

**ABUSE IN CARE ROYAL COMMISSION OF INQUIRY  
STATE REDRESS INQUIRY HEARING**

**Under** The Inquiries Act 2013

**In the matter** of the Royal Commission of  
Inquiry into Historical Abuse in  
State Care and in the Care of  
Faith-based Institutions

**Royal Commission:** Judge Coral Shaw (Chair)  
Dr Andrew Erueti  
Ms Sandra Alofivae

**Counsel:** Mr Simon Mount, Ms Hanne Janes,  
Mr Andrew Molloy, Mr Tom Powell  
and Ms Danielle Kelly

**Venue:** Level 2  
Abuse in Care Royal Commission  
of Inquiry  
414 Khyber Pass Road  
AUCKLAND

**Date:** 28 October 2020

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**TRANSCRIPT OF PROCEEDINGS**

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1 (Opening waiata and karakia)

2

3

4 **CHAIR:** Ata mārie. Nō reira, tēnā koutou katoa. Tēnā  
5 koe, Ms Janes.

6 **MS JANES:** Tēnā koutou katoa. Evidence today will be  
7 given by Ms Helen Hurst on behalf of the Ministry of  
8 Education. She will be led by Ms Wendy Aldred and  
9 Counsel Assist is Mr Opie.

10 **CHAIR:** Tēnā koe, Ms Hurst.

11

12

13 **HELEN HURST - AFFIRMED**

14 **QUESTIONED BY MS ALDRED**

15

16

17 **COMMISSIONER ALOFIVAE:** Good morning, Madam Chair,  
18 Commissioners and Ms Hurst.

19 Q. Ms Hurst, can you please confirm that you have prepared two  
20 briefs of evidence for the Commission?

21 A. I have.

22 Q. A brief of evidence dated 27 January 2020 and a reply brief  
23 dated 13 March 2020?

24 A. That's correct.

25 Q. Thank you. You have those before you?

26 A. I do.

27 Q. Thanks. If I could just take you, please, to page 1 of your  
28 primary brief of evidence and have you read from paragraphs  
29 1.1 to 1.4 for the Commission?

30 A. Of course. Tēnā koutou katoa. "My name is Helen Hurst and  
31 I am the Associate Deputy Secretary in the Ministry of  
32 Education Sector Enablement and Support Group.

33 The Ministry is pleased to have the opportunity to  
34 contribute to this important Inquiry.

1 I would like to acknowledge the survivors and their  
2 whānau and in particular those that have demonstrated such  
3 strength in giving evidence during phase 1.

4 I started in the Associate Deputy Secretary role in 2019,  
5 following a period acting in the role for more than half of  
6 2018. I have held various senior management roles at the  
7 Ministry since late 2012. Prior to that, I worked in the  
8 New Zealand Department of Corrections in leadership roles  
9 spanning service design, change, organisational design and  
10 Human Resource Management and I worked as a Human Resource  
11 Consultant.

12 My role as Associate Deputy Secretary includes oversight  
13 of our Sensitive Claims Team."

14 Q. Thank you. Now, I won't have you read the rest of the  
15 introduction to your evidence and section 2 you provide just  
16 an overview of the evidence that you are to give. But if  
17 you could please read from 2.3 of your evidence, please?

18 A. "I am mindful that this evidence is about processes and  
19 topics that are also lived experiences. At the outset, I  
20 want to say that no child should be harmed while in the care  
21 of the education system and abuse of any kind is not  
22 tolerated".

23 I would also just like to note that I have watched the  
24 evidence of the survivors that relate to the evidence that  
25 I'm giving today, so Mr Johnson, Mr Duncan and Mr Packer  
26 through Ms Munro. I've heard what they've had to say about  
27 our process and the impact that it's had on them and I do  
28 wish to apologise for the delay in particular that came  
29 through in their evidence.

30 Q. Thank you. And then if we just turn to section 3 of your  
31 evidence, which is entitled, "Background: Education Sector  
32 and Tomorrow's Schools Reforms". This section of your  
33 evidence, which I won't have you read in full, briefly  
34 summarises the relevant milestones in relation to the sector

1 and particularly the Tomorrow's Schools Reforms, and I will  
2 take you to some sections of that evidence.

3 But essentially, the reason for referring to these  
4 issues, I suppose, are that they demonstrate, in some ways,  
5 the issues in relation to liability and responsibility of  
6 particular agencies or organisations in the education  
7 sector; is that a fair comment?

8 A. That's correct, yes.

9 Q. And -

10 A. At different points in time, different entities take over  
11 responsibility for schools, so it's fairly complicated.

12 Q. Thank you. And I would just like to refer you to one  
13 document which is MOE277, if that can be put up. If we  
14 could go to page 4, sorry just pause there, this is a  
15 document entitled, "Sensitive claims - guidance", the  
16 heading states it was last updated in July 2019. As I  
17 understand it, this document is available on the website?

18 A. I believe so and it's information that we also provide to  
19 the team as a training resource.

20 Q. Thank you. And if you could turn to page 4, please, of that  
21 document. Can I have the paragraph with the heading,  
22 "Eligibility for our claims process" highlighted, yes, down  
23 to there is fine.

24 So, if I could have you read, Ms Hurst, just from the top  
25 of that, that first paragraph beginning, "A claim" to the  
26 end of c?

27 A. Sure, "A claim is eligible provided the Crown is the correct  
28 respondent/defendant to it (liability sits with us). We, or  
29 the Crown, are the correct respondent to claims about any  
30 closed school or an open primary school before 1989.

31 We may not be the correct respondent to a claim if it is  
32 about an open secondary school (during any time period), an  
33 open primary school after 1989, or a private school (for  
34 example, a Catholic school before it was state integrated)".

1 Q. Thank you, if you could read the following paragraph as  
2 well?

3 A. "A school Board of Trustees is a Crown entity – it is  
4 self-governing and can be sued in its own right (they are  
5 separate from MOE [Ministry of Education]). School boards  
6 are also employers of school staff. If we receive an a or b  
7 claim –".

8 Q. That's referring to the paragraph above?

9 A. Correct.

10 Q. Go on.

11 A. "... a school board may be the correct respondent (this will  
12 always need to be discussed with Legal)", as in our Legal  
13 Services team with the Ministry. "If we receive a c claim  
14 for a private school, we might be able to refer the claimant  
15 to another organisation, e.g. the Catholic Church has  
16 established a process where people can make complaints about  
17 church personnel".

18 Q. Thank you. And if you could just confirm, please, does that  
19 provide basically the current broad guidance that MOE would  
20 provide about where the responsibility lies in the Education  
21 sector?

22 A. It does, yes.

23 Q. Thank you. Now, Ms Hurst, if I could take you, please, to  
24 the next page of your evidence, page 3, and just under the  
25 heading, "Residential special schools", could you please  
26 read paragraph 3.4?

27 A. "Many of the historic abuse claims received by the Ministry  
28 have involved residential special schools. Residential  
29 special schools were established in the early 1900s to  
30 provide for children who were deaf, had had behaviour  
31 management challenges or learning needs. Prior to 1989,  
32 admission to residential special schools was by direction of  
33 the Director-General of Education".

1 Q. Thank you. Going on to health camps which are dealt with on  
2 the following page, can you read paragraphs 3.8 and 3.9 for  
3 the Commission?

4 A. "We have also received claims regarding Health Camp Schools.

5 The health camp movement began in 1919. The  
6 establishment of the camps was motivated by the belief that  
7 the health of malnourished children could be improved at  
8 minimal cost by camping outdoors. Over the years, the  
9 movement underwent significant changes in response to  
10 government policy and changing social conditions. Fewer  
11 children were referred to health camps for physical health  
12 reasons, with increasing numbers put forward for admission  
13 because of behavioural problems and/or dysfunction within  
14 their family situation. Attendance at a health camp was  
15 usually for a short period of around two months, although  
16 some children attended more than one camp.

17 And then I think in 2012, all remaining Health Camp  
18 Schools closed".

19 Q. And we heard the evidence of Dr Fiona Inkpen from Stand Tu  
20 Maia Whānau, and her evidence was that organisation now  
21 deals with any claims relating to health camps pursuant to  
22 an agreement with the Ministry?

23 A. That's right.

24 Q. Thank you. And then you deal next with private and  
25 integrated schools, I won't have you read that evidence, but  
26 if it I could just have you then turn to, "Key changes to  
27 the Education Sector following the Tomorrow's Schools  
28 reforms" and have you read 3.21 and 3.22 of your evidence?

29 A. "The Education Act 1989 gave effect to the Tomorrow's  
30 Schools reforms which marked a significant change in the way  
31 schools were governed. Tomorrow's Schools moved  
32 responsibility for the administration, management and  
33 governance of individual schools away from regional boards  
34 to individual Boards of Trustees. Individual education  
35 boards and boards of governors (for secondary schools) were

1 abolished and replaced with individual and elected local  
2 Boards of Trustees. Each school board was established as an  
3 independent legal entity capable of suing and being sued.

4 As the employer of all staff in a school, Boards of  
5 Trustees are responsible for employment and disciplinary  
6 matters. Boards are also responsible for setting their  
7 school's strategic direction, in consultation with parents,  
8 staff and students, and for ensuring their school is a  
9 physically and emotionally safe place for students and safe.  
10 Schools also hold and manage their own records, subject to  
11 relevant legislative provisions. Ownership of records for  
12 closed schools passes to the Ministry".

13 Q. And the next section of your evidence speaks about the  
14 Ministry itself, so if you could please read paragraph 3.23?

15 A. "In 1989 the Department of Education was abolished and  
16 replaced with a smaller Ministry of Education. The Ministry  
17 of Education, Te Tāhuhu o Te Mātauranga, is the Government's  
18 lead advisor on education from early learning, primary and  
19 secondary schooling through to tertiary education.  
20 Functions that once sat with the Department of Education  
21 were decentralised and new regulatory agencies were  
22 established. The Ministry works with schools and other  
23 organisations and agencies across the Education Sector, as  
24 set out below".

25 Q. Thank you. And you set out, as you say, those other  
26 organisations or agencies in the education sector and just,  
27 I won't have you read those sections of your evidence but  
28 just to summarise, those are the Education Review Office,  
29 the New Zealand Qualifications Authority and the Teaching  
30 Council; correct?

31 A. Yes.

32 Q. And you then go on to talk about health and safety in  
33 education settings at paragraph 3.28 of your evidence. I  
34 might have you read, please, 3.28 to 3.31?



1 A. Sure. "The Ministry works closely with Oranga Tamariki, the  
2 Teaching Council and Police to manage reports of suspected  
3 abuse or neglect. We are committed to ensuring a safe and  
4 supportive environment for all children and young people,  
5 and abuse of any kind is not tolerated.

6 Our regional staff treat any reports of abuse or neglect  
7 as a priority. In accordance with the Children's Act 2014,  
8 all staff working at the Ministry are trained in identifying  
9 child abuse and neglect, and what to do if abuse or neglect  
10 is suspected.

11 The Ministry provides traumatic incident support to  
12 schools to assist them to manage traumatic events, including  
13 abuse. This support is delivered by experienced Ministry  
14 staff, such as psychologists.

15 Despite the best efforts of the Ministry and school  
16 Boards of Trustees, there have been incidents where school  
17 staff have abused children in their care. Where this is  
18 discovered, the Ministry works with Oranga Tamariki, Police  
19 or Teaching Council to immediately remove the accused staff  
20 member and ensure there is no threat to children while the  
21 staff member is being investigated. In these cases we also  
22 provide traumatic incident support to the school".

23 Q. Thank you. And then you go on to detail some further  
24 changes in the legislative and regulatory environment, again  
25 I won't take you through that material in-depth but I will  
26 ask you, please, to turn to the next section which is  
27 corporal punishment and seclusion and just have you read  
28 paragraphs 3.37–3.38 of your evidence?

29 A. "Corporal punishment in New Zealand schools was made illegal  
30 in 1990 and seclusion was made illegal in 2017.

31 In 1960 in a submission to the Currie Commission on  
32 education, the Department of Education stated that:

33 "Dependence in teaching on corporal punishment is  
34 regarded as a serious professional weakness and most head  
35 teachers keep a careful eye on the amount of corporal

1 punishment in their schools. Education bylaws set limits  
2 for its use. For post-primary schools, controlling  
3 authorities are responsible for all matters of discipline  
4 within their schools and ... the Department of Education  
5 cannot direct what is to be done, but its general attitude  
6 is quite clear. It believes that in almost every case of  
7 indiscipline, a more appropriate form of punishment than  
8 corporal punishment can be found".

9 Q. Thank you. Then at section 4 of your evidence, you deal  
10 with the receipt of historic abuse claims and the  
11 establishment of a claims Resolution Process at the  
12 Ministry?

13 A. Mm-Mmm.

14 Q. And I would like you please to read from this section of  
15 your evidence, starting with the section that is headed,  
16 "Development of process" at 4.1?

17 A. Sure. "The Crown Litigation Strategy, initially issued in  
18 2005, provided for relevant agencies, including the Ministry  
19 of Education, to assess and settle meritorious historic  
20 abuse claims out of Court. For the Ministry, the Litigation  
21 Strategy defined an historic abuse claim as relating to  
22 allegations of abuse and/or neglect at a residential special  
23 school before 1993. While 1993 was selected as the cut-off  
24 point for a claim to be considered "historic" under the  
25 Litigation Strategy, following the Tomorrow's Schools  
26 reforms, any claim relating to events after 1989 would sit  
27 with the relevant Board of Trustees. If the school is  
28 closed, the claim sits within the Ministry under section  
29 154(3) of the Education Act 1989.

30 I just note, we have a new Education in Training Act  
31 passed this year, so some of these references may be out of  
32 date.

33 I understand the reason the Litigation Strategy was  
34 limited to residential special schools, and did not include  
35 all schools, was because the claims received by the Crown at

1 that time related to incidents in residential care settings  
2 and concerned matters particular to the residential elements  
3 of an institutional care. For example, issues with  
4 residential staff and supervision.

5 At this stage, it was not envisaged that a general claims  
6 Resolution Process that applied to all schools by default  
7 would be established.

8 Prior to 2010, the Ministry received a small number of  
9 direct claims and these were managed on a case-by-case  
10 basis.

11 Guided by the Crown Litigation Strategy, the Ministry  
12 established a process to manage and respond to historic  
13 abuse claims in 2010. This followed receipt of a direct  
14 claim when an ex-staff member of Waimokoia Residential  
15 School was convicted for abusing students at the school  
16 during the 1980s. Media coverage of this prosecution  
17 resulted in the Ministry receiving a number of other direct  
18 claims from former students of the school. An 0800 health  
19 line was established to facilitate contact and provide  
20 support to former students who wanted to discuss their time  
21 at Waimokoia.

22 This became a general contact number for all queries  
23 about historic abuse claims. When considering how to  
24 develop our process, we took guidance from MSD [Ministry of  
25 Social Development] which by then had an established claims  
26 process.

27 We also considered how other sensitive complaints were  
28 managed within the Ministry, such as protected disclosures.

29 As a result, an external assessor was contracted to  
30 assess our historic abuse claims.

31 The establishment of our process was guided by the  
32 following principles, based on the Crown Litigation  
33 Strategy:

1 (a) Provision of a process that is less time consuming  
2 and onerous on vulnerable claimant groups than the  
3 litigation process.

4 (b) Ensuring that the process supports an outcome that is  
5 enduring, fair and based on a degree of supporting  
6 information.

7 (c) Claimants have the opportunity to share their  
8 experiences with us. The process allows claimants to move  
9 on with their lives to the extent reasonably possible.

10 (d) Public funds are managed appropriately and payments  
11 to resolve claims are set at an appropriate level.

12 (e) The approach to resolving claims does not create new  
13 concerns or risks.

14 We try to take into account the need for individual  
15 claimants and the natural justice considerations of those  
16 who have had allegations made against them, while  
17 acknowledging the Ministry's claims process does not  
18 determine guilt or liability".

19 Q. Thank you. If I could just have you pause there. You talk  
20 about natural justice considerations in relation to alleged  
21 perpetrators of abuse. Can you describe the Ministry's  
22 approach, please?

23 A. Well, I think that would apply in certain situations. So,  
24 the one that springs to mind would be if there was a  
25 situation where a claim was made against a current teacher,  
26 for example, who we knew was currently teaching and it was a  
27 serious allegation, we would need to inform the Board of  
28 Trustees and, in that situation, we would also inform the  
29 teacher about the nature of that claim. We'd do that,  
30 though, in – we'd have a conversation with the claimant  
31 first, so we wouldn't do that without speaking to the  
32 claimant or their representative.

33 Q. Thank you. And if you could go on reading from 4.7?

34 A. "As the volume of claims was initially very low, our claims  
35 process was managed by the Principal Advisor to the Deputy

1 Secretary, Special Education. In 2011, this workstream was  
2 allocated to another Principal Advisor based in the special  
3 education group on a part-time basis. As the number of  
4 claims gradually increased, this work became a full-time  
5 commitment for this person, who was sole charge until 2016  
6 when a second advisor was appointed to process claims".

7 Q. Thank you. You go on to deal with an increased claims  
8 activity from about 2016, if you could just read from 4.8,  
9 please?

10 A. "Between 2010 and 2013, we received fewer than 10 claims  
11 each year (23 claims were received in total for this period)  
12 and most claimants did not have legal representation so  
13 worked directly with us. These claims were generally quite  
14 narrow in scope and included reasonably specific  
15 allegations. At this stage we were generally resolving  
16 claims in under 12 months.

17 In 2013, our claims activity gradually began to increase.  
18 It was around this time that an information analyst from the  
19 Records Services team was allocated to support our claims  
20 work and complete research for claims assessments and  
21 information requests. Temporary staff were hired when  
22 needed to assist with preparing responses to Privacy Act  
23 requests relating to claims and a second claims assessor was  
24 also contracted at this point.

25 During this period we also began to receive an increase  
26 in the number of claims from individuals who were legally  
27 represented. As a result, in December 2013 we entered into  
28 a Legal Aid agreement with the Ministry of Justice to be  
29 sure legally represented claimants would be able to keep any  
30 payments they received from us in full.

31 Under this agreement, we pay 50% of a claimant's Legal  
32 Aid costs and the remainder is written-off by the Ministry  
33 of Justice.

34 There has been a steady rise in the number of claims  
35 lodged with us each year. We've gone from receiving about

1 10-15 claims per annum to 25-30 claims being lodged each  
2 year since 2017. As we continue to receive a steady stream  
3 of Privacy Act requests, often the precursor to a claim  
4 being lodged, this trend looks set to continue.

5 And if I just put that in context. Nearly half of the  
6 claims that we have received have arrived with us since  
7 2018.

8 With increases in volume, the range of claims that we  
9 receive has also expanded. Claims have been lodged that  
10 were not originally eligible for our claims process, either  
11 because the claim related to incidents alleged to have  
12 occurred at later time periods or at schools that were not  
13 residential special schools.

