** There is only one appropriation, so all
2 funding comes from the one appropriation.

3 Q. Thank you. And looking at schedule 1 of the brief, and
4 that's got the estimated figure of 2905 grants for Historic
5 Claims, Mr Howden, these claims are often relating to
6 vulnerable people who are allegedly abused in State care?

7 **MR HOWDEN:** Correct.

8 Q. And the allegations are often of either misconduct or gross
9 misconduct by people in public roles?

10 **MR HOWDEN:** Correct.

11 Q. And often they include allegations of abuse against
12 children?

13 **MR HOWDEN:** Correct.

14 Q. And other people in psychiatric institutions?

15 **MR HOWDEN:** Correct.

16 Q. And a lot of those cases, a reasonable number of those cases
17 are now settled through the various Crown procedures that
18 you are aware of?

19 **MR HOWDEN:** Well, certainly after - yes, after that
20 initial, somewhere about 2012-2013 that was the main
21 route for a resolution.

22 Q. And often in those settlements there is an acceptance by
23 Crown Agencies that abuse occurred, isn't there?

24 **MR HOWDEN:** My understanding is yes and particularly
25 there is an apology.

26 Q. Given that the Agency's role is about ensuring access to
27 justice but also balanced against the public funds, of those
28 2905 applications, there's been approximately 10 cases that
29 have actually been heard in Court, is that right, a round
30 figure?

31 **MR HOWDEN:** If you're referring to fully argued cases,
32 that would probably be about right. I mean, as I say,
33 there's a lot of leave applications and other cases.
34 But the substantive hearings, that I think is probably
35 about right.

1 Q. So, that's a very small proportion of the total number of
2 claimants - sorry, of cases where those allegations have
3 been made?

4 **MR HOWDEN:** It is a small percentage.

5 Q. Less than 1%?

6 **MR HOWDEN:** Correct.

7 Q. Do you think that access to justice is served by having so
8 few of these cases heard in open Court and public
9 determinations made?

10 **MR HOWDEN:** Well, I would respond by saying for whose
11 purpose is that process? The focus should be on the
12 claimant who is the one who has been abused. And the
13 purpose of any process is to get resolution for that
14 claimant. If they can get an appropriate resolution
15 and support through an ADR process, then I would
16 suggest that is a preferable outcome, rather than
17 trying to create new law.

18 Q. Oh, so rather than trying to create new law through the
19 Courts?

20 **MR HOWDEN:** Through the litigation, which has got
21 delay, it's got expense and there is a potentially
22 retraumatised party in the middle of it.

23 Q. You referred in your evidence-in-chief to, for example, the
24 appalling conditions that the J case, I think you used the
25 word appalling?

26 **MR HOWDEN:** Yes.

27 Q. That the J case brought to light about the psychiatric
28 hospitals?

29 **MR HOWDEN:** Indeed.

30 Q. And so, is there just consideration in having that type of
31 information becoming public?

32 **MR HOWDEN:** Well, that case obviously was a hearing
33 but at the end of the day, Legal Aid is a funder and
34 some account has to be taken of the outcomes. And as
35 Williams J I think made the comment, not every

1 arguable case should be funded. And our view was that
2 we were focused on which of the funding - which
3 funding a process would get the best and most rapid
4 way to resolve the claimant's issues with an
5 appropriate package.

6 Q. One more question about the costs of cases. If a claimant
7 has to respond with a limitation defence, that has an
8 important effect on the overall costs of the case because of
9 having to lead evidence, for example, about reasonable
10 discoverability and that type of thing?

11 **MR HOWDEN:** If you're referring to my comment that we
12 funded Cooper Legal to file more rudimentary claims in
13 order to stop -

14 Q. No, I'm asking in your knowledge as someone involved in
15 running these claims from the Agency side, did responding to
16 limitation defences have an important impact on the overall
17 cost of the cases for Legal Aid?

18 **MR HOWDEN:** It did have, it was a factor because
19 usually a psychiatric report would be required and
20 because of the volume of material that the
21 psychiatrist would have to go through, you were
22 looking at anything between \$5,000 to \$8,000 a report,
23 which is not insignificant.

24 Q. And then submissions on the issue, argument?

25 **MR HOWDEN:** Yes.

26 Q. Cross-examination?

27 **MR HOWDEN:** Yes.

28 Q. If I could take you now to document MoJ240. This is an
29 email, you're copied into it, 25 February 2005 from the
30 Agency to Justine Falconer of the Ministry of Justice?

31 **MR HOWDEN:** All right, I see that. I'm sorry, I
32 haven't found it yet in my bundle.

33 Q. Oh, sorry. This may have been a late addition, it may not
34 be there.

1 **MR HOWDEN:** All right, I'm not sure I've seen it
2 before.

3 **CHAIR:** Let's give you an opportunity to have a look.
4 Do we have a hard copy? No.

5 **MR HOWDEN:** If it's possible to highlight because it's
6 all faded on the screen?

7 **CHAIR:** Does that make it easier for you to read?

8 **MR HOWDEN:** Yes.

9 **CHAIR:** Please, Mr Howden, take your time to go
10 through, scroll through the document, because it is
11 2005 which is some time ago.

12 **MR HOWDEN:** True.

13 **CHAIR:** Just scroll through it carefully and see if it
14 does refresh your memory in any way.

15 **MR HOWDEN:** If you could scroll further down a bit?
16 Thank you. Thank you, if you could scroll a bit
17 further?

18 **CHAIR:** It looks as though it's more than one page
19 long, is that right?

20 **MR OPIE:** Yes, it is unfortunately.

21 **MR HOWDEN:** If you could scroll to the next page? Oh,
22 a long one.

23 **MR OPIE:** I don't know if you need to read the whole
24 thing, but you can have time if you like.

25 **MR HOWDEN:** Well, I'm aware of the - I'm afraid I
26 don't specifically remember that email but I am aware
27 of the preliminary discussion, I was part of the
28 preliminary discussions with the respective counsel
29 about having some, well, we called them test cases or
30 important cases that it was agreed Legal Aid would
31 fully fund to try and get some certainty as to how the
32 Courts would view these sorts of proceedings.

33 Q. If we go back to page 1 and highlight the first paragraph,
34 sorry call it out, please. And so, that's Robyn Nicholas
35 from the Agency referring to the information required for

1 the briefing for the Minister, so that means that Justice
2 has said, "We need to brief the Minister, provide us with
3 information about the cases"?

4 **MR HOWDEN:** It would appear so, yes.

5 Q. She says, "Please note, in providing a response on prospects
6 of success we do need to be careful of the confidentiality
7 of the clients and in particular their arguments in relation
8 to the case. This is doubly so as the case is against the
9 Crown"; yes?

10 **MR HOWDEN:** Correct.

11 Q. And then in the email she goes on to refer to meetings with
12 counsel for the claimants and the Agency's views on
13 prospects of success?

14 **MR HOWDEN:** Correct.

15 Q. And refers to what the claimant's counsel had advised about
16 their strategy in proceeding?

17 **MR HOWDEN:** Correct.

18 Q. So, does that mean that the Minister of Justice is receiving
19 information about both the Agency's and the claimant's
20 counsel's view about the merits of cases being brought
21 against the government?

22 **MR HOWDEN:** I agree that that could be one
23 interpretation but I am not familiar, as I say, I
24 don't recall this particular email but I would find it
25 very surprising if particular strategies of the
26 respondent's counsel or the appellant's or applicant's
27 counsel were conveyed to the Crown. Those defences
28 that have been mentioned are fairly standard defences.

29 Q. Well, just the third bullet point in that document, if we
30 could call that out, counsel's original strategy "a
31 comparatively small number of representatives claims etc.",
32 so that information about strategy is going back to the
33 Minister, isn't it?

34 **MR HOWDEN:** Well, it's certainly going to the Minister
35 of Justice apparently but, I mean, when I was part of

1 those discussions with counsel where we agreed that
2 there would be a comparatively small number of cases
3 to try and get appropriate results that could be
4 applied to the balance of the cases.

5 Q. Isn't that, unless claimant counsel chose to disclose that
6 strategy, isn't that strategy at least confidential and not
7 legally privileged?

8 **MR HOWDEN:** Well, I mean, I note the document, it has
9 got "legally privileged" on it but, yeah, I wouldn't
10 disagree with that. I'm afraid I can't really comment
11 too much further on that, except to say that was the
12 basis on which those cases proceeded.

13 Q. Sure, but my question, I guess, is that information
14 shouldn't have been going back to the Minister of Justice?

15 **MR HOWDEN:** It is difficult now to see why it would
16 but, well, I'm afraid I can't really add anything
17 further to that.

18 Q. And then if we could go to document MoJ115, sorry page 39 of
19 the pdf?

20 **MR HOWDEN:** Sorry, which - oh, this one here. Okay,
21 yes, I now have it.

22 Q. Does the document you have start with Mr Adam Dubas, it has
23 Mr Dubas' name at the top?

24 **MR HOWDEN:** Correct.

25 Q. If we could go to Robyn Nicholas' email, 7 April 2008 and
26 call out the first paragraph.

27 **MR HOWDEN:** Would you like me to read it out?

28 Q. I can read it and I will ask you a question about it.

29 **MR HOWDEN:** Okay.

30 Q. So, there the Agency is saying we've received an OIA request
31 and it covers certain matters and it includes email between
32 the Agency and Justice, "and there is information in here
33 that you have previously asked me to keep confidential, can
34 you please advise me if I can release this?"; that's what it
35 says essentially?

1 **MR HOWDEN:** Yes, and she's asking for advice as
2 to - in relation to what her response would be.

3 Q. Yes. We can put that away, please.

4 And the first paragraph there, "I spoke to Justine by
5 phone. She indicated that CLO", I would understand that to
6 mean the Crown Law Office?

7 **MR HOWDEN:** Well, I have not seen this. I don't know
8 but, I mean, that's a reasonable assumption.

9 Q. "CLO would like to be consulted on the documents released by
10 LSA in the OIA request". You can put that down.

11 And then Adam says in his email, the second line there,
12 "I will also be informing the others in the Historic Abuse
13 Claims Group of the OIA". Is that the Agency consulting
14 Crown Law on how it should respond to an OIA request made by
15 the claimant's lawyers of the Agency?

16 **MR HOWDEN:** Um, that is one interpretation. The other
17 interpretation is whose privilege is it that is being
18 sought to be waived? I haven't been through all this
19 material but it could be that some of the material in
20 here was given by the Crown and if it was there with
21 reference to the documents being privileged but if it
22 was the Crown's privilege to waive, that's why they
23 would need to be consulted.

24 Q. Can you go to page 40, the next page of that document? This
25 is the email that they wanted withheld. Do you see the
26 heading "The Litigation Strategy" right down at the bottom?
27 We'll call it out.

28 **MR HOWDEN:** Okay, right.

29 Q. So, that is information about the Crown's Litigation
30 Strategy. Is it an issue for the Agency to be receiving
31 information which is relevant to claimants but then agreeing
32 with the Crown that it will keep that information
33 confidential?

34 **MR HOWDEN:** Well, I can't really explain why that was
35 there because your assessment is not unreasonable,

1 other than it feeds into the wish to get early
2 resolution for the claimants. But all I can say is I
3 was - as a person who was, if you like, at the
4 coalface dealing with a lot of these claims in
5 conjunction with other Specialist Advisors and grants
6 staff, I was not aware of this kind of background.

7 Q. But knowing what you do about how the Agency operated at the
8 time, do you think that that is a concern?

9 **MR HOWDEN:** Well, the bottom line I've always had is
10 the Legal Services Agency and now Legal Aid Services
11 are independent from the Crown and that should be
12 always maintained, that separation. I'm not - it
13 hasn't always been the case that that - sometimes
14 errors are made and I suspect this would be one of
15 those cases where with the benefit of hindsight this
16 correspondence should not have happened.

17 Q. Because it seems that on the one hand the Agency is
18 disclosing the claimants' litigation strategy to the
19 Ministry of Justice and then on the other, withholding
20 information about the Crown's litigation strategy?

21 **MR HOWDEN:** Well, as I say, the documents speak for
22 themselves. I can't really add much to that.

23 Q. Mr Dooley, just changing now topics entirely, if I could
24 clarify your roles. So, you are a Ministry of Justice
25 employee?

26 **MR DOOLEY:** Correct.