14 With a spike in the number of these claims being lodged  
15 in 2017, we received approval the following year from the  
16 responsible Deputy Secretary to extend the eligibility of  
17 our process. It was agreed that we could consider claims  
18 about incidents after 1993 at closed residential special  
19 schools and Health Camp Schools, with claims about other  
20 state schools considered on a case-by-case basis to ensure  
21 we are the right place for it.

22 Generally speaking, if the Crown is the correct  
23 respondent to a claim about a school, we will manage it  
24 through our claims process.

25 There have been a number of other factors that have  
26 contributed to mounting pressure on our process. This  
27 includes individual claims becoming larger and increasingly  
28 complex, particularly as further records are released to  
29 claimant counsel. In recent years, our wider claims work  
30 has escalated. We've had claims, often jointly with MSD,  
31 placed on a trial track, initiating further work. Our role  
32 in the management of joint claims has altered and an  
33 assortment of other issues in the claims space have arisen  
34 in the last few years that have diverted our resource away  
35 from claims processing.

1           While the number of claims we have received is much less  
2 than some other agencies, the reality of having a very small  
3 team doing this work, combined with a work programme that  
4 has grown in scope, breadth and complexity, has meant that  
5 we have not progressed claims as fast as we once did. As a  
6 result, our timeframes to respond to claims has been  
7 impacted".

8           For the next paragraph, I've got some updated figures.  
9 This was prepared at the beginning of the year.

10 **CHAIR:** 4.17?

11 A. 4.17.

12 **MS ALDRED:**

13 Q. 4.17, if you could read that paragraph clearly stating the  
14 revised figures?

15 A. The revised figures.

16 Q. That can be noted.

17 A. "We currently have 131 unresolved claims. These claims are  
18 at various stages of the process, with the majority waiting  
19 to be assessed. A large number of claims (94) are under  
20 three years old. Our two oldest claims are around 10 years  
21 old, that's now one, one of those has since been resolved,  
22 and has been on hold for a number of years, either because  
23 we've been waiting for further information from the claimant  
24 or due to other Court proceedings. And the case of the one  
25 that is outstanding it's other Court proceedings".

26 Q. When you say other Court proceedings, can you just explain  
27 that, please, to the Commission?

28 A. So, in that situation, Police asked us if we would put that  
29 particular claim on hold because they were undertaking a  
30 criminal investigation and the claimant was a party to that  
31 criminal investigation. So, I understand they have asked us  
32 not to proceed because it would have potentially adversely  
33 affect[ed] that prosecution.

1 Q. Thank you. And then if you just turn the page to page 12  
2 and start reading from the first sentence beginning, "In  
3 some cases"?

4 A. "In some cases claims originally lodged with MSD have later  
5 been filed against the Ministry and are therefore older than  
6 our involvement with them.

7 In response to increased work, we have grown the size of  
8 our Claims Team, creating additional roles with some changes  
9 in responsibilities to reflect the work involved to progress  
10 our claims. Since mid-2019, our Claims Team has five  
11 full-time staff, including:

12 A team leader, who manages the team and reports to the  
13 Chief Advisor, Operational Delivery.

14 Two senior advisors who are responsible for progressing  
15 claims, liaising with and guiding unrepresented claimants  
16 throughout the process and preparing advice about  
17 settlements.

18 And two advisors who complete research for information  
19 requests and claim assessments, prepare responses to Privacy  
20 Act requests, prepare information to be released in Court  
21 Ordered discovery and provide records management support for  
22 the team.

23 The team also works closely with the Ministry's Legal  
24 Team.

25 Our work continues to be supported by our two assessors  
26 who have now undertaken the work for a number of years.  
27 Both assessors have considerable experience working in  
28 senior roles in the public sector and experience working  
29 with a diverse range of vulnerable clients. Both  
30 individuals have previously worked for the Ministry. Our  
31 assessors are a retired psychologist, previously a district  
32 manager for special education within the Ministry, as well  
33 as a district psychologist for the Psychological Services  
34 branch of the Department of Education. And a previous  
35 senior manager for the Ministry who worked in the areas of



1 schooling policy and Ministerial support, has a long work  
2 history in the education and training sectors and has formal  
3 qualifications and experience in working with Māori".

4 And then at 4.21, I talk about a procurement process  
5 underway. An update on that, so we have completed that  
6 procurement process and engaged five further assessors. So,  
7 we now have seven assessors. Those five assessors have been  
8 through their induction and orientation and the first  
9 assessment interviews are booked in for next month.

10 Q. And you have stated at your brief that contracting a diverse  
11 range of assessors with experience working with Māori is a  
12 priority; is that something you've been able to accomplish?

13 A. That's right. The five new assessors are not Māori but they  
14 have extensive experience working with Māori. We were  
15 looking to, if possible, engage some assessors that were  
16 Māori. Through the tender process, that didn't eventuate  
17 but the ones that we do have, all seven have extensive  
18 experience working with Māori claimants.

19 Q. And if you could, please, just turn to the next section  
20 which is headed, "Our claims" and read from 4.22. Again, I  
21 understand you have some updated figures?

22 A. Mm.

23 Q. So, if you could just read that clearly into 4.22 and 4.23,  
24 please?

25 A. Sure. "Since 2010, a total of 176 abuse claims have been  
26 lodged with the Ministry of Education. 96 of these claims  
27 have been filed in Court, and the remaining 80 claims lodged  
28 directly with us.

29 We have resolved 46 of these claims as follows:

30 36 claims included either an ex gratia or settlement  
31 payment, except one individual who received an offer of the  
32 Ministry paying for 10 counselling sessions.

33 Five claims were not supported in the assessment, so did  
34 not receive an offer of settlement.

35 Four claims were withdrawn by the claimant.

1           And one claimant, whose claim was not eligible for our  
2 process, was referred elsewhere.

3           We have paid a total of \$595,953.79 to resolve our claims  
4 which includes payment of claimant legal fees and Legal  
5 Aid".

6 Q. And if you could go on, please, to read the next section of  
7 your evidence which is headed, "Extent of abuse"?

8 A. "Across the claims we have received, a range of allegations  
9 have been made at varying degrees of severity. Claims have  
10 tended to focus on the actions of particular individuals or  
11 concerns about past standards of care and practices such as  
12 behaviour management techniques which were considered  
13 acceptable at the relevant time periods but may not be  
14 permissible now.

15           We acknowledge, however, that our assessments completed  
16 to date have related to a relatively small number of claims  
17 and a limited range of schools, and our body of knowledge  
18 will grow as we continue to research and assess further  
19 claims".

20 Q. And then you talk about the agreement with Cooper Legal  
21 relating to the Limitation Act, so please read from  
22 4.27-4.29?

23 A. "In 2014, Cooper Legal approached us to discuss implementing  
24 a Limitation Agreement similar to the one it already had  
25 with MSD which provided for claimants to engage in its  
26 claims process without needing to file claims in Court to  
27 stop time being counted under the Limitation Act.

28           Work on the agreement paused when it became apparent that  
29 there were complex issues that needed to be resolved, such  
30 as clarifying the scope and coverage of the agreement and  
31 ensuring consistency with any existing equivalent agreements  
32 with other Crown Agencies.

33           In 2018, Crown Law initiated work to prepare a whole of  
34 Crown policy on limitation issues for historic abuse  
35 claims".

1 Q. Thank you. If you could pause there, Ms Hurst, and turn to  
2 your reply brief of evidence at page 3. You discuss there  
3 in a little more detail the limitation policy that you've  
4 described and if you could please just read from 3.15-3.17?

5 A. "Paragraphs 4.27-4.29 of my primary brief provide comments  
6 about our attempts to achieve a Limitation Agreement with  
7 Cooper Legal.

8 Despite considerable work, no agreement has been reached  
9 as these discussions raised further issues that require  
10 wider consultation, including:

11 Whether the scope of any agreement should be extended to  
12 cover claims that should be properly directed to Boards of  
13 Trustees; and potential flow on effects from MSD's  
14 Limitation Agreement.

15 It became clear that consultation with MSD and Crown Law  
16 was required to work through these issues and ensure a  
17 consistent approach in keeping with the Crown's overall  
18 approach to limitation defences.

19 The development of a cross-Ministry policy on limitations  
20 is referred to at paragraph 12.5 of the primary brief of  
21 evidence of Una Jagose of the Crown Law Office".

22 Q. Thank you. And then if I could just have you comment there,  
23 please, on the issue, from the Ministry's perspective, in  
24 relation to the impact of legal complexities around  
25 liability for Boards of Trustees on the Ministry's attempts  
26 to agree a Limitation Agreement with Cooper Legal?

27 A. So, my understanding at the time, the key sticking point was  
28 around a preference from Cooper Legal that agreement we  
29 entered into would cover all schools and we didn't believe  
30 that was something we could enter into. As separate legal  
31 entities, the Ministry wasn't in a position to effectively  
32 bind 2,500 independent Crown entities and even had we  
33 entered into that agreement, we didn't see that it would  
34 actually be something that would stand up if a case went to  
35 litigation and the Board of the Trustees was the respondent.

1 It really wasn't something that we didn't want to resolve  
2 the issue, it was just that was something we couldn't do.

3 Q. Was the Limitation Agreement extended that would have  
4 covered other Cooper Legal clients?

5 A. Sorry?

6 Q. The offer was made, as I understand it, Limitation Agreement  
7 was supplied in draft that would have provided some coverage  
8 for Cooper Legal clients?

9 A. Yes, yes. So, we did attempt to come to an agreement and we  
10 thought we had something that could work but we weren't able  
11 to agree.

12 Q. Thank you. And then if you could turn back to your primary  
13 brief of evidence, at section 5 on page 13 you describe, and  
14 from that you describe the current claims process of the  
15 Ministry and I'd like you please to read all of paragraphs  
16 5.1-5.7 of your evidence?

17 A. "Our current claims process has remained broadly the same  
18 since it was established in 2010.

19 The general process as it usually operates is set out  
20 below. There is, however, enough flexibility in the  
21 operation of this process for us to respond to and  
22 accommodate the needs of individual claimants. Claimants  
23 are also free to decide how and when they engage with us  
24 throughout the process.

25 Lodgement of claim. Claims can be lodged directly with  
26 us, either by email, letter or over the phone. Claimants  
27 can contact us via our 0800 number or team email, which are  
28 advertised on our website. Claimants do not need to have  
29 legal representation to work with us.

30 When an unrepresented person first lodges their claim  
31 with us, it is allocated to a senior advisor in our Claims  
32 Team. The senior advisor will contact the claimant  
33 directly, typically by telephone, and have an initial  
34 conversation with them to check their personal details and  
35 gather sufficient information to confirm that they would

1 like to make a claim and the school/s that the claim relates  
2 to.

3 And that conversation would typically include some  
4 preliminary conversation about their needs in terms of the  
5 process".

6 Q. What sort of needs might be discussed?

7 A. So, for example, it might be that a sign language  
8 interpreter might be needed or if they have – we've had a  
9 claimant whose preference was to conduct the interview in Te  
10 Reo Māori, so those kind of things. If they wish to bring  
11 whānau support with them, others that they may want  
12 involved.

13 Q. Thank you. Just continue from 5.5.

14 A. "The claimant is not under any obligation to talk in-depth  
15 about their complaints at this stage. The senior advisor  
16 will explain the process, answer initial queries, discuss  
17 any particular needs and issues raised by the claimant and  
18 advise them that they can seek independent legal advice at  
19 any time during the process.

20 Following this conversation, the claimant is sent an  
21 acknowledgment letter, which includes the senior advisor's  
22 contact details as the claimant's contact person throughout  
23 the process, provides some high-level information about our  
24 process and confirms any other relevant details that were  
25 raised in this discussion.

26 If a claimant is legally represented, the claim is  
27 received in writing either by our Legal Team or Crown Law if  
28 it is filed. Correspondence about the claim is managed  
29 through these channels, as appropriate".

30 Q. Thank you. And you then go on to talk about information  
31 gathering and triage. At 5.8, you refer to searching being  
32 made of the Ministry's own records, plus Archives  
33 New Zealand when you receive a claim. Can I have you,  
34 please, read from 5.9?

1 A. "From time to time, we may also need to contact a school for  
2 a claimant's records. When this is the case, we will ask  
3 the claimant to sign a form providing consent for us to  
4 access their records.

5 We offer claimants a copy of their records, which are  
6 prepared for release in accordance with the Privacy Act  
7 1993. Third party information, such as information about  
8 other students, is withheld for reasons provided under the  
9 Act".

10 And I would just add there, that generally speaking,  
11 information about staff we do provide. So, unless it would  
12 be something that was explicitly covered under the Privacy  
13 Act, we would generally not redact information about staff.

14 "It is also during this stage of the process that we  
15 consider whether the Ministry is the correct respondent to a  
16 claim, or whether it should be referred to another entity  
17 for a response, such as a school Board of Trustees.

18 If the claim should sit elsewhere, we will notify the  
19 claimant or their lawyer of this. Where the claim should  
20 sit with a school board, we can refer it on the claimant's  
21 behalf with their consent, if the claimant prefers that we  
22 do that. To date, we have had a very small number of claims  
23 that have resulted in a referral.

24 We also consider whether there could be any current  
25 safety concerns raised in a claim, particularly if  
26 allegations have been made about an individual who is still  
27 working in a school. This may result in referrals to a  
28 third party, such as Police, the Teaching Council and/or the  
29 Board of Trustees. Referrals are made with the claimant's  
30 consent or leave of the Court, in accordance with the  
31 High Court direction.

32 If the claim sits with us, it is placed in the queue for  
33 assessment. The assessment of a claim can be prioritised in  
34 special circumstances, for example, where a claimant is in  
35 ill-health. When allocating claims for assessment, we

1 consider the age of the claim and, where appropriate, such  
2 as when claims relate to abuse in the school during a  
3 similar time period, claims are clustered together and  
4 assessed by a single assessor.

5 Each claim is researched to support the assessment  
6 process, as well as the claimant's information, the type of  
7 material we search for and review includes records about the  
8 school, including annual reports, review reports prepared by  
9 the Education Review Office, inspection reports and  
10 punishment logs, policy and procedure documents, staff  
11 files, Court documents, including conviction material where  
12 available and files of other students.

13 Of course, we also consider resolved claims with  
14 particular allegations about the same school".

15 Q. And then you go on to talk in the next section about the  
16 assessment of claims and the preparation of an assessment  
17 report. Just before you start that section of your  
18 evidence, I would like you to address, please, an issue that  
19 arose in phase 1. An allegation was made by witnesses from  
20 Cooper Legal to the effect that one of your claims  
21 assessors, one of the original two claims assessors that  
22 have been with the Ministry for a long or as a claims  
23 assessor for a long time, was subject to a conflict of  
24 interest due to previous employment. And that assessor was  
25 Mr Witheford, is that correct?

26 A. Yes, correct.

27 Q. Mr Witheford has supplied a short, written statement which  
28 has been provided to Counsel Assisting just this morning and  
29 sets out Mr Witheford's detailed response to that serious  
30 allegation but, in the meantime, if Ms Hurst, could you  
31 please summarise what Mr Witheford has to say in response to  
32 the allegation that he has a conflict of interest on account  
33 of his earlier employment?

34 A. Sure, thank you. So, it is a statement that sets -

1 **MS JANES:** I am not aware of this matter but I would  
2 just, before we do that, indicate that the Inquiry is  
3 able to accept information that is not admissible but  
4 it would go to weight because this information has not  
5 been provided to the Inquiry on oath, there's no  
6 opportunity to cross-examine.

7 **CHAIR:** Yes.

8 **MS JANES:** It would be received and then given  
9 whatever weight the Commission -

10 **CHAIR:** Indeed. I take it that would be the basis on  
11 which it is being supplied?

12 **MS ALDRED:** I didn't - If the Commission wishes,  
13 Mr Witheford is happy to swear an affidavit in place  
14 of a brief of evidence. I doubt there would be  
15 anything in that statement that Ms Janes or any other  
16 member of Counsel Assisting could possibly wish to  
17 cross-examine on. We did consider asking Mr Witheford  
18 to come to the Commission and give evidence, and due  
19 to the serious nature of the allegation, that is  
20 something that we could consider if that is a real  
21 concern of the Commission.

22 I think it's probably fair to let - the statement has  
23 been sent to Mr Opie. I am sorry, I think I may have  
24 overlooked sending it to Ms Janes.

25 **CHAIR:** Which may be part of the reason why she's  
26 concerned. However, I have to say that where evidence  
27 was given on oath, and it is going to be rebutted or  
28 refuted, it would probably be better to put it in  
29 affidavit form, and that means that this sort of  
30 concern would not be as obvious. But I think what we  
31 should do is continue with the evidence now and then  
32 Counsel Assisting to consider the matter, advise  
33 whether it is accepted, whether in total or on the  
34 basis which Ms Janes has said, and then if necessary



1 we will take remedial action later. Does that suit  
2 you?

3 **MS ALDRED:** Yes, thank you, that's helpful, thank you,  
4 Madam Chair.

5 Q. So, Ms Hurst, I would like you to summarise the evidence,  
6 which of course is given by Ms Hurst on the basis that it  
7 represents the Ministry's view in relation to Mr Witheford's  
8 position.

9 A. Thank you. So, the statement outlines Mr Witheford's  
10 extensive experience as a teacher and a senior psychologist  
11 and manager, former manager with the Ministry. And he makes  
12 a number of points around the course of his employment as a  
13 psychologist. He was sometimes involved in the referral of  
14 children to special residential schools and he understood  
15 that that was the point that was being raised in Cooper  
16 Legal's evidence. And he makes the point that when  
17 residential special schools were under the control of the  
18 Department of Education, that a psychological report and  
19 recommendation from a Psychological Service psychologist was  
20 a requirement enrolment. So, that was the level of his  
21 engagement with those schools, that he would provide a  
22 written report, and that was to ensure that the student met  
23 the enrolment criteria, which included assessing cognitive  
24 levels and severity of behaviour. And he goes on to state  
25 that, to the best of his knowledge, he has never assessed  
26 any allegation from a claimant with whom he has had personal  
27 or professional relationship with. And if such a claim came  
28 before him which involved a person who he had previously had  
29 any such relationship with, he would excuse himself without  
30 any further involvement. And that situation did occur in  
31 relation to the Van Asch School, so he had previous  
32 experience teaching there and did know some of the staff  
33 that were employed around the date that the claim had been  
34 made, so he excused himself from that claim and signed the  
35 appropriate conflict of interest declaration.

1           That, I think, is the substance of it. Just to  
2   reiterate, he's had no personal relationship with any staff  
3   members at any of the institutions where he has conducted an  
4   assessment and he considers himself sufficiently independent  
5   to be able to effectively and properly assess the claims.  
6   To the best of his knowledge, any perceived conflict has  
7   been reported to and managed by the Ministry.

8 Q. Thank you. And then if we can just turn to 5.17 of your  
9   evidence and keep reading from there?

10 A. "Claims are allocated to an assessor on a case-by-case basis  
11   under a Statement of Work which sets out the tasks to be  
12   completed and an estimate of hours and costs.

13           The scope of the assessment encompasses the broad period  
14   in which the abuse is alleged to have occurred. Once the  
15   assessor has been assigned to a claim, they are provided  
16   with the information that has been collated. While we  
17   attempt to find all relevant information prior to the  
18   assessment, the assessor may request further information as  
19   the assessment progresses and may also complete further  
20   research themselves during the course of the assessment.

21           Claimants are offered a meeting with the assessor to  
22   discuss their claim".

23 Q. Thank you, and if you could go on to detail that meeting  
24   from 5.20 of your evidence.

25 A. "If the claimant chooses to meet with the assessor, a  
26   suitable venue for the meeting is discussed with the  
27   claimant. To date, meetings have generally taken place at a  
28   Ministry of Education regional office closest to the  
29   claimant's place of residence. The assessor will ensure the  
30   venue is suitable and allows for confidential discussion.  
31   Meetings are flexible and informal and are able to be guided  
32   by the claimant as appropriate.

33           I should just note, in the setup of these assessment  
34   interviews, that's where we would really talk to the  
35   claimant about any particular needs they might have.

1 Any special requests for needs are considered and  
2 provided for as appropriate. For example, this has included  
3 the Ministry paying for a sign language interpreter selected  
4 by the claimant to support them through the process,  
5 claimants are welcome to bring whānau and other support  
6 people, including their lawyer.

7 The assessor will explain the process before inviting the  
8 claimant to share their story and explain what they would  
9 like from the process.

10 The assessor will ask questions to ensure they understand  
11 the claim and have as much relevant information as possible  
12 from the claimant.

13 Often a Ministry official attends to take notes which can  
14 be provided to the claimant if requested.

15 Sometimes the meeting is recorded, if the claimant is  
16 happy with that.

17 There are occasions where claimants choose not to meet  
18 with an assessor. Where a claimant is unable to manage a  
19 meeting or does not wish to have one, the assessor works  
20 from the documents or information provided by the claimant  
21 or their counsel, along with any further information located  
22 during research by the Ministry or the assessor".

23 Q. Thank you. If you could then go on to read the next section  
24 of your evidence, "Preparation of the assessment report"?

25 A. "The assessor will then consider the merits of the claim,  
26 taking into account the information shared by the claimant  
27 and the available relevant documents.

28 From time to time, an assessor may also speak to other  
29 individuals, such as ex-staff from the school complained  
30 about. A detailed assessment report is prepared and  
31 provided to the Ministry by the assessor. These reports  
32 include the following material:

33 "All the allegations made by the claimant are explained  
34 in detail.

1 Relevant information, including background information  
2 about the school, relevant policies and procedures and  
3 staff. The claim is assessed against the standards and  
4 policies that applied at the relevant time, not those  
5 applicable today.

6 The allegations are analysed against the information  
7 available. The assessor will then make findings about  
8 whether there is enough support for the allegations made.

9 Recommendations about any appropriate action to take to  
10 resolve the claim are also made. This includes a  
11 recommendation on whether an apology and/or a payment is  
12 appropriate".

13 The assessor provides their report to the Ministry for  
14 consideration".

15 Q. And if you could continue reading at 5.27.

16 A. "Once we have considered the assessor's report, a memo of  
17 advice about how to respond to the claim and any recommended  
18 payment is prepared for the Deputy Secretary, Sector  
19 Enablement and Support, who approves our claim responses.  
20 The assessor's report is also provided to the deputy sector  
21 consideration".

22 Q. And if you could read from the next section headed,  
23 "Supporting information"?

24 A. "We do not have a prescribed threshold of evidence that  
25 needs to be met for allegations to be supported. The  
26 assessor will consider each claim against the relevant  
27 information available to determine whether it is reasonable  
28 to accept the allegations made for the purpose of  
29 settlement. Given the historic nature of many of our  
30 claims, the passage of time and unavailability of witnesses,  
31 does mean that there can be limited information available to  
32 shed any liabilities on claimant's allegations.

33 Bearing in mind the principles discussed at 4.5 above,  
34 some information in addition to statements made in claims is  
35 looked for to support allegations made.

1 For example, if a claimant alleges that they were kept in  
2 time-out to an excessive degree in breach of the policies at  
3 the time, we will search the records to confirm whether the  
4 school had a time-out space and/or a history of such  
5 practice and whether there is any information in the  
6 claimant's records to show either time-out usage or indicate  
7 behaviour that would have resulted in time-out usage.

8 Where a claimant alleges abuse from a particular staff  
9 member, we will consider any evidence of that staff member  
10 having committed similar abuse. This might include records  
11 of complaints, criminal convictions or disciplinary  
12 procedures".

13 Q. Thank you. Now, I just want to refer briefly to a document  
14 that was put to Ms Cooper and Ms Hill in phase 1 of this  
15 hearing. And I think I will have that brought up, please,  
16 it's document MOE269.

17 You will see the first page is an email from Bruce  
18 Ferguson, Principal Advisor at the Ministry, and if you  
19 could just pick out the main, sorry beginning, "Attached for  
20 your information". Yes, that's fine.

21 This is a 2014 document and you will see that the top  
22 paragraph there just says, "Attached for your information  
23 and reference for your work is a sample report to help us  
24 all with assessment reports", and that's sent to the two  
25 assessors at the time?

26 A. Correct.

27 Q. And then if you could please just turnover to the next page,  
28 and you will see there that that is a template assessment  
29 report which I believe is based on a real assessment report  
30 redacted?

31 A. Mm-Mmm.

32 Q. For the purpose of the template?

33 A. Yes.

34 Q. It was put to Cooper Legal in phase 1 on the basis that it  
35 indicated a range of factors would be taken into account by

1 the Ministry in assessing a claim. And I don't think it's  
2 necessary to take you to the detail of that but just broadly  
3 as a template, could you confirm whether this document or  
4 the approach taken in this document is something that would  
5 be used by the Ministry?

6 A. Yes, so the process is still broadly the same and the  
7 information and assessment process outlined in the memo  
8 won't have changed. The one thing that is different, is  
9 that we no longer require a legal assessment, so I think  
10 there's a second template attached to this document. That  
11 was something we were doing initially but probably by about  
12 2015-2016 we decided we no longer needed to do that separate  
13 legal advice and the assessment was completed just with the  
14 assessor and the Sensitive Claims Team.

15 Q. Thank you. And then turning to the next section of your  
16 evidence headed, "Response to claim", could you continue  
17 from there, please?

18 A. "Once our response to the claim has been approved, it is  
19 provided to the claimant or their lawyer in a letter. The  
20 documents relied on by the assessor can be made available as  
21 well. There is often a telephone conversation about our  
22 response with unrepresented claimants. Occasionally we will  
23 meet with the claimant to discuss our response to their  
24 claim if that is needed, but this hasn't been common.

25 The letter sets out each allegation and explains the  
26 findings made. If the claimant has any concerns about how  
27 we have responded to their claim, they are welcome to raise  
28 these with us. Claimants can also provide further  
29 information if they wish to make an additional allegation or  
30 are concerned there is material that we have not taken into  
31 account".

32 Q. Thank you. And just turning to the offer of settlement  
33 itself, if you could continue reading from 5.33?

34 A. "Settlement offers may include a payment, either settlement  
35 or ex gratia; payment of legal fees, whether to Legal Aid or

1 to the claimant's lawyers, so the payment is received by the  
2 claimant in full; an apology; and access to other support  
3 requested by the claimant, which could include counselling.

4 Offers are made on a without prejudice basis and are  
5 usually in full and final settlement of the claim".

6 Q. And then just turning to "Payment amounts", if you could  
7 read from 5.35, please.

8 A. "Where it is appropriate to offer a payment to a claimant,  
9 we calculate the amount by considering payments made in  
10 resolved claims with similar facts. In the early stages of  
11 our process, payments made by MSD were used as the  
12 comparator in an effort to maintain equity in payments for  
13 similar types of abuse.

14 To date, our payments have ranged from \$3,000 for the  
15 least serious claims, up to \$40,000 for very serious cases.  
16 Higher level payments have been made for claims with  
17 extremely serious allegations, greater evidential support  
18 for the complaints made and often multiple types of abuse or  
19 greater frequency.

20 Our average payment is \$15,300. Our payments are  
21 intended as an acknowledgement of a claimant's experiences  
22 and to assist them to move forward. We do not compensate  
23 for loss suffered, due to the difficulties in ascertaining  
24 this because of evidential and other difficulties discussed  
25 at 5.28 above, associated with the claims of a historical  
26 nature.

27 From time to time, we have included in the payment a  
28 small increase to acknowledge there was a delay in  
29 responding to a claim within an agreed timeframe".

30 Q. Thank you. If you could just set out your approach to  
31 statutory defences, please, in the claims process by reading  
32 from 5.38?

33 A. "Offers to resolve claims are made notwithstanding  
34 legislative restrictions that might apply if the claim was

1 heard in Court, such as those set out in the Limitation Act  
2 1950 or the Accident Compensation Act 1972".

3 Q. Thank you. Now, I just want to pause before we turn to the  
4 next section which is about joint claims, and ask you about  
5 the apologies that you said could be a component of the  
6 settlement package.

7 Could you just comment briefly in relation to those, the  
8 form and nature of those apologies?

9 A. So, the apologies can be delivered either personally, and I  
10 think we've had just two claimants have specifically  
11 requested a personal apology delivered by a senior official,  
12 which in that case was me, and in most cases they will be a  
13 personalised letter that is signed by the Chief Executive of  
14 the Ministry.

15 Q. Thank you. And then if we could just – the next subject is  
16 "Joint claims" and if you could read from 5.39, please?

17 A. "We have had a number of joint claims with MSD.  
18 Historically, these have been claims lodged solely with MSD  
19 but have included allegations about a residential special  
20 school. The majority of these claims have been about  
21 Campbell Park".

22 Q. Thank you. And then if I could just have you turn to your  
23 reply brief of evidence and at page 4, section 4 of your  
24 reply brief, you deal with the management of joint claims?

25 A. Mm-Mmm.

26 Q. Could you please read 4.1-4.3?

27 A. "As discussed above, there are several matters that impact  
28 on the length of time it takes to resolve claims. Delay is  
29 also sometimes associated with claims involving multiple  
30 agencies.

31 Until a claim is filed or redirected to the Ministry with  
32 the consent of the claimant, the Ministry is unable to  
33 respond to the claim, as discussed further below.

34 The Ministry has worked with MSD to resolve a number of  
35 joint claims. As the resolution of these claims requires



1 some sharing of information, this process must also take  
2 into account any privacy or legal constraints, such as the  
3 Court directions issued in late 2017 preventing referral of  
4 material in Court files to third parties without leave or  
5 the claimant's consent".

6 Q. Thank you. And then could you just turn back, please, to  
7 your primary brief of evidence at page 19. In that section,  
8 you deal with Te Tiriti o Waitangi and Tikanga Māori; could  
9 you please read that section of your evidence, please.

10 A. "The Ministry of Education's commitment to Te Tiriti o  
11 Waitangi is set out in our Policy Statement. The Ministry  
12 expects its staff to give active expression to the  
13 principles of the Treaty as they carry out their day-to-day  
14 professional duties.

15 Our claims process can be tailored to the needs of  
16 individual Māori claimants and cater for any cultural or  
17 spiritual practices they would like observed. Discussions  
18 with a claimant throughout the process can assist to  
19 determine how they would like to engage with us.

20 For example, claimants are welcome to bring whānau and  
21 other support people to meetings with the Ministry. A  
22 meeting can be held at any suitable venue, including a marae  
23 if required. Translation services are also able to be  
24 provided if this is required.

25 In practice, we have had one claimant request that the  
26 process accommodates their cultural needs. This person  
27 requested that their claim was dealt with by a Māori  
28 assessor who also spoke Te Reo. In that instance, we  
29 arranged for the then National Manager of Māori Service  
30 Provision in Group Special Education to form part of the  
31 assessment team. This individual attended the meeting with  
32 the claimant and assessor and was available to provide input  
33 into the process and work with the claimant as they  
34 required. The substantive assessment was completed by an

1     assessor who does not identify as Māori but has experience  
2     working with Māori clients.

3             We do not have records about how many of our claimants  
4     identify as Māori, as claimants are not obliged to disclose  
5     this information to us. We accept that more could be done  
6     to proactively and explicitly incorporate tikanga into our  
7     process and we will consider how to do this as part of any  
8     future process improvements. We are currently considering  
9     commissioning an external review of our process. This  
10    review will likely consider how we can strengthen our  
11    process for Māori. And, in fact, we went on and did engage  
12    a third party to carry out that review and there's some  
13    further work that I think we need to do in the New Year to  
14    be able to consult more fully on our process going forward".

15 Q. Thank you. And then if I could have you turn back again to  
16    your reply brief of evidence. I will just have you deal  
17    with the issues that you set out in your reply brief at this  
18    point, other than those we've already – I've already had you  
19    read. So, you note at section 3 of your reply brief of  
20    evidence that your comments in section 3 are focused on a  
21    statement by Cooper Legal which criticises the Ministry's  
22    approach in its claim process, particularly around legal and  
23    factual complexity and transparency and delay. Can you read  
24    just the first part of paragraph 3.2 which deals with the  
25    legal framework of the education sector.

26 A. "I agree with Cooper Legal's above comment that the legal  
27    and factual landscape of the Education Sector is complex. I  
28    provided an overview of this in chapter 3 of my primary  
29    brief".

30 Q. And you go on to provide an example where this has been  
31    difficult in practice and you also at 3.3 deal with Cooper  
32    Legal's brief which suggests that the Ministry should have  
33    standing to respond to claimants about open schools after  
34    1989 and I think you've already responded to that in your  
35    oral testimony today.

1           So, if we could just turn to the next section which is  
2           headed "Further comments about issues raised with our  
3           assessment claims process" and read from 3.5?

4   A. "A number of issues have impacted on the Ministry's ability  
5           to assess and respond to claims and the timeframes for  
6           response.

7           The Ministry's assessment process requires sufficient  
8           factual information, an understanding of that information,  
9           and ability to weigh complex and at times competing  
10          information to make informed judgements that are robust.

11          The challenge and cause of tension is how the Ministry  
12          applies this in individual cases and, in particular, how it  
13          often has to manage claimant expectations of having their  
14          claims accepted at face value or of receiving higher  
15          settlement offers.

16          The historical nature of these claims adds further  
17          complications as there are gaps in institutional records,  
18          there are often no witnesses or they are hard to find or  
19          their recollections are sketchy".

20   Q. And if you turn over and read 3.9, please.

21   A. "The Ministry responds to these challenges by locating and  
22          providing as much information as possible to the claimant,  
23          by carefully explaining its process of assessment, listening  
24          to and taking account of what the claimant says, explaining  
25          its findings on the basis of the information available,  
26          including what the claimant has said, and the basis for  
27          settlement. If appropriate, following the provision of  
28          additional information, the Ministry would also be willing  
29          to review a decision".

30   Q. Thank you. And then we'll have paragraphs 3.10-3.12 taken  
31          as read and if you could just please take 3.13 and if you  
32          could read from 3.14?

33   A. "I accept the claims have taken longer to resolve than is  
34          desirable for both the claimants and the Ministry. The time  
35          taken is, however, a reflection of the complexity of these

1 claims and, more recently, the relatively sudden increase in  
2 the volume of claims received. I consider the Ministry has  
3 acted in good faith by providing an assessment process as an  
4 alternative to claimants having to pursue claims through  
5 Court, that is non-adversarial, voluntary, accessible,  
6 allows for face-to-face interaction and with costs that are  
7 met by the State".

8 Q. Thank you. Now, you've already covered the next two  
9 sections of your reply brief, so I'll take you to section 5,  
10 please, which relates to survivor evidence and if you could  
11 read from 5.1?

12 A. "The Ministry values the evidence provided by survivors to  
13 the Royal Commission about their experiences of its claims  
14 process. We accept there have been delays in the process  
15 that can be frustrating for claimants. We are endeavouring  
16 to take steps to address this, as I explain below in  
17 relation to the current review of the claims process.

18 I respond below to some points in the survivor briefs  
19 with a view to providing further useful information for the  
20 Commission.

21 Kerry Johnson and Chassy Duncan. Cooper Legal state in  
22 paragraph 756 of their brief that they "have always been  
23 clear that a plaintiff is entitled to elect their defendant  
24 and if their claim was to be discussed with another  
25 Ministry, there had to be transparency around that".

26 Kerry Johnson and Chassy Duncan both provide examples of  
27 the process when a claim is first made against another  
28 agency and later with the Ministry. Both of their claims  
29 were initially lodged with MSD. The Ministry of Education  
30 component of these claims were redirected to the Ministry at  
31 a later date.

32 In the case of Mr Johnson, he explains in his brief that  
33 he first lodged a claim against MSD, including details about  
34 his time at Campbell Park School in 2008. The claim against  
35 the Ministry was lodged much later in November 2018.

1           The Ministry responds" – I've gone the wrong way, sorry.

2           "I understand that Mr Duncan's claim against MSD will be  
3 discussed in the reply brief – or has been discussed now –  
4 of Linda Hrstich-Meyer. A separate claim has been lodged by  
5 Mr Duncan with the Ministry in September 2014.

6           Mr Duncan's claim against the Ministry was subsequently  
7 amended in August 2018. Much has happened with that claim  
8 since then. The claim has been filed and amended and  
9 discovery has been completed. Mr Duncan rejected the fast  
10 track offer made in 2018 to settle his entire claim,  
11 including complaints about Waimokoia".

12 Q. And just to confirm, those aspects of the complaint were the  
13 aspects that would be relevant to the Ministry?

14 A. That's right. A meeting with our assessor was then held in  
15 October 2019 and we are actively working to provide our  
16 response to this claim. And at the moment we're in the very  
17 final stages and would anticipate that an offer should be  
18 made by the end, probably the end of this week.

19 Q. Thank you.

20 A. In the case of both Kerry Johnson and Mr Duncan, it is only  
21 when the claims are transferred to the Ministry that its own  
22 claims assessment process will be engaged.

23 Q. Thank you. Now, just turning to the question of delays in  
24 the process. We heard, as you already acknowledged, about  
25 some of the delays that claimants have had in resolving  
26 their claims, including their claims with MOE?

27 A. Mm.

28 Q. And Mr Duncan was one example of that. I think it would be  
29 helpful for the Commission if you were able to comment on  
30 the delays, and specifically what sort of factors contribute  
31 to them? I know you've already touched on this a little but  
32 if you could provide some further detail.

33 A. Okay. So, certainly the volume increases in the last  
34 three years in particular will have a significant part to  
35 play in delays and we are now finding that on average it's

1 taking over two years to resolve a claim, whereas earlier on  
2 we were resolving claims within a few months. So, there's  
3 quite a difference now.