27 Q. And you hold two positions; one is Group Manager?

28 **MR DOOLEY:** Yes.

29 Q. Is that a senior management role?

30 **MR DOOLEY:** Level 3 role.

31 Q. How many levels are there, for the uninitiated?

32 **MR DOOLEY:** 7, 8, 9 probably.

33 Q. So, you are a couple of steps removed from the Secretary, is
34 that right?

35 **MR DOOLEY:** I report to the Deputy Secretary.

1 Q. You report to the Deputy Secretary. And the other position
2 you hold is as Legal Services Commissioner?

3 **MR DOOLEY:** Yes.

4 Q. And you are required by the Act - sorry, the Legal Services
5 Commissioner must be a Ministry employee?

6 **MR DOOLEY:** Correct.

7 Q. You have to act independently in exercising granting
8 functions in relation to Legal Aid?

9 **MR DOOLEY:** Correct.

10 Q. At 3.7 of your initial brief, you said, "In practice, the
11 Commissioner's authority is delegated to grants officers".
12 So, does that mean that you don't actually exercise - you
13 don't make decisions as a Commissioner, rather, that
14 authority is delegated to grants officers?

15 **MR DOOLEY:** Correct but the Ministry processes over
16 80,000 applications a year, so obviously they have to
17 be completed by not me but people with delegation, so
18 I delegate that role to named individual grants
19 officers.

20 Q. So, if all of that authority is delegated, then what
21 functions do you perform as Legal Services Commissioner?

22 **MR DOOLEY:** Those are my functions, but they've been
23 delegated to the staff necessary to process the
24 applications that are received.

25 Q. So, do you make any decisions yourself in practice as the
26 Legal Services Commissioner?

27 **MR DOOLEY:** Decisions could be escalated to me to
28 make.

29 Q. Right. And then that may happen from time to time?

30 **MR DOOLEY:** Yes.

31 Q. And you refer in that same paragraph to "the decisions of
32 grant officers being guided by operational policy"?

33 **MR DOOLEY:** Correct.

34 Q. Which organisation makes that policy?

1 **MR DOOLEY:** Those are policies that are made by the
2 Legal Services area and signed off by the
3 Commissioner.

4 Q. I just wonder as a general proposition, if you are a senior
5 employee of the Ministry of Justice, isn't it difficult to
6 act independently from the Ministry? It's quite a juggling
7 act, isn't it, to hold those two hats?

8 **MR DOOLEY:** In the time that I've been there, I
9 haven't found it to be an issue. If you consider in
10 the last 2 years we would have processed over 160,000
11 applications for Legal Aid. I've never once felt that
12 the Commissioner's functions have been compromised in
13 any way whatsoever. We do have controls in place, as
14 already mentioned, that only those with delegated
15 authority would have access to our Legal Aid
16 management system. Training and induction on
17 exercising delegations is very thorough and I have
18 certainly found within the Ministry there's a very
19 strong understanding of the role of the Commissioner
20 and the fact that there are certain functions which
21 are to be enacted independently.

22 Q. As a senior Ministry employee, all senior Ministry employees
23 are responsible for - they are aware of the priorities and
24 preferences of the government of the day? This is a
25 difficult question. Senior Ministry employees would be
26 aware of the priorities and preferences of the government of
27 the day?

28 **MR DOOLEY:** Yes.

29 Q. And as senior employees and within the bounds of your
30 obligations as a public servant, you are responsible for
31 advancing those policies and priorities?

32 **MR DOOLEY:** Yes.

33 Q. And advancement in the Ministry does depend, to a certain
34 extent, on one's relationship with the Secretary and with
35 the Minister?

1 **MR DOOLEY:** What do you mean by advancement?

2 Q. Career advancement, you need to have good relationships with
3 people to get forward; is that fair?

4 **MR DOOLEY:** I don't particularly think so, no.

5 Q. You don't think so. I just wonder, could there be a
6 perception or a concern that it would be difficult to make a
7 decision as Legal Services Commissioner that the Commission
8 knew that the Secretary or the Minister would not like?

9 **MR DOOLEY:** Potentially.

10 Q. Potentially. And so for that reason, wouldn't it be better
11 for the Legal Services Commissioner to be independent from
12 the Ministry to avoid the possibility for any such
13 perception arising?

14 **MR DOOLEY:** In the way it operates at the moment, I
15 don't see that there's any issue with how it
16 functions.

17 Q. If I could go to document MoJ270, sorry this might be one
18 that you don't have in your bundle but it will come up in
19 front of you. Oh, it is in the bundle, it is there. And if
20 we could just go to page 3 of the pdf.

21 **CHAIR:** Just identify the document so that we know -

22 **MR OPIE:** This is a 22 February 2005 email between
23 employees of the Ministry of Justice. Do you see the
24 paragraph beginning, "Goff has already requested a
25 briefing on the impacts", let me just call that out.
26 It says "Goff" - Minister Goff - "has already
27 requested a brief on the impacts on the Justice
28 portfolio of these claims" and carrying on, "This will
29 enable us to give Goff a general idea of how the cases
30 are tracking and potential aid expenditure and impact.
31 I have a feeling that there is a view brewing that
32 Legal Aid is the tap which we might need to clarify".

33 I suppose, one way of interpreting that is Legal Aid is
34 the tap that needs to be turned off, potentially? You don't
35 know?

1 **MR DOOLEY:** If that's how you want to interpret it.

2 Q. If there were such a view held strongly by the Minister,
3 then you - sorry, the Commissioner, as a Ministry employee
4 would be aware of it?

5 **MR DOOLEY:** The Minister wished to turn the tap off,
6 are you suggesting?

7 Q. Mm.

8 **MR DOOLEY:** The Minister may decide to share that or
9 he may decide not to. The Commissioner wouldn't
10 necessarily know, I would suggest.

11 Q. But if the view is strongly held, particularly if the
12 Commissioner is an employee of the Ministry, that may put
13 them under quite a lot of pressure?

14 **MR DOOLEY:** It may do.

15 Q. It may do. Does the Act require the Commissioner to
16 have - so, the Act requires the Commissioner to be an
17 employee of the Ministry, but does it require the
18 Commissioner to have other roles within the Ministry?

19 **MR DOOLEY:** No.

20 Q. So, wouldn't it at least be better for the Legal Services
21 Commissioner not to be a member of the Ministry's senior
22 management, from a perceptions basis?

23 **MR DOOLEY:** I don't think so. Like I say, I've seen
24 nothing in the last 2 years that would give any
25 indication of compromising.

26 Q. Mr Dooley, at 4.37 and 4.38 of your brief, and that is the
27 initial brief -

28 **MR DOOLEY:** What are those numbers?

29 Q. 4.37 and 4.38.

30 **MR DOOLEY:** Yes.

31 Q. You're talking there about the waiver of the user charge?

32 **MR DOOLEY:** Yes.

33 Q. At 3.4 of your brief of reply, you say "Legal Aid works to
34 make pragmatic improvements wherever possible to prioritise
35 the needs of claimants"?

1 **MR DOOLEY:** Yes.

2 Q. And you say that one of Legal Aid's initiatives was to waive
3 the initial application user charge?

4 **MR DOOLEY:** Yes.

5 Q. Cooper Legal says in its evidence that it was the one that
6 sought this waiver and the Ministry of Justice actually
7 opposed it; are you aware of that?

8 **MR DOOLEY:** I am not aware. Mr Howden might have -

9 Q. Can we call up document MSC547? This is a document
10 18 October 2013 from the Ministry of Justice and if we could
11 call out - to the Chairperson of the Regulations Review
12 Committee and if we could call out paragraph 3 there? "The
13 Ministry considers that mechanisms such as a user charge are
14 necessary to ensure the legal aid system continues to be
15 financially viable".

16 **MR DOOLEY:** Yes, I see that.

17 Q. It's probably fair that Legal Aid can't claim the removal of
18 the user charge as one of its initiatives?

19 **MR HOWDEN:** No, I'm afraid I - I wasn't part of that
20 process, but I wasn't aware that it was being
21 proposed. There were a number of other exemptions
22 from that user charge and with the benefit of
23 hindsight, historic abuse cases would be an obvious
24 other area for exemption.

25 Q. Right. I would like to ask a question about the Treaty of
26 Waitangi.

27 Has Legal Aid Services or the Agency considered how the
28 Crown's obligations under the Treaty are relevant to its
29 decision-making on historical abuse claims?

30 **MR DOOLEY:** I am not aware that's been done
31 specifically.

32 Q. But in other ways? When you say specifically but does that
33 mean it's generally been done?

34 **MR HOWDEN:** Could I chip in here?

35 Q. Yes.

1 **MR HOWDEN:** Just backing up a little. Legal Aid, as I
2 said before, can only consider the information that's
3 placed in front of it and I do not recall in all this
4 period that we've been talking about where any one of
5 the providers has raised Treaty issues in relation to
6 a claimant or tikanga that affected the way that that
7 case should be looked at. It's arguable that
8 if - well, Legal Aid doesn't have a role to suggest
9 approaches and you will have seen that some of the
10 lawyers have objected strenuously of Legal Aid trying
11 to get into that area.

12 So, I mean, the only point I would make is that Legal Aid
13 funds all the or the majority of lawyers that appear before
14 the Waitangi Tribunal, so we have a fairly good
15 understanding of Treaty principles and I personally have
16 appeared in front of a number of Inquiries to give
17 information about Legal Aid,
18 so I'm familiar with the process. But in relation to Legal
19 Aid granting in the historic abuse area, as I say, we could
20 only make decisions based on information that was presented
21 to us and none of this was presented.

22 But that's not to say that there are areas where we could
23 improve.

24 Q. If I understand correctly, the Agency hasn't taken advice
25 itself on how and in what way Treaty principles, for
26 example, might improve its approach not to Waitangi Tribunal
27 cases but to historic abuse claims?

28 **MR HOWDEN:** As Mr Dooley said, I am unaware of any
29 such approach.

30 Q. Mr Dooley, at paragraph 4.10 of your brief of reply, you say
31 "We continue to identify and implement further improvements
32 to our processes".

33 **MR DOOLEY:** 4.10, is that page 5?

1 Q. Yes, have I got that there, it is the brief in reply, second
2 sentence, "We continue to identify and implement further
3 improvements to our processes"?

4 **MR DOOLEY:** Sorry, yes.

5 Q. What are those improvements?

6 **MR DOOLEY:** So, we talk about Legal Aid Services in
7 general, there's been a number of changes that have
8 happened, certainly even in the last two years that
9 I've been within the organisation, trying to make our
10 forms easier. As an example, we have just worked on
11 the whole process to on-board lawyers, taking the 96-
12 page application down to less than 10 pages. We are
13 just about to launch the second phase of a review to
14 look at the whole quality framework and the auditing
15 processes for lawyers. We've just recently started to
16 bring the process online so that we can do away with
17 paper files. At the moment, the process is very
18 heavily dependent, so we're trying to make that easier
19 and quicker for lawyers to engage with us. So,
20 there's a range of things that kind of have always
21 been looked at. During the Covid process, we put a
22 whole lot of ad hoc arrangements in place to deal with
23 the situation at the time and most of those decisions
24 have now been reversed. We did it for a specific
25 period of time to benefit those that were making
26 applications at the time.

27 Q. Just one more question about expenditure. At paragraph 6.2
28 of your initial brief, you say "the median Legal Aid
29 expenditure for finalised historic abuse cases is \$8,575",
30 how does that compare with median Legal Aid expenditure for
31 other types of civil cases?

32 **MR DOOLEY:** The average would be between \$1,500 to
33 \$2,000 across everything that Legal Aid processes.

34 **MR OPIE:** Those are my questions, I will leave time
35 for the Commissioners.

1 **CHAIR:** Thank you. Ms Aldred, do you have any
2 questions arising?

3 **MS ALDRED:** Yes, I do.

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BRETT ANTHONY DOOLEY
DAVID MACDONALD HOWDEN
RE-EXAMINED BY MS ALDRED

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Q. My first question is just a short follow-up question for Mr Dooley. In relation to the question you were just asked about the decision to waive the user charge. If I could just take you to paragraphs 4.37 and 4.38 of your brief of evidence, that's your primary brief.

MR DOOLEY: Yes.