4 There's also been quite a significant increase in the  
5 number of schools that a claim is lodged in relation to.  
6 So, initially it was just the special residential schools  
7 and a small number of them. I think at the latest count  
8 there's something like 55 schools that have been implicated  
9 in our current claims, so that requires us to carry out  
10 significant additional research. If the schools are open,  
11 we will need to contact them because the records will be  
12 held by those schools. In the case of small schools, I can  
13 recall one which is a teaching Principal, they had no staff  
14 to go through the shed of files, so we needed to engage  
15 someone to do that for them. So, all of those things add  
16 time to the process and records can be located in a number  
17 of different archives or different organisations.

18 A growing number of claims also do require engagement  
19 with third parties. So, as I say, if the school is open or  
20 even in the case of a school like Kelston, which is open but  
21 the claim might relate prior to 1989, we would engage with  
22 the Board of Trustees around that and particularly in the  
23 research phase.

24 Then there's some legal and technical issues. So, I  
25 think the complexity of the claims we're receiving now,  
26 particularly some of those that are filed, they might be  
27 20 pages with 30 separate allegations, so that in itself  
28 requires a lot more work to consider each of those  
29 allegations, carry out the investigative work around each of  
30 them. And some of those larger claims, the senior advisor  
31 working on that particular claim would do some preliminary  
32 work to order those claims, if you like, and make it easier  
33 for the assessor to review.

34 I think overall, the process itself is labour intensive,  
35 involving multiple individuals, multiple organisations and I

1 think if – certainly, they're becoming more complex and  
2 involving more parties, so the time to resolve a claim is  
3 taking longer from the point at which we start the work.

4 Q. Do you ever receive further allegations after the claim has  
5 been initially lodged?

6 A. We do and that might come up at the assessment interview,  
7 for example. So, that will then require us to obviously  
8 have a look at the facts and what information we have around  
9 that. So, that's not uncommon. Or it might be for a claim  
10 that is represented, that as the documents that we discover  
11 are released to the claimant through their lawyers, that  
12 reveals other matters that the claimant wishes to make a  
13 claim about.

14 **MS ALDRED:** Thank you, it might be a convenient time  
15 to take the adjournment.

16 **CHAIR:** Yes, it is time to take a break and you can  
17 finish off after the adjournment?

18 **MS ALDRED:** Yes, I don't think I'll be much later but  
19 I think we should break.

20 **CHAIR:** Certainly.

21

22

23 **Hearing adjourned from 11.30 a.m. until 11.52 a.m.**

24

25

26 **MS ALDRED:**

27 Q. Ms Hurst, you were in your reply brief and we were just  
28 talking about survivor evidence in relation to, and also  
29 specifically delays in, processing claims.

30 You were just about to turn to the evidence in relation  
31 to James Packer which was given in phase 1 by his mother,  
32 Cheryl Munro.

33 And I believe that you watched that evidence?

34 A. I did, yes.

1 Q. So, I won't take you through your detailed account of the  
2 steps that were taken in that case but you do mention at  
3 5.14 Ms Munro raising the issue of independence in your  
4 process, and I wonder if you could just read from the middle  
5 of that paragraph beginning "We"?

6 A. "We acknowledge that our investigations are not carried out  
7 by an independent agency but we do not agree that the  
8 Ministry is interested in protecting its conduct and  
9 reputation and those of teachers at the expense of  
10 claimants".

11 Q. Do you have any further comments in relation to  
12 independence?

13 A. I think there's probably a public perception that teachers  
14 and schools are part of the Ministry. And I think for us,  
15 since 1989, the Ministry and schools have been quite  
16 separate entities. So, we don't have that overwhelming  
17 loyalty, if you like, to protect the interests of those that  
18 are accused or individual schools. And the team that is  
19 employed to do this work are specifically employed because  
20 they have an interest in this work and resolving the claims.  
21 So, they're not people that would have other interests that  
22 might be in conflict with that. So, I can see where that  
23 perception might come up for someone not familiar with the  
24 separation between the Ministry of Education and schools but  
25 it's not, in effect, how it works.

26 Q. Thank you. And at 5.16 and 5.17, you just talk a little bit  
27 about the timeframes broadly for the claims process, can you  
28 just briefly outline that?

29 A. Well, I think this section sets out the chronology.

30 Q. Yes.

31 A. There were a number of things that happened over a longer  
32 timeframe but, I guess, the key point from the Ministry's  
33 perspective in this case, is that we responded to the claim  
34 within 12 months of receiving all the relevant information.  
35 So, I appreciate that, for Mr Packer and Ms Munro, the



1 overall timeframe for them was much longer but, from the  
2 Ministry's perspective, we did respond within 12 months of  
3 the claim and all the information being received.

4 Q. And you say at 5.17 that that offer made within that  
5 12 month period wasn't accepted by Mr Packer?

6 A. That's correct.

7 Q. And later resolved at a judicial settlement conference?

8 A. That's right, yep.

9 Q. So, just turning now to, I won't have you read section 6 of  
10 your evidence, which relates to the evidence of Ms Grant on  
11 behalf of IHC [formerly the Society for Intellectually  
12 Handicapped Children, which currently provides support and  
13 care for people of all ages with intellectual disabilities],  
14 but if you could please turn to section 7 which is the  
15 Ministry's Treaty of Waitangi policy and just read from that  
16 section, please?

17 A. "My primary brief discussed the Ministry's Treaty of  
18 Waitangi policy from paragraph 5.42. That policy has been  
19 updated since the time of filing and so I take this  
20 opportunity to provide the Royal Commission with the updated  
21 policy. The updated policy shifts from a focus on  
22 obligations to a focus on positive outcomes that can be  
23 achieved through working in Te Tiriti/Treaty-honouring  
24 relationships. I also note that staff and management  
25 involved in our claims processes are completing bespoke  
26 Treaty of Waitangi training and this new organisational  
27 policy will inform the review of our sensitive claims  
28 process noted above".

29 Q. Thank you. And just a slightly related point although more  
30 generally, I want to talk to you about the staff you employ  
31 in your team. Specifically, it's clear from the evidence  
32 you've given that direct claimants, that is claimants who  
33 come to the Ministry and are not represented, will have  
34 initial contact and thereafter some regular contact with  
35 your senior advisors; is that correct?

1 A. That's correct. So, we assign a senior advisor to each  
2 unrepresented claimant and they will be that person's  
3 contact throughout the claim process. They are people that  
4 we hire specifically in terms of looking for characteristics  
5 around manaakitanga, so they're kind, they're respectful,  
6 they have empathy and, you know, those strong inter-personal  
7 skills so that they can guide the unrepresented claimants  
8 through the process.

9 Q. Thank you. And do those staff have any particular training  
10 in relation to Te Tiriti?

11 A. We have put the entire team through a two-day Te Tiriti  
12 course which was specifically focused on applying the  
13 principles of Te Tiriti to their work. They have all  
14 undergone a two-day diversity training that all staff in the  
15 Ministry go through.

16 Q. Thank you. And then if I could take you back to your first  
17 brief and can I have you first of all just turn to page 12  
18 because I understand we have a slight correction to the  
19 ever-changing figures at paragraph 4.22?

20 A. Yes, I think I mentioned 176 claims in total have been  
21 lodged. I am now advised that is 177.

22 Q. Thank you. The other thing I will have you note is at 4.24  
23 of your evidence, you gave a figure for the total amount  
24 paid in resolution of claims and just to confirm, that  
25 amount isn't updated to reflect the updated figures that  
26 you've just given?

27 A. Correct, there are three further claims that have been  
28 settled since then, so we can provide an update to those  
29 figures.

30 Q. So, that would be able to be provided in writing?

31 A. Yep.

32 Q. And then if I can take you right to the end of your primary  
33 brief of evidence, please. At section 6 you make some  
34 concluding remarks and if I could just have you read those  
35 comments, please?

1 A. "Our claims process has been operational for 10 years.  
2 During that time, our work has substantially changed from  
3 being focused on a small number of claims about a reasonably  
4 narrow scope of allegations, to encompassing a growing range  
5 of concerns about a number of schools. The last three years  
6 in particular has seen an increase in the scope, volume and  
7 complexity of claims and a growth of wider demands that have  
8 put pressure on the claims process.

9 The resolution of abuse claims is not easy. We are  
10 committed to providing a robust and fair process that is  
11 appropriate in our claims environment, but remains  
12 responsive to the recommendations that will be provided  
13 through the Royal Commission. It is therefore timely for us  
14 to commission an external review of our process to ensure  
15 that we are best placed to respond to the growing area of  
16 work going forward".

17 Q. And rather than reading the rest of that paragraph, could  
18 you just provide, please, a brief outline of where that  
19 review is at?

20 A. Yes. So, we have received a draft review report and that  
21 will be finalised very shortly, so I'm sure we can provide  
22 that within the next few weeks, along with our action plan  
23 and response to the recommendations from that review.

24 So, we engaged the reviewers, they were due to commence  
25 just in March and then we had a lockdown, so that did delay  
26 things somewhat but they carried out a three step process,  
27 where they planned out the work with us. We did ask them to  
28 focus particularly on process, and process improvements,  
29 where we could speed things up or make the process, you  
30 know, better for claimants. And they have provided a number  
31 of recommendations in that space.

32 In terms of – we specifically asked them to look at our  
33 process in relation to Te Tiriti. They did interview a  
34 small number of people but I think both us and the reviewers  
35 have recognised there's more work to be done in that space,

1 so that's a piece of work we are planning for the New Year  
2 where we would want to engage more widely with broader  
3 representation of Māori and iwi organisations.

4 So, that's where we're at with that process review.  
5 There are a number of process improvements which we've  
6 already put in place around information provision to  
7 claimants and improving information on our website.

8 Q. Thank you. Currently, you have a draft report, is that  
9 correct?

10 A. That's right. It's really just going through final review  
11 and sign out. So, we had some follow-up questions in  
12 relation to the draft report, so they've incorporated a bit  
13 more information for us, but yes, it's all but done.

14 **MS ALDRED:** Thank you, that's the end of your evidence  
15 from me, Ms Hurst. If you could remain to answer any  
16 questions.

17 A. Thank you.

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**HELEN HURST**  
**QUESTIONED BY MR OPIE**

Q. Tēnā koe, Ms Hurst.

A. Tēnā koe.

Q. I would like to pick up on the issues you were discussing about the time it's taking to resolve claims. So, you provided the updated figures, 177 received since 2010?

A. Mm-Mmm.

Q. And of those, you have resolved 46?

A. 46, yes.

Q. 46. So, in the last 10 years, it's an average of about 4.6 per year?

A. On average, although I think in terms of the claims that have been processed in the last couple of years, because they've been more complex they have taken longer.

Q. You –

A. But on average.

Q. You'd say that average is distorted by this influx in the last three years?

A. That's correct.

Q. And you've apologised to a number of the claimants and said, "Well, it's taking longer than desirable"?

A. Absolutely.

Q. But then you've also referred to a large number of factors which you say caused delay?

A. Mm.

Q. So, I wasn't sure whether your evidence is, well, we're sorry for it but the delay is inevitable, or is it something else?

A. I think it's something else. I think it's a recognition that we need to do better going forward and recognising

1 where we're at with the number of claims we've received, the  
2 increased breadth of those claims and the overall volume.  
3 We do need to make some process changes to be able to ensure  
4 that we can continue to resolve claims in a reasonable  
5 timeframe.

6 Q. Yes. And that increasing complexity, that's in the last  
7 three years, since 2017?

8 A. I think the nature of the filed claims have been – you know,  
9 in their nature they tend to have more claims, more elements  
10 to the claim about them. But I think, yes, increasingly,  
11 they have involved more institutions and more parties and  
12 have become more complex.

13 **CHAIR:** Can I just clarify, a previous witness  
14 referred to filed claims as being those claims which  
15 had been filed in the High Court. Is that the same  
16 use that you're using there?

17 A. Yes, it is.

18 **CHAIR:** Good, thank you.

19 **MR OPIE:**

20 Q. Up until mid-2019, you say in your evidence you had a small  
21 team?

22 A. Mm.

23 Q. And you only had two assessors?

24 A. Correct.

25 Q. And that was the case until January this year?

26 A. In terms of the assessors?

27 Q. Yes.

28 A. Yes.

29 Q. And you decided to start this procurement process in January  
30 for more assessors?

31 A. We tendered for more assessors in 2019. Prior to that, we  
32 had attempted to identify other suitable assessors. So, we  
33 had identified potential candidates but were unsuccessful in  
34 securing someone with the skill set that we were looking for  
35 and, hence, decided to tender for that. So, that's the

1 point where we were successful in securing another five  
2 assessors.

3 Q. Sorry, when were you successful in securing the five?

4 A. This year, this year. So, the tender went out second half  
5 of last year and they were appointed, well, following when  
6 we returned from lockdown.

7 Q. Could I just have document MOE035, page 2 of that, please?  
8 If we could call out paragraph 1?

9 And so, this is a memorandum from Bruce Ferguson seeking  
10 approval to engage an additional assessor on a temporary  
11 basis?

12 A. Correct, yes.

13 Q. And then page 2, paragraph 3, if we could call that out? It  
14 says there, "We currently have two assessors"?

15 A. Yes.

16 Q. And then could I go to page 4, please, paragraph 18? So,  
17 here Mr Ferguson is saying we'd like this temporary assessor  
18 because we need to work through a bulge?

19 A. Mm-Mmm.

20 Q. And "longer term, we intend to expand the pool of assessors  
21 to four or five to improve our response time"?

22 A. Yes.

23 Q. And then that request was declined, wasn't it?

24 A. It was, yes, in relation to the specific assessors that were  
25 put forward. So, not as a general decline to have more  
26 assessors.

27 Q. But another assessor was not appointed at that time?

28 A. That's correct, they were unsuccessful in securing an  
29 alternative.

30 Q. Could we now go to document MOE 36?

31 **MS ALDRED:** Excuse me, sorry, I think we arranged  
32 earlier that we would have the Commission staff member  
33 sit with the witness so that she could be provided  
34 with a full copy of every document for the purposes of  
35 responding to questions.

1     **CHAIR:** Ms Wills is racing to the platform.

2     **MR OPIE:** It seems to be going quite well  
3     electronically.

4     **MS ALDRED:** I think it's useful and fair for her to  
5     have the whole context of the document.

6     **MR OPIE:** Sure.

7     Q. If we go to page 2 and call out paragraph 8? And so there  
8     Mr Ferguson is saying at that stage "We have 38 claims and  
9     we would like to appoint another two or three assessors to  
10    ensure the work progresses in a timely manner"?

11    A. Yes.

12    Q. If you could go to page 3 of that document. The notes have  
13    been taken out, I will leave that question.

14         But that request or the intention for another two or  
15    three at the beginning of 2018, that wasn't granted either,  
16    was it?

17    A. Again, in relation to the particular individuals put  
18    forward. So, there was absolutely an agreement that more  
19    assessors could be engaged. The difficulty was finding  
20    people that were suitable.

21    Q. So, it took about two and a half years to find more  
22    assessors?

23    A. In hindsight, it would have been far preferable had those  
24    assessors been brought on board sooner. If I could just add  
25    with that, so yes, that would have been far more ideal but  
26    the other challenge was also having staff to respond to the  
27    assessor. So, once the assessors complete their work, we  
28    need to have staff that can then work with them to finalise  
29    the report and recommendations and progress the claim. So,  
30    while I would have preferred that we had more assessors  
31    earlier, it may not have had a significant impact on the  
32    number of claims progressed through to resolution.

33    Q. So, even if you had had another five in 2018, you don't  
34    think you'd be much further ahead?



1 A. I think it was important that we also increased the size of  
2 the Sensitive Claims Team to respond to the increased  
3 volume.

4 Q. It does seem employing more assessors, given you had the  
5 majority of claims waiting to be assessed, that employing  
6 more assessors would have been an obvious step to take much  
7 earlier than this year; is that fair?

8 A. I think we did work to try and identify people and I don't  
9 want to give any sense that the team were not committed to  
10 doing that. It was very much in their interests to secure  
11 more assessors so they could get the work progressed.

12 Q. So, now that MOE has 177 claims, how long does it estimate  
13 it will take to resolve those?

14 A. So, we've got some work under way at the moment looking at  
15 process improvements or process changes that might need to  
16 happen. I think it's inevitable we will need to engage more  
17 resource to work through this volume. But, at the same  
18 time, I think we have to look at some different ways of  
19 doing some things.

20 So, for example, we're looking at where we have schools  
21 with multiple claims, engaging someone potentially to do  
22 research, detailed research on the relevant schools so that  
23 we consider those claims together and have a far more  
24 efficient process for conducting the research and analysis  
25 phase.

26 We need to give consideration to some different ways that  
27 we might progress. So, I think that's a matter of some  
28 urgency for us now. It's probably been a matter of some  
29 urgency this year, if I'm fair, as it's been clear that the  
30 rate of increase has been increasing beyond what we were  
31 used to or set up to respond to.

32 Q. And so, do I understand at this stage MOE doesn't have any  
33 targets in relation to claim resolution, X number a year?

34 A. No, I don't think it's necessarily useful to put it on a  
35 target basis because our process is so very tailored and the

1 claims themselves are so very different. What I have asked  
2 for is some clear timeframes in terms of our response to  
3 claimants and their representatives and the regularity with  
4 which we keep them informed but I think a numerical target  
5 in itself is probably not the right measure.

6 What we are now doing as a management team, is we are  
7 reviewing the numbers on a monthly basis to track to see are  
8 we making an inroad and what else we might need to do. And  
9 our conclusion at this point is we are going to have to do  
10 some things differently to be able to reduce back that time  
11 it takes to resolve claims.

12 Q. Because if you keep going at that 4.6 cases a year, then it  
13 would take decades, wouldn't it?

14 A. I have not done that calculation but it's not something that  
15 would be acceptable to the Ministry to continue at that  
16 rate.

17 Q. Just turning now to talk about joint claims with MSD. Those  
18 are claims where you've got some allegations which MSD  
19 considers it's responsible for?

20 A. Mm-Mmm.

21 Q. And others which MOE has responsibility for. If I could  
22 just take you to document MOE085. This is draft advice from  
23 Crown Law to MOE's solicitor dated 2 August 2019. Do you  
24 know if that advice was finalised?

25 A. I don't, off the top of my head, sorry.

26 Q. If we go to page 3, paragraph 10. In this paragraph, Crown  
27 Law is setting out its understanding of the differences  
28 between MOE's settlement process and MSD's process. And  
29 those three bullet points there, 10.1-10.3, it takes longer  
30 to complete, MSD applies a lower threshold, and MOE and MSD  
31 do not have a shared framework for assessing the quantum  
32 offered in respect of similar allegations; is that  
33 understanding of Crown Law right?

34 A. I would disagree with some elements of it. So, I think in  
35 terms of the Ministry's settlement process, that will very

1 much depend on the nature of the claim and the complexity of  
2 dealing with multiple other entities in some cases. So,  
3 generally speaking, I don't think our actual process for  
4 settlement takes longer but they may be referring to the new  
5 process, the Two Path Approach process that MSD put in place  
6 but we don't have a Fast Track Process similar to that, so  
7 that's most likely what I suspect that was relating to.