Q. Can I just ask you to read through paragraphs 4.37 and 4.38? Don't read it out, just familiarise yourself with it. The Commissioners have a copy as well. (Short pause).

MR DOOLEY: Yes.

Q. Can you just confirm, do you state anywhere in those two paragraphs that the decision to remove the \$50 user charge was at the initiative of Legal Aid?

MR DOOLEY: No.

Q. Were you simply providing an account of what happened?

MR DOOLEY: Correct.

Q. Thank you. The next question I have is for Mr Howden, and it's just in relation to the decision to reduce the higher hourly rates for Cooper Legal that they had been operating under for I think several years.

The first question I have is, did withdrawal of those rates mean that Cooper Legal were therefore receiving less than other Legal Aid providers?

MR HOWDEN: No. The intention was that they would then receive the same rate as every other civil Legal Aid provider.

Q. When you say every other civil Legal Aid provider, do you mean across the board in relation to all kinds of civil proceedings?

1 **MR HOWDEN:** By civil proceedings, I'm meaning general
2 civil proceedings because the hourly rates are
3 dependent on the Court that most of the proceedings
4 take place. And it was agreed that High Court, the
5 High Court is the appropriate rate for historic abuse
6 cases because that's where any litigation would take
7 place.

8 Q. So, in terms of the different rates for different fora that
9 you've mentioned, would the High Court - so, there would be
10 lower rates for lower Courts; is that correct?

11 **MR HOWDEN:** Correct. Like, for example, Family and
12 general and District Court matters, then that is a
13 lower rate.

14 Q. So, there would be a higher rate paid for this work than,
15 for example, a Civil Legal Aid provider doing work in the
16 Family Court?

17 **MR HOWDEN:** Yes.

18 Q. Thank you. And if we could just turn to the withdrawal of
19 aid process. I have a few just follow-up questions around
20 that, Mr Howden.

21 The first thing I want to do, is just to provide you with
22 a copy, and actually hand up a copy because it's not in this
23 bundle but it has been in the Crown bundle, of the letter
24 advising of LSA's intention to review the aid process or to
25 withdraw aid.

26 **MS ALDRED:** Copies will be provided by the registrars
27 to the Commissioners, thank you Madam Registrar, and a
28 copy, Mr Dooley and Mr Howden, you both have a copy?

29 **MR HOWDEN:** Unfortunately, it has the full name of the
30 K case.

31 **MS ALDRED:** That's why we've handed it up rather than
32 asking for it to be -

33 **CHAIR:** Please don't put this on the screen. Is it
34 just on our screens here?

35 **MS ALDRED:** Yes, it's not on the public screens.

1 **CHAIR:** We don't really need it because we've got the
2 hard copies.

3 **MS ALDRED:** Right.

4 Q. So, I just wanted you to confirm, is this a letter advising
5 of LSA's intention to withdraw aid?

6 **MR HOWDEN:** Yes, yes, I'm just having a quick flick
7 through it.

8 Q. Would you like to take a moment just to have a look through
9 it?

10 **MR HOWDEN:** What this letter is saying, it was
11 referred to earlier in questions, was that we were
12 giving the heads-up that we were looking to maybe give
13 Notice of Intention to Withdraw and we asked the
14 lawyer concerned to carry out an analysis of each of
15 the psychiatric or each of the DSW and psychiatric
16 claim files.

17 Q. So, this preceded any formal intention, any formal Notice of
18 Intention to Withdraw Aid; is that what you're saying? Can
19 you perhaps have a look at paragraph 4, Mr Howden.

20 **MR HOWDEN:** Yes.

21 Q. And if you could just read out to the end of the head
22 paragraph.

23 **MR HOWDEN:** "We would accordingly request?".

24 Q. Yes, actually just read that yourself and if you could just
25 tell me whereabouts this letter came in the process, is I
26 think what I'd like the answer to.

27 **MR HOWDEN:** This wasn't a formal withdrawal or Notice
28 of Intention to Withdraw Aid but it was certainly a
29 letter expressing considerable concerns about the
30 prospects of success. And in order for Legal Aid to
31 make an informed decision in this area, we were asking
32 the lawyer to address a number of areas or a number of
33 obstacles from a legal and statutory perspective that
34 they had.

1 Q. And just in terms of those obstacles, so if you flip through
2 to the first page, you set out there the concerns or the
3 reasons for LSA's concerns about the continuation of aid, in
4 terms of prospects of success?

5 **MR HOWDEN:** Yes.

6 Q. If you just look down at number 2 which has a large number
7 of subparagraphs setting out the nature of each particular
8 concern.

9 **MR HOWDEN:** Yes.

10 Q. If you can just confirm there which of the cases you've
11 mentioned has given rise to concerns and forms most of those
12 considerations?

13 **MR HOWDEN:** It's fair to say that it is the White
14 cases that were the substantive - caused substantive
15 problems because that was the - I think that was the
16 most or the two cases where most funding was devoted,
17 was granted.

18 Q. And just taking you to paragraph 4, that is where you have
19 said - that is where you have requested an analysis of each
20 of the Historic Claims held by that solicitor?

21 **MR HOWDEN:** Correct.

22 Q. And asked for a series of issues to be addressed?

23 **MR HOWDEN:** Yes.

24 Q. Including limitation and causation and so on?

25 **MR HOWDEN:** Yes.

26 Q. And could you just read also paragraph 6, please? You can
27 read that out.

28 **MR HOWDEN:** "I invite you to now submit an amendment
29 dealing with the Agency directed analysis".

30 Q. Can you just explain what you meant by that, for the people
31 who aren't familiar with Legal Aid terminology?

32 **MR HOWDEN:** Well, Legal Aid was asking a lawyer to
33 provide us with an analysis on quite a few complex
34 areas and we did not expect the lawyer to do that for

1 free. So, we were saying that send us an amendment, a
2 reasonable amendment, and we will pay for it.

3 Q. Thank you. The other thing I wanted to ask you about that,
4 was that you were asked about earlier case law, the cases
5 specifically S and W, and whether those had also informed
6 this withdrawal process. Over the break, Counsel Assisting
7 has kindly provided you with the summary of those cases that
8 are attached to actually Ms Jagose's evidence, and I think
9 you've had a short time to reflect on those cases. Is there
10 anything you'd like to comment on in relation to those?