8 In terms of a lower threshold for taking account of  
9 allegations, I disagree with that statement. Other than the  
10 fact that the Fast Track Process for MSD, as I understand  
11 it, accepts claims at face value without corroborating  
12 information largely, I think that our threshold is similar  
13 for a fully assessed claim.

14 And in terms of a shared quantum for the framework, now,  
15 in relation to when this was raised by Crown Law, we at the  
16 end of last year we did ask MSD to do a comparison with a  
17 sample of claims. So, they took a sample of our settled  
18 claims and they ran that through their criteria and they  
19 ended up with broadly similar outcomes. Not exactly the  
20 same but broadly similar in terms of quantum.

21 So, I think in relation to the fact that MSD has a two-  
22 step process, yes, that's different, but in terms of our  
23 overall process, it's similar and the quantum is similar.

24 Q. And then could we expand one on the same page? This is  
25 again Crown Law recording its understanding at the time?

26 A. Mm.

27 Q. "MOE applies a high standard of proof and may not always  
28 take account of similar fact evidence. In contrast, MSD  
29 applies a lower standard of proof"; is that right or wrong  
30 in your opinion?

31 A. I would disagree with that statement. When I read that, I  
32 can only assume that they have relied on statements made by  
33 Cooper Legal to that effect as well because I understand  
34 that is their perception but I disagree that we do apply a  
35 high standard of proof. We look for – we consider – we

1 would need to consider whether a claim is meritorious but  
2 we're really looking for information to support that claim.  
3 We're not looking for proof as such that something happened,  
4 only that it probably happened.

5 Q. Right because that's, on the balance of probabilities that's  
6 the standard you apply?

7 A. I don't know whether the balance of probabilities, it's not  
8 always -

9 Q. More likely than not, probably -

10 A. But there is some evidence to indicate that, yes, the person  
11 may have experienced that abuse.

12 Q. And then if we could go to paragraph 11, just in the middle  
13 there Crown Law is saying, "It could be the case that when  
14 assessing similar allegations the settlement amounts offered  
15 by MSD will exceed amounts offered by MOE. These potential  
16 differences are likely to be made starker by the  
17 introduction of MSD's new claims process", that's the Two  
18 PA.

19 A. Yes.

20 Q. Is that the case, it could be when assessing similar  
21 allegations, MSD settlement amounts will exceed?

22 A. That's not the outcome of the work that we did at the end of  
23 last year, so I feel more confident that actually, the  
24 quantum would be broadly similar.

25 Q. And just at page 4, paragraph 20 of the advice, they are  
26 saying there if there are inconsistencies between the MSD  
27 and MOE approach, you may have an issue of arbitrariness?

28 A. Yes, that's what they're saying, yes.

29 Q. And then call out paragraph 21, then they say, "A clear way  
30 to mitigate this risk is to ensure there is this consistent  
31 approach and it could be achieved by having a single agency  
32 assessing joint claims"?

33 A. Yes.

34 Q. And so, did MOE then go on and consider whether there should  
35 be a single agency assessing joint claims?

1 A. Well, historically, joint claims, we would consider our  
2 relevant parts of each claim but the settlement would be  
3 made by one agency, so usually MSD. So, in terms of –  
4 sorry, can you just repeat the question that you're asking?

5 Q. Just whether, after receipt of that advice, did MOE, I  
6 suppose with MSD, consider whether there should be a single  
7 agency to assess joint claims?

8 A. We met and had some discussions with MSD, absolutely. I  
9 think there were a number of, in terms of where we've ended  
10 up, which I'm sure we'll get to, a number of factors that  
11 kind of drove the approach that we've ultimately adopted.

12 So, some consideration would have been given to that but  
13 we also felt that it was really important for the Ministry  
14 to have consistency across its own claims.

15 So, if a claim is not a joint claim with MSD but it  
16 contains facts similar to another claim that is Ministry of  
17 Education only, we thought it was very important that  
18 there's consistency across Ministry of Education claims.

19 There's also something, I think, to be said for the  
20 agency that is responsible for – ultimately responsible for  
21 what happened to hear and respond to claims. So, that's  
22 certainly something that we factored into our thinking.

23 So, if it relates to a school and the Ministry is the  
24 correct respondent, it seems appropriate that it is the  
25 Ministry looking into that and responding as appropriate to  
26 that.

27 I mean, there was also some consideration to Cooper Legal  
28 – Cooper Legal had also put forward a request on more than  
29 one occasion, that their preference and the preference of  
30 their claimants was that the Ministry separately consider  
31 claims. So, that did have some bearing on where we ended up  
32 eventually.

33 And then there was some practical considerations,  
34 although I think if a single entity was to review those  
35 joint claims, it would be less relevant, but we did have

1 some practical considerations around where elements of  
2 different claims sit within our schedules of work and  
3 whether we were responding to those at the same time, so  
4 that created some challenge to the joint process that did  
5 exist, if that makes sense.

6 Q. If there were just one agency responsible for it and they  
7 had the legal authority to do it, do you think it would make  
8 a difference that it wasn't the Ministry of Education  
9 responding or wasn't the Ministry of Social Development?

10 A. I think, other than the point that I made about the  
11 responsible agency I guess owning the response, I'm fairly  
12 agnostic about whether one entity did it or not.

13 The challenge probably is in having staff who have a  
14 really good understanding of the context in which the claims  
15 may have occurred, or the abuse may have occurred, that  
16 historical context and the access to the information.

17 Q. But would you say the Ministry was in agreement with Crown  
18 Law's advice that if the approaches were inconsistent as  
19 between MSD and MOE, that shouldn't occur? There shouldn't  
20 be an inconsistency?

21 A. I think some level of consistency is important. I think  
22 consistency across similar claims and similar situations is  
23 particularly important. So, that's where the outcome for a  
24 claim that relates to the Ministry as part of a joint claim  
25 needs to be consistent with other claims that the Ministry  
26 resolves. I think that's particularly important. Similar  
27 facts, similar setting, that consistency is essential. So,  
28 there is a potential risk either way possibly if different  
29 processes were followed. But, having said that, our  
30 processes are modelled on MSD's processes and have been  
31 fairly consistent up until the point that the Two PA process  
32 was introduced.

33 Q. But your and MSD's process, if you're saying they are  
34 consistent, they're not consistent with the Ministry of  
35 Health's process, are they?

1 A. I am not familiar with the Ministry of Health's sorry.

2 Q. I'll carry on, then. So, if we could go to MSD623 now,  
3 page 2. This is a 31 July 2020 letter from you and MSD to  
4 Cooper Legal about joint claims?

5 A. Yes.

6 Q. And you're saying now that you will apply your own  
7 assessment process – sorry, "Each Ministry will apply their  
8 own assessment process to the allegations they are  
9 responsible for"?

10 A. Correct.

11 Q. "And ensure that all claimants who raise concerns with the  
12 same agency are treated consistently using the one  
13 assessment model"?

14 A. Yes.

15 Q. So, that deals with, if you like, intra-agency consistency?

16 A. Mm-Mmm.

17 Q. So, within the Ministry of Education and within MSD. How  
18 will you ensure consistency between the two agencies?

19 A. Well, I think it's one of those areas where the continual  
20 dialogue with our colleagues in MSD, this will be one of the  
21 matters that the teams will continue to discuss. That's  
22 fundamental. And, as I say, to date we haven't identified  
23 outcomes that are fundamentally different, they're broadly  
24 similar. If we ended up in a situation where it looked like  
25 was diverging, that would be something that we certainly  
26 would want to discuss at the time and understand why that  
27 was.

28 Q. Okay. And sorry, the assessment that you did with MSD to  
29 work out whether the payment levels were roughly the same,  
30 when was that?

31 A. That was November/December 2019, last year.

32 Q. Not –

33 A. November, I think.

34 Q. So, we might – sorry, the Commission might not have seen the  
35 outcome of that?

1 A. Yeah, and I don't think I did see it in here, so we can  
2 certainly provide some information on that.

3 **CHAIR:** Thank you.

4 **MR OPIE:**

5 Q. You've said that – well, I imagine it requires a special  
6 skill set and a reasonable amount of experience to address  
7 these claims?

8 A. Yes.

9 Q. Is that right?

10 A. Yes.

11 Q. But, as I understand your evidence, for a reasonable number  
12 of claims it may be individual Boards of Trustees that the  
13 Ministry sees or you're responsible for that?

14 A. Where a claim falls under their responsibility, we would  
15 refer the claim to that Board of Trustees. So, it wouldn't  
16 work through the Ministry's claims process.

17 Q. And would you provide any assistance to Boards of Trustees  
18 to –

19 A. Absolutely. That absolutely wouldn't come from the  
20 Sensitive Claims Team. That would be our regional staff  
21 that have an existing relationship with the Board of  
22 Trustees and they would also get advice from organisations  
23 like the New Zealand School Trustees Association which  
24 provide effectively their HR employment advice and support  
25 and governance support.

26 Q. And what experience do – those regional people and NZSTA  
27 [New Zealand School Trustees Association], what experience  
28 do they have in addressing historical abuse or abuse claims?

29 A. That would no doubt vary on the individuals but it's  
30 something that unfortunately does come up from time to time.  
31 So, each of our regions will have had people that have some  
32 knowledge and experience in that space. We also will draw  
33 on, as appropriate, our Specialist Education Service, so  
34 educational psychologists potentially, depending on the  
35 situation. I think it would depend on what the needs were



1 for the school, what expertise they did have themselves on  
2 the Board and what else might be helpful.

3 I think we would be clear on, you know, our expectations  
4 in terms of how claims might be dealt with and that might  
5 include working them through how we deal with our own claims  
6 but it will be up to the Board to progress the claim as they  
7 see fit.

8 Q. So, the Ministry wouldn't control the outcome in any sense?

9 A. We wouldn't be able to because we don't have that governing  
10 oversight. The Board of Trustees is responsible for the  
11 governance and management of the school and the employment  
12 of the staff.

13 Q. Does that then create an issue about a claimant being  
14 treated potentially differently, depending on who the  
15 responsible entity is for the setting in which the abuse is  
16 alleged to have occurred?

17 A. I think in terms of consistency in terms of how the Crown  
18 responds, you know, less so. But individual Boards, as I  
19 say, they will manage claims as they choose to manage them.  
20 And we don't have the ability to, you know, control that.  
21 That's really up to them. Limited leave is available to us.

22 **CHAIR:** Do you have any idea or does the Ministry have  
23 any idea how many such claims have been dealt with by  
24 the Boards of Trustees?

25 A. No. We know that we've referred a relatively small number  
26 so far. We get a lot more contemporary claims of abuse come  
27 through. So, those ones tend to be dealt with quite  
28 differently and they're more likely to involve Police and an  
29 immediate response.

30 **CHAIR:** When you say "relatively few", any idea at  
31 all?

32 A. Off the top of my head, probably not more than half a dozen  
33 at the moment, but there will be claims in that bundle of  
34 131, I think it is, unresolved claims, where there are  
35 issues about who's the correct respondent to either the

1 claim in full or aspects of the claim. We've got one at the  
2 moment where there's potentially two, if not three, Boards  
3 of Trustees that might need to respond.

4 **CHAIR:** And they haven't been referred to those Boards  
5 yet?

6 A. We're still working that through with the Boards and  
7 clarifying who's responsible and best placed to respond.

8 **CHAIR:** Just following that, of those that you have  
9 referred, do you keep a track of the outcomes of those  
10 investigations or assessments?

11 A. I can't answer that question for you, sorry.

12 **CHAIR:** Okay, thank you.

13 **MR OPIE:**

14 Q. Is it also the case that at least some of the Boards of  
15 Trustees may be insured for claims like these?

16 A. Yes, I would expect mostly they would be.

17 Q. So, the insurer may take conduct of the claim?

18 A. That's not a process I'd be familiar with.

19 Q. Just moving to ask some questions now about what you've said  
20 in relation to Te Tiriti/Treaty. Is the Ministry confident  
21 that its redress processes are consistent with the Treaty?

22 A. I think our process takes a very survivor-centric view.  
23 It's very tailored to the individual. I think that we've  
24 been able to accommodate different aspects of tikanga as  
25 appropriate and as those matters have arisen. What I would  
26 like to do though, what we haven't done is consulted  
27 externally around our current processes and that's the piece  
28 of work that I think we need to do next year. And I don't  
29 want to rush that but to really interrogate our current  
30 process and see how it can be improved and whether there is  
31 anything that is not consistent or could be more consistent  
32 with the principles of Te Tiriti.

33 Q. Why has the Ministry not got to that external consultation  
34 yet?

1 A. So, it was within scope of the external review that we  
2 carried out this year. Partly, there was a timing issue, in  
3 terms of the reviewer's ability to engage externally but,  
4 actually, as they started that work, we actually stepped  
5 back and thought that we probably needed to do this more  
6 fulsomely than the initial look that the reviewers have  
7 taken.

8 So, that's effectively where we're at with the process.

9 We haven't, to my knowledge, had any concerns raised in  
10 that space but I think, as we as an organisation have been  
11 investing more in ourselves, in terms of both training in Te  
12 Tiriti and general responsiveness to diversity, it's one of  
13 the things that we identified as something that we wanted to  
14 do and needed to do going forward.

15 Q. And so, when did the Ministry, I guess, become aware that it  
16 did have an obligation to consult?

17 A. On the process?

18 Q. Mm.

19 A. I couldn't answer that question for you. I mean, I think  
20 we've been clear that we've always had an obligation to  
21 operate in a way that is consistent with the principles of  
22 the Treaty and work in partnership. I think, in terms of  
23 being clear what that means in relation to consulting on our  
24 process, that is something that we have given some attention  
25 to since last year.

26 Q. Because the process has been going for 10 years?

27 A. That's right, yes. And I think a bit of context with the  
28 process; So, it is very much one that evolved and we did  
29 draw early on, on what could we learn from the MSD process  
30 that had been in place prior to us needing to put a process  
31 in place ourselves. And it has, you know, grown over time  
32 in terms of the scale and very clearly now we're at a point  
33 where the number of claims - we need to ensure that our  
34 processes continue to be fit for purpose and appropriate.

1 Q. As I understand it, within the Crown you have the Ministry  
2 of Health, Ministry of Education, Ministry of Social  
3 Development, each running redress processes?

4 A. (Nods).

5 Q. Does having multiple agencies responsible for these  
6 processes make it harder to ensure consistency with the  
7 principles of the Treaty?

8 A. I think as long as - no, I don't think it makes it harder to  
9 be consistent with the principles. And I think there's an  
10 opportunity to learn from each other as well, and I am aware  
11 that MSD is further ahead than we are in that process. But  
12 I also think it's really important that we look at the  
13 process as it applies in an education context to ensure that  
14 that's fit for purpose.

15 So, hence, we think that it's really important we conduct  
16 that consultation ourselves, rather than simply rely on a  
17 process that another agency may have undertaken. But there  
18 will be learnings and things that we can take from that, I'm  
19 sure.

20 Q. I suppose again, if there were the one agency responsible,  
21 then it would have to keep on consulting over time but the  
22 initial consultation would be just the one agency doing it,  
23 rather than multiple agencies?

24 A. Well, I guess in hindsight there was nothing stopping the  
25 agencies doing consultation together, and we haven't done  
26 that. But I don't know that that's necessarily the  
27 strongest argument for one agency. You know, looking at all  
28 claims but I think that you'd still want to look at what  
29 makes sense in the different contexts that those agencies  
30 are operating in or that the claims have been made in.

31 Q. Is it right that the Ministry doesn't know the demographic  
32 make-up of the people who put claims to it?

33 A. Only anecdotally. So, we have not collected demographic  
34 information. We have not required claimants to give us that  
35 information. It's one of the things that we consider going

1 forward about whether we should be doing that. Anecdotally  
2 speaking to the team, we would estimate that more than half  
3 of the claimants were Māori.

4 Q. What has been the reasons for deciding not to collect that  
5 information up-to-date?

6 A. I think it's very much not been a deliberate decision not to  
7 collect it. I think it's been a very bespoke process  
8 tailored to the individual. So, the team hasn't collected  
9 that information in order to make decisions about the  
10 process because the process is, in itself, customisable to  
11 the individual.

12 Q. And so, if you were to change that decision going forward,  
13 why would you change it?

14 A. I think now that we have a different scale of claims coming  
15 through, there might be some value in looking and seeing if  
16 that information could tell us anything that could be  
17 helpful to improve the process.

18 Q. And you've got the external review in draft?

19 A. Mm-Mmm.

20 Q. And you're thinking that you're going to consult after that?

21 A. Mm-Mmm.

22 Q. Do you have a timeframe for that process to start?

23 A. We haven't. It certainly would need to start in the first  
24 half of next calendar year. So, there's some planning work  
25 being carried out at the moment to look at what that might  
26 look like and what other process improvements we need to be  
27 putting in place in the very near future.

28 Q. I would just like to talk now about the quantum offered in  
29 settlement payments.

30 A. Mm-Mmm.

31 Q. You said in your primary brief that MOE calculates how much  
32 to offer by considering payments made in resolved claims  
33 with similar facts. So, that means the amount used in the  
34 previous cases, those are precedents?

35 A. Correct.

1 Q. So, how did MOE decide how much to offer at the beginning of  
2 the process?

3 A. We looked at MSD claims basically until we built up a number  
4 of claims ourselves.

5 Q. Did you look at settlement categories that MSD had at that  
6 time?

7 A. We didn't put in place categories but we looked at  
8 settlement amounts for similar situations.

9 Q. And did the Ministry understand how MSD had arrived at those  
10 settlement amounts?

11 A. I couldn't tell you, sorry.

12 Q. If I could just go to MOE064, page 1 of that document. This  
13 is an internal memorandum giving advice on the process for  
14 determining ex gratia payments. If I could just go to  
15 paragraph 4 and the third bullet point. The solicitor is  
16 advising there that, "Where the allegations have merit, an  
17 assessment is carried out on the extent and degree to which  
18 the claimant suffered as a result of the abuse; where  
19 payment is warranted, they are assessed against past  
20 payments"; that's right?

21 A. Yes, that's what it says.

22 Q. If we could go out of that, keep in that document, do you  
23 see there's a broad assessment of settlement categories  
24 starting at the bottom of the page there?

25 A. Yes.

26 Q. If we go on to the next page, please, page 2 -

27 **CHAIR:** Just before going on, have you seen this  
28 document before?

29 A. I have, yes.

30 **CHAIR:** So, you are familiar with it?

31 A. Yes.

32 **MR OPIE:**

33 Q. Just go to - I suppose the first question is, is MOE still  
34 using these settlement categories?

1 A. I think in the context of this document, I understand that  
2 these categories - this was put in place in relation to the  
3 specific claim, so it's not a comprehensive categorisation.  
4 It was relevant to a particular case that was being referred  
5 to. But broadly looking at those categories, they are  
6 similar, yes, they're broadly what we would still apply. I  
7 would note for category 5 there's no upper limit, so it's  
8 not capped, and some more recent settlements have been at  
9 the \$40,000 level.

10 Q. And so, sorry, you said that you thought that these  
11 categories just applied to a specific claim?

12 A. Well, I think they were prepared in relation to a specific  
13 claim, but they do reflect the levels but they're not  
14 comprehensive categories, if you like, that we would refer  
15 to in each case. But they accurately reflect the quantum as  
16 they relate to the information in the memo.

17 Q. Right. Could we pull up category 5, please? So, that's  
18 where you've got, "Claim is characterised as serious or  
19 extremely serious" and if you look at the frequency of abuse  
20 including hospitalisation potentially, and you say there's  
21 no upper limit but the most that has been paid is \$40,000 to  
22 date?

23 A. That's correct, plus costs, yep, plus costs.

24 Q. Is \$40,000 for that level of abuse, is that low?

25 A. I mean, I think in terms of the redress process, the amounts  
26 that are paid out are about acknowledging that something  
27 happened to someone that should not have happened. It's an  
28 amount that is provided to support them to, you know,  
29 perhaps move on from what happened to them and to provide  
30 some assistance to them in relation to - if they have  
31 particular needs, for example. Counselling is one thing  
32 that people might want to use some of the money for. I'm  
33 not probably well placed to be able to quantify what the  
34 correct amount would be. I do think it's an area where  
35 consistency across the Crown would be helpful and, as I

1 understand it, certainly in relation to MSD we are broadly  
2 consistent but I don't know - I wouldn't be well equipped to  
3 be able to quantify what the right amount should be,  
4 recognising that we're not in a position to understand the  
5 loss that the individual has experienced. We don't go  
6 through a process to that level to understand exactly what  
7 the impact has been.

8 Q. Well, I'll ask one more question because this is a point  
9 that I want to come to in a bit. If we go back, if we just  
10 pull out of that and go back to page 1 of the memorandum,  
11 and pull out the third bullet point in paragraph 4. There  
12 the solicitor is advising that you do assess the  
13 loss - sorry, the Ministry assesses the loss as a result of  
14 the abuse?

15 A. I think in relation to that point, that's about, you know,  
16 factors such as the frequency and the extent of the harm.  
17 But, in terms of quantifying that, I still don't think we,  
18 through this process, would be in a position to be able to  
19 quantify that loss for the individual. I don't think this  
20 process really would allow us to do that.

21 Q. No but you say in your evidence that the Ministry wants a  
22 process that is fair?

23 A. Mm.

24 Q. And part of that, is for example if a person has been - you  
25 find through the process that probably or it's more likely  
26 than not that the person has been seriously sexually abused  
27 and you're settling that claim, then the amount you pay is  
28 part of whether or not it's fair, isn't it?

29 A. I think it's - in terms of the settlement amount, it's a  
30 decision the claimant needs to make in terms of whether  
31 that's fair. And in some cases claimants will not accept an  
32 offer and the claim won't be resolved or it will continue.  
33 And in some cases, we resolve that at a judicial settlement  
34 conference. That might relate to the individual providing  
35 further information that is relevant.



- 1 Q. So, you're saying, well, if that's not enough, then you've  
2 got the option to litigate it?
- 3 A. Well, I think it's something that the claimant has that  
4 right to consider, if they feel that what is being offered  
5 is not fair. But, you know, we enter into conversations  
6 with claimants and their representatives around that. But,  
7 again, I still come back to I'm not sure how we would  
8 quantify loss for individuals, given the level of assessment  
9 that an ADR [Alternative Dispute Resolution] process  
10 entails. I think that's something that generally would  
11 require more than the ADR process provides for.
- 12 Q. Because it would require something like the receipt of  
13 psychological reports, that sort of nature? What more do  
14 you think would be required?
- 15 A. Potentially but the information, you see, we're not - it's  
16 very hard for an assessor, I think, to be able to quantify  
17 the impact that events have had on them and their life  
18 outcomes, to be able to determine that it was these events,  
19 as opposed to other events, that have contributed. I think  
20 we look at quite a narrow piece of information around the  
21 claim itself and the facts of whether the events likely took  
22 place or not and here's a process of redress to respond to  
23 that.
- 24 Q. There's a lot of information already available about the  
25 extent to which serious abuse impacts on people, isn't  
26 there?
- 27 A. There is and people's responses are individual but, again, I  
28 still come back to I don't think the Ministry is well  
29 positioned to be able to quantify that for individuals.
- 30 Q. It does quantify it in a way though, doesn't it, because it  
31 says, well, coming to our settlement - we have this  
32 settlement process available and within it we're offering  
33 you these things, and part of that is that, even for very  
34 serious abuse, you're probably not going to get more than  
35 \$40,000? So, it does quantify it in that way, doesn't it?

1 A. Not in terms of the loss to the individual or the impact on  
2 the individual. This is an amount of redress. It's  
3 not - we're not trying to compensate for what's happened, if  
4 you like.

5 **CHAIR:** You are going to start a new topic?

6 **MR OPIE:** Carrying on a little bit, there's a little  
7 way to go with that one, shall we pause?

8 **CHAIR:** It is a good time for a pause at this stage?

9 **MR OPIE:** Yes.

10 **CHAIR:** We will take the lunch adjournment, thank you.

11

12

13 **Hearing adjourned from 12.57 p.m. until 2.19 p.m.**

14

15

16 **CHAIR:** Yes, Mr Opie.

17 **MR OPIE:** Thank you.

18 Q. So, we were talking, Ms Hurst, about settlement quantum and  
19 I'd just like to go now to document MSC346. So, this is an  
20 email from Crown Law to MSD, so it's not an email to you  
21 obviously, and it's explaining sums paid as compensation in  
22 the W v AG and S v AG cases. Are you familiar with those  
23 cases?

24 A. Not especially, I'm afraid.

25 Q. If I could just say one was in 1999, that was the W case.

26 A. Mm-Mmm.

27 Q. And S was 2003, both of those cases are historic abuse cases  
28 that were successful essentially. You will see there, if I  
29 could just call out the payments there, \$330,000 and  
30 \$357,000.

31 **MS ALDRED:** Excuse me, I'm just wondering why the  
32 witness is being asked to comment potentially on a  
33 document between Crown Law and the Ministry of Social  
34 Development, not even the Ministry of Education  
35 generally is a recipient or addressee.

1     **CHAIR:** I am sure Mr Opie will explain it as best he  
2     can and then we'll - I suspect I know where you're  
3     going, Mr Opie.

4     **MS OPIE:** I can explain it now.

5     **CHAIR:** I think we'll just let you go and if we think  
6     it's irrelevant or if the witness is not able to  
7     answer or needs some time, we will certainly give it  
8     to her.

9     **MR OPIE:** Sure.

10  Q. So, you'll see there that W's damages sum is \$180,000, do  
11  you see that?

12  A. Mm-Mmm.

13  Q. And S was \$160,000. And if we could take that back, and if  
14  we could call out the next paragraph. In these cases,  
15  liability was determined "in the plaintiff's favour". There  
16  was "no bar in ACC, no Limitation bar", those issues weren't  
17  there, and "the Court found the plaintiffs had both been  
18  seriously and over a prolonged timeframe been sexually  
19  assaulted in their foster homes".

20         And then just pull up the last paragraph, please. "The  
21  greater the finding of liability/damage/truth the higher the  
22  sums of money" and so, "the higher burden of proof for a  
23  plaintiff. But on a lower scale of proof, then the sums and  
24  the liability are also reduced."

25         So, my question is, well, to pay say the highest sum,  
26  \$40,000, the Ministry makes a finding that it's more likely  
27  than not that the claimant suffered serious sexual or  
28  physical abuse; is that right?

29  **MS ALDRED:** I would like to object to that question,  
30  Madam Chair, and the basis for that is it's  
31  essentially asking the witness, who isn't a lawyer, to  
32  comment on what is essentially a legal matter.

33         Mr Opie quite fairly did take the witness to that middle  
34  paragraph which makes it clear that these are damages that  
35  were paid in the context of a Court having already

1 determined liability but, nevertheless, in order to be able  
2 to comment fairly or fully on this comparison that my friend  
3 is inviting, I really think the witness would need to be  
4 able to answer that as a lawyer. It's open to Mr Opie to  
5 make this submission, which is effectively what he's putting  
6 to the witness, it's in the nature of a submission. I don't  
7 think it's fair to put that question to a non-lawyer.

8 **CHAIR:** Frankly, I don't think it's a legal question.  
9 I think it's a question of numbers. And the witness,  
10 who I am sure is more than capable of saying if she  
11 can answer it, and if she can she will, and if she is  
12 unable to then she will not. I don't see anything  
13 wrong with the question at this stage, Mr Opie, so  
14 please carry on.

15 **MS OPIE:** Thank you.

16 Q. So, my question was, well, to come into that category 5,  
17 there is a decision that to a particular standard the  
18 claimant has suffered serious sexual and/or physical abuse;  
19 is that right?

20 A. It's the serious end of the offending spectrum.

21 Q. But yet, that claimant in the settlement process might get  
22 some \$140,000 less than what W received, for example, in  
23 1999?

24 A. So, there's a couple of things I'd say to that.

25 So, I think the first thing is that there is no upper  
26 limit. So, on the facts of the 46 cases that we have  
27 resolved to date, the upper limit of what we have paid has  
28 been \$40,000 but there isn't an upper cap to the settlement  
29 limits.

30 And what gets paid out is judged on the basis of the  
31 facts of the case.

32 So, I'm not familiar with these cases and I'm just not in  
33 a position to say whether the facts are comparable or not,  
34 sorry.

1 Q. What I'm asking you about, is that on its face there's a big  
2 disparity between the \$40,000 which the Ministry has paid to  
3 date when it's found that a particular claimant suffered  
4 serious sexual and/or physical abuse, and then these amounts  
5 back in 1999-2003?

6 A. As I say, I find it difficult to compare not knowing the  
7 facts of the two cases but one is a litigation context, one  
8 is a redress context. I think they're somewhat different  
9 but I understand the point you're making, I just don't feel  
10 that I know enough about this situation to be able to agree  
11 with you on that point.

12 Q. Okay. Can I ask, so you say different in a trial situation  
13 than a redress situation. So, you say one of the  
14 differences might be that the claimant hasn't come right  
15 through a trial; yes?

16 A. Well, I think it's what goes with the trial process, in  
17 terms of the information available to the Court in making  
18 its ruling.

19 Q. But you say that the research that the Ministry does into  
20 claims is extensive, don't you?

21 A. What we do is look at all the information that we can find  
22 relating to the events. So, we will search records, we will  
23 talk to the claimant and their representative, we will  
24 sometimes talk to other witnesses that are either identified  
25 by the claimant or the assessor that may have some relevant  
26 information to assess whether the event occurred.

27 We don't put extensive research into assessing the impact  
28 of that on the claimant themselves. So, it's not something  
29 that's not considered at all but it's not something that the  
30 ADR process has a large part around trying to understand the  
31 impact it's had on the claimant.

32 Q. Why would you not want to understand the impact?

33 A. It's not that we don't want to understand the impact. It's  
34 just not part of the process for assessing a claim for  
35 redress.

1 Q. But you're saying that you do put a lot of effort into  
2 researching the facts of the case to reach an assessment on  
3 whether what is being claimed occurred?

4 A. Mm-Mmm.

5 Q. Yes?

6 A. Yes.

7 Q. And that takes quite a long time?

8 A. Mm-Mmm.

9 Q. But you don't put the same amount of work into - or do you  
10 do any work on -

11 A. The assessor will comment on that, so it's certainly  
12 something they would talk to the claimant about and an  
13 understanding of what potential impact that might be. But  
14 it's not work that would be sufficient to then use that to  
15 estimate the damages, if you like.

16 Q. Why wouldn't you do that work?

17 A. I think that would create a really significant volume of  
18 work that would require quite considerable resource and it's  
19 not within the ADR process, so it's not something that has  
20 been set out in either the Crown Litigation Strategy or the  
21 Crown Resolution Strategy as part of what the ADR process is  
22 trying to resolve, in my understanding.

23 Q. And so, if a claimant has suffered significant harm as a  
24 result of abuse, the ADR process might not address that?

25 A. I'm not quite sure I understand the question.

26 Q. Well, you were saying that it would require a significant  
27 volume of work to assess harm and the Ministry pays the  
28 amounts it does but it doesn't necessarily know what the  
29 harm is?

30 A. Well, no, I haven't said that. So, we pay the amounts we do  
31 because we have regard to previous settlements and we look  
32 to be consistent. So, that's the basis on which the amounts  
33 that we pay at the moment have been calculated and that's, I  
34 think, consistent with other agencies or certainly with MSD,

1 so that's the basis on which the process works at the  
2 moment.

3 I think there's a real importance that consistency  
4 exists. In terms of being able to quantify that, I don't  
5 know that that's something that individual agencies are best  
6 placed to try and work out for themselves. I think, you  
7 know, if I refer back to the conversation we had earlier  
8 around the need for consistency and fairness, it's one of  
9 those things that I think needs to be looked at  
10 cross-agency.

11 Q. But there could be consistency if higher amounts were paid  
12 across the board, isn't that right?

13 A. There could be, if that were the case.

14 Q. So, the need for consistency has nothing to do with how much  
15 should be paid for particular categories of abuse, does it?

16 A. Well, except that we have regard to existing settlements  
17 when we settle. So, at the moment it does but if that were  
18 to change, if there was a different framework, if you like,  
19 applied in the future, then that could still be consistent  
20 across future claims.

21 Q. So, that's the issue, isn't it? I'm not saying that they  
22 are, I'm just putting the proposition, but if the amounts  
23 have been set quite low on one point of view and in  
24 comparison with these cases, then that lowness will continue  
25 through all of the settlement payments, won't it?

26 A. I think that's one of the things no doubt the Commission  
27 will want to consider.

28 Q. But you're confident because of the process that the  
29 Ministry goes through and the research it does, that when it  
30 reaches the view to pay a settlement, that will be because  
31 of a robust view that the things the claimant is alleging  
32 probably happened?

33 A. Yes, I think that's fair.

- 1 Q. You said in your evidence that the Ministry does not take  
2 into account ACC or Limitation when it's making settlement  
3 payments; is that right?
- 4 A. You might need to take me to the point so I can -
- 5 Q. Oh, sorry. Paragraph 5.36 of your main brief?
- 6 A. Yes, that's correct, "Offers to resolve claims are made  
7 notwithstanding legislative restrictions", so we don't rely  
8 on a legal - technical, if you like, reason when we are  
9 settling claims through the ADR process.
- 10 Q. You'll make a payment, notwithstanding that those defences  
11 could be raised? You will offer to make a settlement, even  
12 though if the case went to Court -
- 13 A. Absolutely. They're not considered at that stage.
- 14 Q. But can I just ask, the quantum again of what you offer, it  
15 is affected by availability of those defences, isn't it?  
16 So, if the ACC bar weren't there and if the Limitation bar  
17 weren't there, then the Ministry would probably offer more  
18 to settle claims?
- 19 A. I don't think so because, as I say, the primary driver has  
20 been prior settlements. Yeah, I don't think that's  
21 accurate.
- 22 Q. Well, if in the W and S cases one or two of the factors that  
23 required that there be a settlement was that there was no  
24 ACC obstacle and no Limitation obstacle; yes, that's what  
25 the email said?
- 26 A. Yep.
- 27 Q. So, that must have affected the amount that was paid in  
28 damages because those were no longer obstacles for the  
29 claim?
- 30 A. I'm not sure it would.
- 31 Q. You're not sure?
- 32 A. No, sorry.
- 33 Q. Okay. And you're saying you don't see any particular issue  
34 about the differences between these damages and what the



1 Ministry routinely pays because you're saying, "We're not  
2 trying to compensate for harm"; is that right?

3 A. Well, I think what I'm saying is that the redress amount  
4 that is paid is simply that. It's not pretending to be  
5 compensation for all harm caused.

6 Q. Okay.

7 A. And I think, you know, yes, there is an option for claimants  
8 if they wish to go through this process but I don't think we  
9 use either the ACC bar or the Limitation Act to determine  
10 the quantum of what we would pay. So, for example, we  
11 certainly wouldn't differentiate if there was a case where a  
12 claimant could - you know, those defences weren't available,  
13 versus a claim where they were. We wouldn't change the  
14 amount that we would offer in the ADR process.

15 Q. Okay. If we could go to document MOE0000221. So, this  
16 document is a draft briefing to the Attorney-General  
17 concerning limitation defences and it's been sent to the  
18 Ministry, amongst other recipients. Are you familiar with  
19 this document?

20 A. I have seen this one, yes.

21 Q. So, if we just go to page 18, paragraph 81 -

22 **CHAIR:** Sorry, what was the date of the document?

23 A. November 2018.

24 **CHAIR:** 2018, thank you.

25 **MR OPIE:**

26 Q. Sorry, back one page, please. Call out paragraph 81. So,  
27 this is Crown Law advising the Attorney-General that if the  
28 limitation defence were removed or the discretion expanded  
29 it is likely there would be a significant improvement in the  
30 prospects of success of many claims filed in court; can you  
31 see that?

32 A. 81, yes.

33 Q. And then if we could now go to page 19 and call out 81.1.

34 So, it's saying there that the removal of the limitation

1 defence would likely lead to an increase in the number of  
2 claimants who argue their claims in court; do you see that?

3 A. (Nods).

4 Q. And then, can we call out 81.2.1. So the removal, this is  
5 Crown Law again, the removal of the limitation defence bar  
6 would also likely lead to at least some increase in the  
7 amount paid to claimants because it would materially improve  
8 the bargaining power of claimants; do you see that there?

9 A. I do, yes.

10 Q. So, that's Crown Law's advice but are you saying you don't  
11 agree with that?

12 A. I guess what I'm saying, is that - I mean, I don't know that  
13 we see the process at the moment as a bargaining process,  
14 but we will make, you know, claimants might make their own  
15 offer to settle and we might make an alternative one. I  
16 don't see it as being quite as straightforward as that.

17 Q. And why do you not see it as a bargaining process?

18 A. Well, I think there's a discussion around the basis on which  
19 we offer to settle. The information - the conclusions we've  
20 drawn, the information that has led us to those conclusions  
21 and how that then compares relevant to similar cases.

22 I mean, trying to quantify - it's not an area I feel that  
23 I'm well equipped to be able to quantify what the right  
24 amounts would be.

25 Q. Is it fair to say it's also not bargaining because the  
26 Ministry does have these fairly set categories into which it  
27 fits the claims?

28 A. We don't have set categories but we compare to similar. So,  
29 as I say, that earlier memo we saw was prepared in relation  
30 to a specific claim, a specific case, but it's not as set as  
31 that but it's more a comparison to cases with similar  
32 circumstances.