11 **MR HOWDEN:** No, well, thank you for providing the
12 material. Well, it refreshed my memory on that, in
13 that both S and W, the decisions were given at the
14 same time, and S being the primary case, and that it
15 was, as I recall, it certainly involved sexual abuse,
16 significant sexual abuse on the claimant but of
17 relevance, the statutory bars were addressed by the
18 timing of when the abuse happened being before the
19 Accident Compensation legislation came in. And also,
20 there was - well, we basically, the timing was a
21 critical point. And in W's case, I think it basically
22 followed S's case, the reasons in S's case, but it was
23 also, these were children who were placed in foster
24 care and that's where the abuse occurred. And in fact
25 the Crown's cross-appeal against that was
26 unsuccessful, against that finding.

27 But it related to establishing whether S was under a
28 disability and in the particular circumstances, it was found
29 S did have a disability, so time didn't start running for a
30 considerable period afterwards.

31 Q. Thank you. And then I just want to take you to - well, it
32 was suggested to you, I think, by Mr Opie that Legal Aid or
33 LSA had pushed ADR as an option and your evidence was that
34 the Agency wished to ensure claimants were aware of the
35 availability of the ADR process; is that -

1 **MR HOWDEN:** That is correct.

2 Q. But I just want to ask you, if an aided person opted for the
3 ADR route and had a grant of Legal Aid for ADR and then
4 decided not to accept an offer of settlement during that ADR
5 process, would that refusal of an offer ultimately or would
6 that have automatically disqualified the person from any
7 further grant of aid in relation to litigation?

8 **MR HOWDEN:** It would not automatically prevent a grant
9 being made for litigation, but it would depend on what
10 the Legal Aid's view was of the amount of the
11 settlement offer and all the other details of it.

12 If Legal Aid felt that that was a reasonable offer which
13 should reasonably have been accepted, then that could well
14 be a factor and I'm aware of a case of Pickard, for
15 instance, the Legal Services Agency v Pickard, where there
16 had been a long litigation settlement process. What we
17 thought was a generous offer, also the claimant lawyer
18 thought was a reasonable offer, and that was rejected and
19 aid was withdrawn because we thought it was unreasonably
20 rejected and that decision was upheld on appeal.

21 But that's a fairly unusual situation. That would be the
22 only case I am aware of where someone rejecting a settlement
23 offer, it affects their Legal Aid.

24 Q. Thank you. And then also in questioning, I think, it was
25 referred to that in the letters that were issued to those
26 legally aided persons whose aid was withdrawn as part of the
27 review process, there was a reference to the availability of
28 MSD's CCRT or settlement process. What was the reason for
29 putting that reference in those letters?

30 **MR HOWDEN:** Sorry, which particular letter?

31 Q. So, I think it was put to you that the ADR process or the
32 availability of the ADR process was referred to in letters
33 withdrawing aid; is that correct?

34 **MR HOWDEN:** I'm sorry, I can't remember exactly but it
35 was probably getting back to the point that the

1 letters withdrawing aid were in relation to a grant of
2 aid for a litigation purpose and that there was a
3 separate - there was a possibility or there was an
4 option of another, a fresh grant of aid to deal with
5 ADR or the CCRT process offered by DSW, so that was
6 making sure that the clients were aware of this
7 process because the letter obviously, well not
8 obviously, the letter went both to the lawyer and the
9 client.

10 Q. Yes.

11 **MR HOWDEN:** So, it was making sure that they were
12 aware there was a CCRT process.

13 Q. And did you say that Legal Aid was available in respect of
14 it? Sorry, I just wasn't sure whether you said, I think you
15 said that?

16 **MR HOWDEN:** No, I didn't specifically say that in my
17 answer but, I'm sorry, I can't recall.

18 Q. You can't recall exactly?

19 **MR HOWDEN:** But the lawyers concerned would have been
20 aware that Legal Aid was available.

21 Q. Thank you. And then finally, I just want to take you to a
22 case that my friend referred to. So, the general theme of
23 this questioning was that I think LSA took an overly
24 negative view of the prospects of success of these claims in
25 general. And, in that context, I want to take you to the
26 judgment of Dobson J in JMM and that was Witness 94010,
27 that's the reference.

28 **MR HOWDEN:** I am familiar with it, yes, I know the
29 case.

30 Q. That can be brought up on the screen, there are no issues
31 with names, everything is anonymised. This judgement
32 concerned eight appeals in relation to the withdrawal of aid
33 process and I think you can take it from me, Mr Howden, that
34 His Honour Dobson J who set out a summary of the outcomes
35 from paragraph 285, it's fair to say there were mixed

1 results with four of the appeals on behalf of aided persons
2 were upheld, so the Agency was directed to reconsider.
3 Three in relation to - another three cases, the Agency's
4 decision was upheld to withdraw aid and finally, there was
5 an appeal by the Agency in respect of a reversal of one of
6 the Agency's decision by the Legal Aid Review Panel, and
7 that was determined in the Agency's favour.

8 But what I want to take you to is Dobson J's concluding
9 comments in that case and really, I think if I could just
10 take you, to begin with, to paragraph 301.

11 **MR HOWDEN:** Yes.

12 Q. Can we have 301 brought up?

13 **MR HOWDEN:** That was the J case?

14 Q. This is JMM.

15 **MR HOWDEN:** Sorry, what that paragraph refers to.

16 Q. Yes, you're right, the first thing there is a reference to
17 Justice Gendall in J. You will see, first of all, you will
18 see that the heading, sorry, to this to be I can, which I
19 don't need to have pulled up, that's fine, is an invitation
20 to consider alternatives, and that's from the Judge. His
21 Honour notes at paragraph 301 that there have been a number
22 of judgments where the constraints in conventional
23 litigation have been remarked upon by the judiciary.

24 And that's one of the features of His Honour Justice
25 Gendall's comment.

26 If you could go to 302, I would like you to perhaps read
27 out the statement that Hammond J made for the Court of
28 Appeal in 2008.