33 Q. We can take that document away for the moment, thanks.

34 At paragraph 5.28 of your primary brief, you said that  
35 "ascertaining loss can be difficult because given the

1 historic nature of claims there can be limited information  
2 available to shed any light on a claimant's allegations";  
3 that's right?

4 A. Yes.

5 Q. But in some cases that won't be an issue?

6 A. Yes, sometimes there will be more information available than  
7 others.

8 Q. And an example of that might be where the abuser has been  
9 prosecuted and convicted?

10 A. Correct.

11 Q. And in other circumstances because of the research that has  
12 been done, the assessor might find the claimant's  
13 allegations credible; is that right?

14 A. Yes, that would be one thing that assessors would consider.

15 Q. Now if I could go to document MOE70, page 2, paragraph 4.1,  
16 please.

17 **CHAIR:** Could you describe the document, please?

18 **MR OPIE:** Sorry, yes. This is a 19 November 2014  
19 memorandum from the Ministry's solicitor to the Deputy  
20 Secretary talking about the processes for payments.  
21 I've just called out that paragraph there saying  
22 payments have been made up to \$30,000 for cases where  
23 there have been findings of serious practice breaches.

24 So, where there are those findings, doesn't MOE  
25 compensate for loss arising from those; saying we've found a  
26 serious practice breach, we will therefore pay more money?

27 A. I think that comes down to the seriousness and regularity of  
28 the abuse that occurred.

29 Q. Sure.

30 A. So, for example, a serious practice breach might relate to  
31 the extent of, you know, time-out, seclusion etc., so it  
32 could relate to a number of things.

33 Q. But where a finding of a serious practice breach is made,  
34 this memo is saying we might pay up to \$30,000?

35 A. Mm-Mmm.

1 Q. And you're making a larger payment for a more serious issue  
2 than for a less serious issue, is that right?

3 A. Yes.

4 Q. So, aren't you compensating for loss because the amount  
5 you're paying is determined in part by the seriousness of  
6 the breach?

7 A. I think the payments are relative to the harm caused but it  
8 doesn't try to compensate for a specific loss.

9 Q. Okay.

10 A. So, I do think, you know, it's appropriate to have relative  
11 payments for more serious abuse and more frequent abuse.

12 Q. If you are providing these payments as part of redress, why  
13 wouldn't you compensate for the harm caused?

14 A. Because we're not in a position to be able to quantify what  
15 that would be. I think there would be a whole lot more  
16 information required in order to, you know, and probably  
17 expertise beyond my own, in order to be able to do that.

18 Q. So, the issue is not so much, well, we don't think it's  
19 appropriate to pay that? It's more, it would require a lot  
20 more work; is that -

21 A. Well, it's not work that currently sits within our process  
22 so -

23 Q. If we just go now to MOE261, this is just an 8 March 2010  
24 internal Ministry of Education document, if I could go to  
25 page 2, please. Could you pull out the last paragraph,  
26 numbered 2? This is saying when an ex gratia payment will be  
27 made, and so it follows a finding that a claim has merit.  
28 So, the Crown may not be legally liable but there's a strong  
29 case to answer. And the investigation indicates the  
30 complainant did suffer serious abuse of a type not covered  
31 by ACC and the Crown has a moral obligation to the person?

32 A. Mm-Mmm.

33 Q. So, if there is a finding of serious abuse suffered and the  
34 Crown has a moral obligation, shouldn't that moral  
35 obligation include rectification of the harm?

1 A. I don't know that a sum of money can rectify the harm  
2 necessarily.

3 Q. No.

4 A. But, in terms of your point, I think the intent of the  
5 payment in the redress process is to recognise that harm has  
6 occurred but it's not to fully compensate for any potential  
7 loss.

8 Q. And we've already discussed why not. So, yesterday, and the  
9 Crown can raise issue if they want but Mr Groom of Oranga  
10 Tamariki, he said that if a child is harmed in care, that  
11 child will receive a therapeutic assessment regarding the  
12 impact of that harm. So, why would a person who was harmed  
13 much earlier, before the existence of Oranga Tamariki, why  
14 would they not be assessed in a similar way?

15 A. It's just not something that's been part of our process. I  
16 think it's probably challenging for historical cases. I am  
17 not sure if it would be how you'd do that assessment some  
18 decades after an event.

19 Q. So, in some cases it might be - those causation issues could  
20 be complicated?

21 A. Mm.

22 Q. In some cases they may not be so complicated? You'd have to  
23 do a case by case assessment, wouldn't you?

24 A. I think you would.

25 Q. Do you investigate if a claim is covered by ACC, just  
26 referring to that reference there?

27 A. I'm not sure I know the answer to that. I suspect that that  
28 would be - we no longer are required to file statements in  
29 reply, so I suspect it would have been at that point that  
30 would have been looked at, but I don't know that we would do  
31 that now because we don't file statements in reply unless  
32 the claim is progressing down the trial track.

33 Q. So, in determining a response to a particular claim, you  
34 might not know whether the person is receiving entitlements  
35 or compensation from ACC?

1 A. I think where it might come up is if the situation is one  
2 where the claimant might be eligible for some of the support  
3 under ACC. So, in that situation, if the person is  
4 unrepresented, that may be a conversation a senior advisor  
5 might have with them, depending on the circumstances of the  
6 abuse. So, yes, in that scenario they might talk to the  
7 claimant about possible access to support that way.

8 Q. But in deciding settlement amounts, the process doesn't  
9 differentiate between claimants?

10 A. No, it doesn't. That would be unfair.

11 Q. Why is that?

12 A. Because, going back to this point, it's about the moral  
13 obligation. It's a meritorious claim, yes, there's  
14 substance to it, we have a moral obligation to respond and  
15 those technical arguments really come down the track if the  
16 claim then proceeds down the litigation path.

17 Q. Your point there about - that one of your staff might talk  
18 to a claimant about ACC - there could be a range of  
19 government services which might assist the claimant. Does  
20 the Ministry try to link up the claimant with other  
21 agencies?

22 A. It's something we've talked about more recently. So,  
23 historically I don't know to what extent we've done that but  
24 certainly more recently we've talked about putting  
25 claimants, particularly those that are unrepresented and  
26 therefore don't have someone else who is most likely doing  
27 that for them, in touch with relevant sources of support.

28 Q. Do you know why that wasn't done earlier?

29 A. I don't, sorry. And I can't guarantee it wasn't, I just  
30 know that it's something that we've been more conscious of  
31 more recently in making sure that that has happened.

32 So, it came up for me with a case where the claimant was  
33 overseas and had not been able to access ACC, so I was  
34 asking questions about making sure we did put claimants in

1 touch with relevant supports locally where they were  
2 eligible.

3 Q. Just a quick question, if we could go very quickly back to  
4 MOE085. This is just the Crown Law opinion again about  
5 joint claims.

6 You said earlier that you thought that when Crown Law set  
7 out the differences as it understood them in this draft  
8 advice, that it may have got that information from Cooper  
9 Legal?

10 A. Well, I think - so, that was in relation to quantum, I  
11 think?

12 Q. The various differences that they were saying at the time  
13 they understood to exist between the MSD and the MOE.

14 A. I think there was one point in particular I was relating  
15 that to.

16 Q. Would you like to go -

17 A. I am just going back to it.

18 Q. Yeah, sure. I think if you go to page 3, paragraph 10.

19 A. It might have been the footnote actually which I'm  
20 struggling to read.

21 Q. I'll just pull it out there. You were saying that you  
22 didn't agree with Crown Law's analysis?

23 A. Yes, that's correct, that's correct.

24 Q. And you thought that they could have got the information -

25 A. It was specifically in relation to the footnote on that  
26 page, so it says, "We understand that MOE applies a high  
27 standard of proof and may not always take the account of  
28 similar fact evidence when assessing a claim". So, that was  
29 the bit that I thought, when I read it, I wasn't sure where  
30 they had come to that conclusion but it occurred to me it  
31 might be because that was a matter that Cooper Legal had  
32 raised through Crown Law that they were concerned about.

33 Q. Basically, in relation to those bullet points, numbered  
34 paragraphs 10.1-10.3, you didn't agree with the analysis.

1 And my question was, was there then a communication from the  
2 Ministry back to Crown Law to say, "No, we don't agree"?

3 A. I don't know the answer to that, sorry.

4 Q. And now if we just turn to what the Ministry does offer. At  
5 5.33 of your initial brief you set out what the settlement  
6 offers may include. So, it could include compensation,  
7 legal fees, an apology and you also say, "Access to other  
8 support requested by the claimant". So, does that mean that  
9 the settlement would generally just include the  
10 compensation, legal fees and apology if the claimant doesn't  
11 ask for anything else?

12 A. So, that might be something that comes up in discussion with  
13 the claimant. As I say, I do think this probably would  
14 differ, depending on whether the claimant is represented or  
15 not because I think we would expect the claimant's lawyer to  
16 raise.

17 But for unrepresented claimants, I would expect there to  
18 be a conversation about what they're seeking and if there  
19 was an indication that they were still struggling to move on  
20 with their life, then I would expect that we would include  
21 that potentially.

22 We have done some different things with counselling as  
23 part of settlement. So, we have paid for a number of  
24 sessions or arranged counselling through another party or we  
25 have simply factored that into the quantum of the payment  
26 that was made, so they can then choose to spend that as they  
27 would but recognising it's in relation to counselling.

28 Q. And so, right, so for some claimants you might proactively  
29 offer counselling?

30 A. I think for unrepresented, yeah, yeah.

31 Q. What other support could be provided?

32 A. I don't know that we've had anything else specifically come  
33 up but we would always be, you know, prepared to consider  
34 anything that the claimant wanted to put forward.



1           One of the improvements that we have talked about in the  
2 team, is maybe providing some examples of things that  
3 claimants might want, both in terms of the process and in  
4 terms of what might be helpful to them. So, that's a piece  
5 of work still to be carried out.

6 Q. If we turn to document MOE233 and go to page 6, please.

7 This is a Ministry response to an OIA request. If you could  
8 just pull out paragraph 22, sorry the bit in italics below  
9 it, please. So, a claimant there is asking "are all your  
10 apologies in this wording", and I just wanted to ask you  
11 whether that wording there in italics is the standard  
12 apology wording?

13 A. I don't know that it is. Just looking at the date of this,  
14 I suspect it may have changed because it's not familiar to  
15 me, but I couldn't guarantee that.

16 Q. Do you know if the apologies still include either the  
17 disclaimer or similar disclaimers as in the last two lines?  
18 So, "Please note however this payment and apology is offered  
19 on a "without prejudice" basis"?

20 A. I think the way we would deal with it today is there would  
21 be a separate settlement and the apology would not - we  
22 would achieve a settlement and the apology would be part of  
23 what was delivered, so that this wouldn't be included in the  
24 apology letter itself.

25 Q. And why was that change made?

26 A. I could only speculate but that does subtract somewhat from  
27 the apology.

28 Q. Do you know when those apologies were being given, why the  
29 Ministry felt it necessary to include those disclaimers?

30 A. I suspect that if it was an ex gratia payment and not in  
31 full and final settlement, that it was on advice from our  
32 legal representatives because there would be potential for  
33 litigation to still follow at some point.

34 Q. And in any cases, whether by settlement or ex gratia, has  
35 the Ministry offered an unreserved apology?

1 A. I can't answer that, sorry.

2 Q. In some institutions, the Ministry does know that serious  
3 offending has taken place, is that right? Waimokoia, for  
4 example?

5 A. Yes.

6 Q. So, to those people, if an unreserved apology hadn't been  
7 offered, would that be a case in which the Ministry could  
8 offer an unreserved apology?

9 A. I think it would probably depend on the facts of the case  
10 because, you know, while we absolutely accept that offending  
11 took place with certain staff members, we don't know exactly  
12 what has happened for individual claimants.

13 Q. Do you know how the Ministry decided what was the process it  
14 went through to say "when we're making settlements as part  
15 of redress, our package should include these things"? Why  
16 did it decide on this particular combination of items, for  
17 want of a better word?

18 A. I suspect it relates to having a look at the process that we  
19 were modelling from, which was the MSD process, and what  
20 they had done and have done. So, we very much modelled what  
21 we did on MSD's approach.

22 Q. And do you know, did that approach take into account  
23 international best practice? Was it modelled on overseas  
24 approaches, for example?

25 A. I couldn't tell you what MSD's approach was modelled on.

26 Q. And has the Ministry considered more recently whether what  
27 it currently offers, whether it should be expanded or  
28 whether it was consistent with international best practice?

29 A. So, part of the process review that has been undertaken this  
30 year, is to look at international jurisdiction, other  
31 jurisdictions. So, that has been considered. The one thing  
32 that comes to mind is one that we will look at more  
33 fulsomely next year, which is relating to whether there's  
34 something we can do in supporting claimants to re-engage

1 with whakapapa, if that's something that they were  
2 interested in. So, that came up in there.

3 Q. And how would you do that?

4 A. That's something we would certainly seek advice from, from  
5 Māori and iwi organisations.

6 Q. Right. And you've said that the Ministry's payments to the  
7 claimants are in acknowledgment of their past experiences  
8 and you're trying to assist them to move forward. Do you  
9 think that the settlements do assist the claimants to move  
10 forward?

11 A. Yes, I do think so.

12 Q. And what's your basis for thinking that?

13 A. So, my personal experience with the claimants that I've  
14 spoken to have certainly indicated that's the case and their  
15 representatives have.

16 Q. And have you considered whether there should be elements of  
17 collective redress? So, not just making redress to one  
18 person who's been abused but also potentially to other  
19 members of their family or people who may also have been  
20 affected by the abuse?

21 A. That's a really interesting point and in a couple of cases  
22 speaking to claimants, they have had whānau support with  
23 them and have been able to explain to me how the ongoing  
24 impact of the abuse that the claimant suffered have impacted  
25 on them. So, that's not something that we have thought  
26 about but I think it's an interesting point that we want to  
27 think about some more.

28 Q. So, that's something that is potentially on the agenda but  
29 not necessarily?

30 A. It could be. I think, yeah, and again, that may well come  
31 up, I would imagine, in this next piece of work. If we're  
32 looking at our process, collective redress may well be  
33 something that I'm sure might be raised.

34 Q. Just paragraph 5.18 of your brief of evidence, your initial  
35 brief, I can't currently find the place but I will just see

1 if you remember it. I think you referred to the Ministry's  
2 processes being necessarily constrained by the Crown  
3 Litigation Strategy?

4 A. Yes, I don't know if I used those exact words but  
5 effectively, yes. So, we followed - our process was  
6 consistent with the Crown Litigation Strategy and more  
7 recently the Crown Resolution Strategy.

8 Q. So, if the Ministry weren't so constrained, what do you  
9 think would be different about the process?

10 A. I don't think we've really tested that, so I don't know.

11 Q. I was just thinking around what you were saying in your  
12 comment, I was wondering if you were saying we would do  
13 things differently but we're constrained or -

14 A. No, I think what I was saying is we work within the Crown  
15 Litigation/Crown Resolution Strategy, and it's consistent  
16 with that and we are obliged to do so but not that there was  
17 necessarily an alternative that we'd been thinking about.

18 Q. If I could talk about the Limitation Agreement with Cooper  
19 Legal. Can we go to MSC652. Sorry, no, no, we won't go  
20 there.

21 If we could go back to document MOE221, page 19, go back  
22 to paragraph 81.1, if you could pull that out? You're  
23 saying there, Crown Law is talking about the sensitive  
24 nature of these claims presents a significant emotional  
25 barrier to some claimants going to trial. And then if we  
26 could go to page 19, we'll leave it there.

27 Would you accept that, for the purposes of litigating  
28 cases in the civil courts, one obstacle facing claimants is  
29 the sensitivity of the subject matter? It's difficult for a  
30 person to go to court because it's so sensitive?

31 A. Yes, I agree with that.

32 Q. And another issue is the ACC bar. So, the fact that the ACC  
33 bar presents an obstacle?

34 A. Mm-Mmm.

1 Q. Another issue is limitation. And then another issue might  
2 be the historic nature of the claims and the burden of proof  
3 being on the claimant?

4 A. Mm-Mmm.

5 Q. All of those obstacles? Because of these barriers, going  
6 down that civil litigation route is mostly a very hard  
7 course for a claimant to take; will you accept that?

8 A. I think for some people, absolutely it would be.

9 Q. For most people, isn't it? Because for many people, because  
10 of those obstacles the chances of success may be difficult  
11 for them to make their case out?

12 A. Absolutely for many people, that would be the case.

13 Q. So, given these barriers, if the Ministry, as it has in some  
14 cases, takes a long time in processing settlement offers,  
15 there's not much a claimant can do, is there?

16 A. In terms of what are you referring to?

17 Q. You were saying before, for example, if the claimant doesn't  
18 like the Ministry's settlement offer, then one option it has  
19 is civil litigation. And I'm saying, well, I think you've  
20 agreed that that's -

21 A. Challenging for many people.

22 Q. That's very challenging?

23 A. Yep.

24 Q. And the only other source of redress, it seems, is the  
25 Ministry's own process, but if the Ministry takes a long  
26 time, well there's not much the claimant can do?

27 A. And it would be very frustrating for people. And I think if  
28 we track back through a lot of cases that have taken longer,  
29 there are reasons for that and I would expect certainly if  
30 the claimants are represented, they would be communicating  
31 that with the Ministry and we'd look to resolve those issues  
32 as quickly as we could.

33 In the case of an unrepresented claimant, our staff are  
34 in regular contact and I think at least six monthly going

1 forward is the contact that we expect for a senior advisor  
2 to give people an update.

3 But, yes, the process, the ADR process is the alternative  
4 to litigation.

5 Q. And, in your evidence, you've detailed a number of - you've  
6 commissioned an external review - sorry, the Ministry has  
7 commissioned an external review, it's hired more assessors,  
8 it's managed to get to a stage where it thinks it would be  
9 able to make an offer to claimants whose offers have been  
10 outstanding for a long time. Is it fair to say that this  
11 Commission has provided an incentive for the Ministry to  
12 push those processes along?

13 A. I think they're not unrelated but I don't think it's quite  
14 as simple as that. The process review was put in place  
15 because of the volume of claims coming through. I'm sure  
16 that's related to the Commission because of the extra  
17 publicity, the fact that the Commission has been speaking to  
18 claimants and making them aware they could submit a claim,  
19 I'm sure that's part of the volume increase. But it's the  
20 volume increase that's driven a need to fundamentally think  
21 about how we are going to process these claims going  
22 forward.

23 Q. You did have a volume increase three years ago, so back in  
24 2017 you said you started receiving a lot of claims?

25 A. Yes, and I think we put some things in place there and that  
26 was when we were looking to hire additional assessors and we  
27 also made a decision to increase staffing in 2018 in  
28 response to that.

29 Q. So now just going to the Limitation Agreement, if we could  
30 go to document MSC652.

31 **CHAIR:** Mr Opie, would you mind bringing your  
32 microphone a little bit closer?

33 **MR OPIE:** There?

34 **CHAIR:** That's better, thank you. Sorry, what was the  
35 document?