29 **MR HOWDEN:** Yes. His Honour held that:

30 "I worry most of all for the claimants. They have
31 presumably all been encouraged to think that they have
32 sustainable claims. They will of course have an intrinsic
33 belief in the justice of their cause. All counsel and
34 Judges who practised in the days before the Accident
35 Compensation Corporation became familiar with the effects on

1 people in real life of long-pending claims for damages.
2 Here we have an even more vulnerable people, most of whom
3 have had what they clearly regard as inappropriate and
4 harrowing experiences in psychiatric institutions. Counsel
5 for the claimants, with respect, need to make a realistic
6 re-appraisal of the claims, and those claims which are to be
7 advanced need to be dealt with timeously."

8 Q. Thank you, just turn over the page, please. One of the
9 aspects that Hammond J touched on is dealt with at 305, if
10 that could be pulled out, please. If you could just read
11 that out for me too, please?

12 **MR HOWDEN:** "With all the claims being pursued by two
13 relatively small Wellington law firms, there has been
14 an inevitability about aggregating work that can be
15 done in common, and prioritising the cases that are
16 advanced. As Mr Benton pointed out in the argument on
17 JMM, as at October 2010 she sat halfway down a list of
18 some 284 cases treated as coming within "DSW
19 Litigation Group claims". Assuming JMM took her turn
20 in the current rate of allocation of fixtures to such
21 matters of, say, two a year, her substantive claim
22 would be heard in some 60 years' time".

23 Q. Thank you. And then that can just go back to the full page.

24 So, the next paragraph after that talks about the costs
25 of Legal Aid. And then I think if I could just have you
26 read, pull up paragraphs 307 and 308. Could I have you read
27 those two paragraphs please, Mr Howden?

28 **MR HOWDEN:** "To the extent that many of these
29 claimants place a priority on vindication of their
30 complaints rather than financial success, then pursuit
31 of litigation is likely to expose them to substantial
32 ongoing stress, in many cases the high prospects of
33 failure and, for those who proceed to trial, the
34 additional stress of having the accounts of their
35 tragic pasts tested in what cannot be other than an

1 unsympathetic forum. In many situations, vindication
2 is achieved by an acknowledgment of wrong-doing by
3 those with responsibility for having caused the wrong
4 in the first place. That is not an outcome that is
5 achievable in litigation.

6 I respectfully agree with all the observations I have
7 referred to from earlier cases. In many of these historic
8 abuse claims, the prospects for compensatory damages are, at
9 best, limited and claims for exemplary damages have
10 historically, in the relatively rare cases where they have
11 succeeded, led only to modest awards".

12 Q. Thank you.

13 **MS ALDRED:** I don't have any further questions.

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1 **BRETT ANTHONY DOOLEY**

2 **DAVID MACDONALD HOWDEN**

3 **QUESTIONS ARISING FROM MR OPIE**

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6 **CHAIR:** Did you wish to ask anything arising?

7 **MR OPIE:** There is one very minor matter which is can
8 the witness read the reference for the 21 February
9 2008 letter into the evidence? Crown tab 33.

10 **MR HOWDEN:** That is this one here. The letter to
11 Johnston Lawrence of 21 February?

12 Q. Yes. Just to record that was Crown tab 33, MSC000499.
13 There we are, I've done it for you.

14 **CHAIR:** It's now in the record.

15 **MR HOWDEN:** Thank you.

16 **MR OPIE:**

17 Q. Just one other, really if I can, matter, I don't want to
18 labour the point too much but, Mr Dooley, the issue about
19 the user charge. Just if you could turn to paragraph 3.4 of
20 your brief in reply.

21 **MR DOOLEY:** Yes.

22 Q. You do say there, don't you, that the waiver of the user
23 charge was an initiative of Legal Aid?

24 **MR DOOLEY:** Yes.

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2 **BRETT ANTHONY DOOLEY**
3 **DAVID MACDONALD HOWDEN**
4 **QUESTIONED BY COMMISSIONERS**
5
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7 **CHAIR:** I think it's important that we allow you two
8 gentlemen to conclude this evening. It might mean we
9 take a few extra minutes. Just checking with the
10 signers, is that all right with you, and for our
11 stenographer? Thank you.

12 **COMMISSIONER ALOFIVAE:** Thank you, Mr Howden and
13 Mr Dooley for your very fulsome evidence.

14 It's really just a point of clarification. So much has
15 been said this afternoon around comments from different
16 Judges of the High Court, Court of Appeal, so there's a real
17 sense about the disparity and inequity of the state and the
18 survivor and the incredibly important role that LSA plays.

19 So, I understand that you've made your point very clearly
20 that LSA is independent of the Crown but along with the
21 other stakeholders in the system, MSD, Ministry of Health,
22 Ministry of Education, that you've been engaged in those
23 conversations, so you've been sit - being at that table, is
24 that correct, about how to advance matters? For example,
25 you all agreed on a strategy around elimination of Legal Aid
26 debt?

27 **MR HOWDEN:** Yes, that is correct.

28 **COMMISSIONER ALOFIVAE:** Okay. And you've been trying
29 to work a way forward?

30 **MR HOWDEN:** Yes.

31 **COMMISSIONER ALOFIVAE:** But the privileged position
32 that you have, is that you were able to see these
33 claims coming into your space and your evidence this
34 afternoon is actually, both of you, by virtue of your
35 roles, have had intimate knowledge and detail of a lot

1 of what's gone on with these claims; would that be
2 right?

3 **MR. HOWDEN:** Well, indeed. We had to be familiar with
4 the whole, with all the details because we had to
5 assess prospects of success.

6 **COMMISSIONER ALOFIVAE:** And so, my question is really
7 then, you've made a point about the public purse being
8 fiscally prudent and responsible about the spend. Did
9 you not also see that as an opportunity, seeing the
10 themes and the patterns come through, as an
11 opportunity to use the Legal Services role as an
12 opportunity to speak louder about perhaps redefining
13 the humanitarian landscape, given your comments this
14 afternoon around novel defences, untested law, the
15 extreme brutality of having to go through a Court
16 process for the claimants?

17 **MR. HOWDEN:** The actual, if you like, the problem Legal
18 Aid faces, is that it is a creature of statute. We
19 can only grant within the confines of the statute.
20 But, having said that, we were trying to find other
21 ways to help claimants get to a resolution and this is
22 where - we tried funding the litigation route and that
23 failed. So, the next alternative was, and we could
24 only do that because the various departments came
25 forward with initiatives of ADR processes. And we
26 proceeded down that route which continues to this day
27 and I will suggest is a more holistic way of resolving
28 these sort of claims.

29 But, as to more than that, I'm not sure but that's
30 certainly where Legal Aid has gone.

31 **COMMISSIONER ALOFIVAE:** So, I appreciate the confines
32 and parameters of the legislation that you're bound by
33 but in terms about bringing about some sort of
34 revolutionary change for what you're saying
35 repetitively come across your desk, the desk of your

1 staff members, the frustration, the anxiety, the
2 enormous work that was going on. What is another lens
3 that we could look through?

4 **MR HOWDEN:** Well, if you go back 15 years, it is, I am
5 bound to say it is a great shame that the initiatives
6 of Cooper Legal to try and get a Commission or some
7 settlement process similar to Lake Alice were not
8 listened to because that - but Legal Aid could not, as
9 the funder it was difficult to see an avenue where we
10 could have done something different. I mean, at the
11 end of the day, we fund lawyers to get results for
12 their clients and it's difficult while our statute is
13 as it is, to see there are too many other
14 opportunities.

15 **COMMISSIONER ALOFIVAE:** Thank you, no further
16 questions.

17 **COMMISSIONER ERUETI:** Just one. Tēnā kōrua, my
18 question follows from my colleague's question about
19 the constraints of the legislation, the Legal Services
20 Act. And I wonder because the statutory - if we go to
21 the general principles, it's about access to justice,
22 right? And then it's about assisting someone with
23 financial difficulties to bring a case. But there
24 must also be a prospect of success?

25 **MR HOWDEN:** Correct.

26 **COMMISSIONER ERUETI:** And I think of the client base
27 of say Sonja Cooper, for example, I mean a large
28 number, a majority are Māori, it doesn't seem to me
29 that there's any directive to decision-makers in the
30 legislation to take that factor into account?

31 **MR HOWDEN:** With the benefit of hindsight, and
32 certainly current thinking, that I agree stands out as
33 a very obvious omission and, well, who knows where
34 this process is going to lead but, I agree, there are

1 a number of factors that possibly could also be taken
2 into account.

3 **COMMISSIONER ERUETI:** Okay, yeah. And so, that's just
4 for Māori. So, I mean, I wanted to know whether there
5 had been any thought about - in 2011 when the Legal
6 Services Bill was enacted, about a Treaty clause which
7 would direct decision-makers. And you both know what
8 I mean by Treaty clause?

9 **MR DOOLEY:** There's nothing.

10 **MR HOWDEN:** There's nothing in the legislation. I am
11 bound to say if it was going through now, there would
12 be a clause but there's not, so I can't rewrite that
13 situation but I don't disagree with you.

14 **COMMISSIONER ERUETI:** Okay, thank you. Thank you for
15 your time.

16 **CHAIR:** I'm not sure who can answer this one. One of
17 you, I think it was you, Mr Howden, referred to the
18 litigation, the policy of the Legal Services funding
19 litigation and then requiring a separate application
20 to fund ADR.

21 **MR HOWDEN:** Yes.

22 **CHAIR:** It was you?

23 **MR HOWDEN:** Yes, it was.

24 **CHAIR:** You said it was policy at the time. I just
25 wondered whether that was a policy that was founded on
26 any legislative basis? Was it a policy that could
27 have been changed? And who set the policy?

28 **MR HOWDEN:** Well, the policy was set by Legal Aid, so
29 effectively going back to the Commissioner. But there
30 were practical reasons for it that in the past where
31 you ended up with several strands of litigation or
32 recovery under the one Legal Aid grant, you ran
33 into - it was very difficult for grant staff to manage
34 because while some strands had a charge, other strands
35 may not have a charge or there were different ways of

1 looking at it. And so, it was decided that it was a
2 lot cleaner, and this is purely an administrative
3 decision, but it was a lot cleaner to have litigation
4 involving one grant and an ADR involving another
5 grant.

6 And indeed, my recollection is that if you were in the
7 High Court but then you were going to appeal, you needed a
8 new grant for an appeal because -

9 **CHAIR:** You'd have to justify that?

10 **MR HOWDEN:** It would be different criteria.

11 **CHAIR:** The reason I'm asking really arises out of my
12 colleague's question about what could have been done.
13 This is a large group of applicants, major stressor
14 for everybody involved, including your office, and
15 badly calling out for a response that might have gone
16 outside the box, and I just wonder in hindsight
17 whether an option for you, and this is just really, as
18 I say, hindsight and we know it didn't happen, that
19 maybe it would have been an option to have said, as
20 you said for the higher rates at the beginning, the
21 test cases etc., let's treat this a bit differently,
22 let's stand outside our usual pragmatic reasons,
23 everybody is crying out for settlement, including the
24 Judges, why don't we just say, look, let's fund
25 everybody for ADR? Let's not have to do this - just
26 thinking of a different way. Do you think that would
27 have been possible?

28 **MR HOWDEN:** Well, effectively that's what we did do
29 but it requires the lawyer for the claimants to want
30 to do that. I mean, it is not - although they are
31 Legal Aid claimants and we are funding them to have
32 access to justice, we aren't their lawyer.

33 **CHAIR:** No.

34 **MR HOWDEN:** And at times, as a lawyer myself, you
35 think, gosh, I'd like to phone up and say something

1 but that's not our role. And so, I mean, whatever we
2 thought about it at the time, unless the Crown
3 departments involved waived reliance on statutory
4 obstacles, then we had to take them into account. And
5 I am aware, like - I think the Minister of Education
6 waived not only limitation but I think also ACC
7 defences in relation to not only ADR but also
8 litigation. And, in retrospect, it's a pity that all
9 agencies didn't take the same approach.

10 **CHAIR:** You needed co-operative and willing partners
11 in this, didn't you?

12 **MR HOWDEN:** Yes. Yeah, and - yes.

13 **CHAIR:** Thank you for that. Is there anything arising
14 from that. Ms Aldred, anything arising?

15 **MS ALDRED:** No.

16 **CHAIR:** Thank you very much, both of you, for a long
17 day but it is very important insights of the way the
18 system worked in the past and we're grateful for that.
19 Thank you very much.

20

21

22 (Closing waiata and karakia)

23

24

Hearing adjourned at 5.17 p.m.