1 **MR OPIE:** MSC652.

2 **CHAIR:** Thank you.

3 **MR OPIE:**

4 Q. This is a letter from Crown Law to Cooper Legal starting  
5 again with the consultation process on the limitation  
6 policy.

7 **CHAIR:** The date?

8 **MR OPIE:** 24 August 2020, very recent.

9 Q. And so, is it right that now MSD and MOE are saying "we'll  
10 have a joint process around limitation"?

11 A. That's effectively the case, yes.

12 Q. And so, why is it you have the joint approach to limitation  
13 but separate claims assessment processes?

14 A. So, I think this came out of some work that Crown Law was  
15 doing in trying to have a multiagency Limitation Agreement.  
16 For whatever reason, that was proving difficult. So, the  
17 decision was made to try and go forward with something that  
18 just covered two agencies.

19 So, I don't think that considering the claims separately  
20 means that you need to have a separate agreement around this  
21 matter.

22 Q. Didn't you say that one of the reasons why there is no  
23 Limitation Agreement yet, even though you've been talking  
24 about it, you and Cooper Legal, for about 6 years, is  
25 because of the particular issues relating to the Ministry,  
26 Boards of Trustees and the like?

27 A. To Boards of Trustees, yeah, yeah. So, this proposal would  
28 not include Boards of Trustees.

29 Q. That is how you've resolved -

30 A. Yes.

31 Q. So, there you might get an issue where a claimant who is  
32 alleging abuse and comes within the Ministry's purview, they  
33 might get treated differently to a claimant alleging abuse  
34 and coming within a Board of Trustee's purview?

1 A. If it, a Board of Trustee, chose to rely on that defence,  
2 that could eventuate.

3 Q. Talking a bit now about residential special views. At  
4 paragraph 3.4 of your initial brief you say that many of the  
5 abuse claims or historic abuse claims the Ministry has  
6 received have involved these types of schools?

7 A. 3.4, sorry, was that?

8 Q. 3.4.

9 A. Yes.

10 Q. And at 3.6 you list the six residential special schools  
11 open, so those are Salisbury, Van Asch, Kelston, Halswell,  
12 Westbridge and Blind and Low Vision?

13 A. Correct.

14 Q. There are three which are closed, Campbell Park, McKenzie  
15 and Waimokoia?

16 A. Yes.

17 Q. Is it right that MOE has received historic abuse claims  
18 relating to all of these schools?

19 A. I couldn't guarantee in relation to all of them but  
20 certainly some of them I am aware of. It may well be the  
21 case.

22 Q. So, you don't know?

23 A. I don't know the answer, whether it's all of them, but  
24 certainly I am aware that some of the open schools there  
25 have been complaints made.

26 Q. If it were all of them, would that tend to indicate a  
27 systemic issue with residential special schools?

28 A. Well, it's not something that the facts have really borne  
29 out for us. So, we have looked at that and considered that  
30 previously and it seems to mainly relate to conduct of  
31 individual staff members, rather than a wider systemic  
32 issue. I think what residential special schools have in  
33 common, is that they will - you know, they have residences  
34 where potentially abuse might happen. So that, the initial  
35 claims certainly we were getting from residential special



1 schools, it was the residences where the issues were arising  
2 and many of the children attending these facilities were in  
3 some way vulnerable.

4 So, I think those things together, you know, are a common  
5 factor but I don't know that you could point to systemic  
6 abuse in relation to the cases that we have resolved. We've  
7 resolved 36, I think it is. There's a lot more to look at.  
8 So, at this point we wouldn't say there's systemic abuse but  
9 we learn more as we continue to review the claims that are  
10 outstanding.

11 Q. And do you have any understanding about why the abuse which  
12 you have accepted occurred, why that was not picked up?

13 A. Again, I think that depends very much on the individual  
14 circumstances of the case. So, in some cases some things  
15 were picked up with individuals and not necessarily with  
16 others. So, one of the pieces of evidence we'll look at is  
17 what records exist around that staff member. So, it might  
18 be that the staff member had been disciplined for something  
19 similar, for example, and that had been picked up but it  
20 hadn't been picked up by someone else. I'm thinking about  
21 an assault on a child, where a child had been hit by a  
22 teacher. So, sometimes things would be picked up but I  
23 think that unfortunately perpetrators of abuse can be quite  
24 clever and crafty in carrying out the actions that they  
25 carry out.

26 So, I think in hindsight you're always looking for how  
27 you can ensure that you make the system as safe as it  
28 possibly can be but whether you could always eliminate all  
29 risk, I don't know that you can.

30 One of the things I was reflecting on at lunch, after we  
31 were talking about the concept of another agency taking  
32 responsibility and I said I was agnostic, and I probably  
33 remain agnostic on that. But I think it's really important  
34 that if another agency were to review claims, that the  
35 individual agencies weren't divorced from understanding what

1 happened because I think it's really important we continue  
2 to learn from and identify any behaviours or activity that  
3 might potentially continue to be a risk in schools today.  
4 So, I think that's important and it's one of the reasons  
5 that we really want to understand what happened to claimants  
6 in their own right, but how do we prevent it happening  
7 again.

8 Q. Who carries out that analysis of claims to try and think,  
9 well, what can we learn from why, for example, this abuse  
10 wasn't picked up and how do you record that?

11 A. So, I think the assessors might bring things to our  
12 attention and the Claims Team would look to do that as well.

13 Q. And then how does that feedback into the Ministry's wider  
14 work?

15 A. It would depend on what was identified. And I'm not sure  
16 that I can think of specific instances where we have  
17 identified a broad issue, but it might be a specific issue  
18 at a school and it might be something that we might want to  
19 feed into our practice guidance or resources online for  
20 schools. So, that's probably the avenue we would use if  
21 there are some useful learnings to come out of one of these  
22 cases.

23 Q. And then, would you disseminate that more widely?

24 A. So, information to schools, if it's new practice guidance,  
25 would go out through our regular bulletin to school leaders  
26 and it would be in our resources on our website as well.  
27 And it depends what it is. If we, and I don't think we have  
28 identified any specific issues that have given us great  
29 alarm, but were we to do so, that would be something that we  
30 would use our regional officers to communicate with the  
31 sector and make sure that if there was a risk that had been  
32 identified, that they knew what that was, and how to  
33 mitigate that.

34 Q. If we could go now to MOE0046, this is just an internal  
35 memorandum dated 23 June 2010, so it's some time ago. If we

1 could just go to page 2 of that document, if you see  
2 paragraph 4 and if you could just highlight that, please,  
3 bring that out? "Some 30 cases filed naming MSD as a  
4 defendant involving Campbell Park school". And then is it  
5 right that the Ministry of Education essentially got brought  
6 into those claims?

7 A. Into some of them. So, it would have depended on who the  
8 correct respondent was at the time. In 1972, I think it was  
9 - MSD assumed responsibility for the school because it was  
10 run through - the particular entity it was run through  
11 transferred from the old Department of Education to MSD.  
12 So, it probably depends on the timing but some of them will  
13 have an element that was relevant to the Ministry.

14 Q. And then if I could go to page 3, please? And if you see  
15 paragraphs 6, 7, 8 and 9, maybe I'll just give you a chance  
16 to read those.

17 Those paragraphs are about claims made about Waimokoia  
18 and is talking about physical and sexual assault at  
19 Waimokoia?

20 A. Mm.

21 Q. And if you see paragraph 9 there, "Initial indications from  
22 Crown Solicitors suggest that there may have been a ring of  
23 offenders at the school and there was generally a climate of  
24 abuse and nepotism". Does that suggest that at Campbell  
25 Park and Waimokoia, that there were systemic issues? There  
26 could have been a ring of offenders and a climate of abuse  
27 and nepotism and that was not detected?

28 A. If that were the case, that may have been the case at that  
29 school. I don't know that it's saying it was. It was  
30 indicating that might have been an issue.

31 Q. And then if I could just go to document MOE - I have a  
32 couple more questions on this topic but we could easily  
33 break now.

34 **CHAIR:** It's up to you. A couple more sometimes takes  
35 15 minutes.

1 **MR OPIE:** Yes, why not?

2 **CHAIR:** Let's not risk it, let's take the afternoon  
3 adjournment and then we'll come back refreshed.

4

5

6 **Hearing adjourned from 3.28 p.m. until 3.50 p.m.**

7 **CHAIR:** Yes, Mr Opie.

8 **MR OPIE:** Thank you.

9 Q. If we could now go to document MOE634, please. This is a 7  
10 August 2017 briefing to the Minister of Education. If we  
11 could just go to page 4 and call out paragraph 23, please?

12 This is the point I think you were talking about earlier?

13 A. Mm.

14 Q. "Based on research we have completed to date we have not  
15 found evidence to suggest that abuse in residential special  
16 schools was systemic; there were individual failings by  
17 specific staff, and we are aware of four staff that have  
18 been convicted for sexually abusing pupils at a residential  
19 special school."

20 Is that school Waimokoia, do you know?

21 A. I'm not sure that the four staff were all from the same  
22 residential special school but certainly at least one of  
23 them would have been from Waimokoia.

24 Q. Okay. Right. So, those four staff might have been -

25 A. They might have been -

26 Q. At other schools?

27 A. Yeah.

28 Q. Okay. Does the Ministry know how the number of abuse claims  
29 brought in relation to residential special schools, how that  
30 compares with the number of abuse claims brought against  
31 other types of school?

32 A. No. So, partly we don't know that because the process  
33 originally only related to residential special schools, so  
34 we wouldn't be able to make that comparison. And while  
35 generally I think we would be informed if there was an abuse

1 case at a school, historically there might not have been.  
2 So, we would expect to be notified now but we wouldn't  
3 have - we didn't collect that information centrally  
4 previously.

5 Q. Going forward, would you be doing that type of analysis?

6 A. Going forward, yes, we are now collecting that.

7 Q. Where it says "we have not found evidence to suggest that  
8 abuse was systemic", do you know what would have been  
9 considered evidence of systemic abuse?

10 A. I would only be speculating really.

11 Q. Could there be a difference between systemic abuse and also  
12 systemic failures to identify abuse?

13 A. There could be a difference but I'm not sure that we have  
14 identified either to date. But I do want to go back to -  
15 there are only 36 claims that we have resolved so far and  
16 they're across a number of different schools and settings.

17 Q. So, those 27 findings may be revisited or will be revisited?

18 A. Well, I think if evidence did emerge, then that would be  
19 something we'd very much want to take a look at and  
20 potentially respond to if there was an issue, both in terms  
21 of if there had been an issue previously that did not now  
22 exist or a risk that might exist going forward, absolutely  
23 we'd be very concerned about that.

24 Q. I suppose it goes back to my question, what would systemic  
25 abuse look like when the Ministry starts thinking we have an  
26 issue of systemic abuse?

27 A. Well, I guess if we saw a pattern of behaviours that were  
28 undetected or a pattern of practice or practice that  
29 appeared to not be appropriate for the time but was not  
30 responded to and people knew about it. There might be a  
31 range of things that fell into that category.

32 Q. Just moving now to talk about the reports by assessors. At  
33 paragraph 5.26 of your initial brief you said after an  
34 assessor has assessed a claim, they will provide their  
35 report to the Ministry?

1 A. Yes.

2 Q. You also say that the documents relied on by the assessor  
3 can be provided to the claimant or their lawyer?

4 A. Mm-Mmm.

5 Q. Is that on request or?

6 A. Generally we would provide the information on which the  
7 decision is based. So, any information that the assessor  
8 relies on in forming their assessment, we would pass on.

9 Q. But is it the case that you don't give the assessor's  
10 report?

11 A. That's correct, we don't.

12 Q. Why not?

13 A. Because it's subject to legal privilege.

14 Q. But if you're saying then you tell the claimant essentially  
15 the main bases for putting a particular offer, then could  
16 you explain why you hold back the report?

17 A. Because if it's of a particular filed claim, it's subject to  
18 privilege. That's the advice we've had from our legal team  
19 and we follow that advice.

20 Q. Because you went on to say at 5.32 that, "The response to  
21 the claimant and the lawyer would set out the allegation  
22 made by the claimant"?

23 A. Yes.

24 Q. And then also explain the findings made?

25 A. Yes, yes, our letter does that.

26 Q. And those findings are the assessor's findings?

27 A. They are.

28 Q. So, if you're giving all that information, I still struggle  
29 to understand why you wouldn't give the report?

30 A. That's the advice that we've received.

31 Q. How confident can you be that the assessor's report is right  
32 without inviting the claimant to comment on it?

33 A. I think the process we go through involves quite a lot of  
34 scrutiny, conversation, questions from the Sensitive Claims  
35 Team. So, we might have further follow-up questions, we

1 speak to the assessor to understand how they've come to  
2 their conclusion. Then, in terms of all of the information  
3 that's been considered, that is provided to the claimant and  
4 there is an opportunity then, if the claimant or the  
5 representative does not agree with the conclusions or they  
6 think there might be information that should have been  
7 relied on that hasn't been, for example, they would put that  
8 to us.

9 Q. If you did provide the assessor's report in its entirety,  
10 that would mean that the claimant and any representative  
11 would have access to the same information as the Ministry?

12 A. I think in terms of the pertinent information, they have  
13 that through providing all of the information. So, that  
14 would include information that came from interviews, for  
15 example, any documentary evidence and the rationale for the  
16 assessor's conclusion. So, I think the key information in  
17 reaching the decision is made available to claimants.

18 Q. That then is the Ministry deciding what the key information  
19 is, isn't it?

20 A. All the information that is used by the assessor to draw  
21 their conclusions.

22 Q. I've taken that as far as I can.

23 **CHAIR:** You might be going to cover this and if you  
24 are tell me. I'm interested to know when you were  
25 settling, effectively you were offering a settlement  
26 of a filed claim, is a condition of that settlement  
27 that the claim is withdrawn?

28 A. Yes. So, it's in full and final settlement.

29 **CHAIR:** Right. So, there wouldn't be any proceedings  
30 following that?

31 A. There might be information in the assessment report that  
32 might be privileged in relation to another claim  
33 potentially.

34 **CHAIR:** Thank you.

35 **MR OPIE:**

1 Q. I just want to talk a little bit more about learning from  
2 claims. This isn't in front of you so tell me if this is a  
3 problem, but did you hear the evidence of Ms Hrstich-Meyer  
4 for MSD?

5 A. I didn't, sorry.

6 Q. You didn't?

7 A. No.

8 Q. I'll just run a few things by you and then if you say "I  
9 don't know", that's fine. But she says in her evidence that  
10 MSD has appointed a Principal Analyst and that the purpose  
11 of that position was to provide expert analysis and support,  
12 to support policy development within Historic Claims. Does  
13 the Ministry have any similar position?

14 A. So, that's one of the recommendations from the independent  
15 review that we've just had done, is to consider establishing  
16 that position. What we've done in the interim, while we  
17 think about what we need going forward, is we have taken the  
18 team leader of the team out to do some of that work and also  
19 to do some of the progress improvement thinking and we've  
20 put someone else in to lead the team to free her up, but  
21 it's certainly something that we are giving consideration  
22 to.

23 Q. She also said there would be a strong focus on building the  
24 MSD Historic Claims Team capacity to share learnings from  
25 claimants, share experience in relation to Oranga Tamariki;  
26 that would be something the Ministry is also considering?

27 A. We would be interested in being part of that, certainly.

28 Q. And then she also talks about a knowledge management data  
29 base which stores analyses about claimants past experiences  
30 in care and then she says these can be anonymously shared  
31 with agencies such as Oranga Tamariki. The Ministry of  
32 Education doesn't have anything like that at the moment?

33 A. We don't. It's another recommendation that was in that  
34 report. So, they did look at progress improvements MSD has



1 made as part of the review work they did, and so some of the  
2 things that MSD is considering, we will also now consider.

3 Q. Do you know why MOE hasn't taken these steps up until the  
4 internal review?

5 A. I think it's really been about the volume of the claims and  
6 the size of the team. So, while the volume of claims has  
7 been relatively low, the team has had a good level of  
8 knowledge across all the claims and the status. As that has  
9 grown, we're now getting to the point where actually, we do  
10 need some different systems. The systems that were suitable  
11 for 10-15 claims a year are no longer suitable for 25-30  
12 claims a year plus.

13 So, we need to look at some different ways of doing  
14 things now with this kind of volume. I am not sure if it  
15 will continue but it's continued for the last three years,  
16 so that's why we're thinking we need to do something  
17 differently going forward.

18 Q. And just in your predictions about the growth of claims, you  
19 say there have been Privacy Act requests. Rather than  
20 diminishing, it would seem they are exponentially growing;  
21 is that a fair assessment?

22 A. I think the level has been quite consistent for the last  
23 three years but there's nothing to suggest that that's about  
24 to drop off. So, it's not exponentially growing but it's at  
25 a much higher level than it has been historically. So,  
26 therefore, what we have been doing is no longer fit for  
27 purpose. We need to think about how we deal with that  
28 volume of claims in a different way and how we would  
29 resource that work.

30 Q. And the Ministry sees that as an area which it may have to  
31 devote quite considerable resources to, to get through the  
32 work?

33 A. I think we have to look at the resourcing and the processes  
34 and how we manage claims. I think the two things together  
35 are important. I absolutely think we're going to have to

1 put some more resource in to be able to respond but we also  
2 have to think about this very long, labour intensive process  
3 and if there's more efficient ways that we can do some of  
4 that. I think I mentioned earlier we are looking at where  
5 multiple claims relate to the one institution, there's  
6 certainly some things we can do differently there to do a  
7 single, more comprehensive research and bring someone in to  
8 do that work and then we've got that body of information  
9 available. We will have to consider a range of things, I  
10 think, in terms of how we manage things going forward.

11 Q. If I could just go to document MOE099. This is an internal  
12 memorandum 22 March 2017. Just go to page 2, paragraph 12,  
13 please, and if we expand that. That statement there, "The  
14 Ministry sees little benefit from using Historic Claims  
15 findings to inform current practice as the system is now  
16 significantly different and current policies and processes  
17 are based on current international best practice", are you  
18 saying that's not now the Ministry's view?

19 A. I think this relates to the findings that we have had in  
20 relation to Historic Claims, that those findings are not  
21 necessarily things that would apply now because the  
22 situation has changed.

23 I wouldn't read that as a global, the Ministry sees no  
24 value in taking learnings and looking at how we might  
25 improve safety for children in the future.

26 Q. Would it have been the case though at that time with the  
27 number of claims the Ministry had then -

28 A. They would be much fewer and the number of settled claims  
29 would have been much fewer at that point.

30 Q. Do you know, and you might not know, but is it saying there,  
31 well, we have analysed the findings and we don't think  
32 they're relevant, or we're not going to do it?

33 A. I think what it's saying is that the findings - and there  
34 would have been two or three key people involved at that  
35 stage of managing Historic Claims, they would have had a

1 good appreciation of the claims that have been settled and  
2 the findings from those claims. And I think what it's  
3 saying, is that those findings, actually you wouldn't see  
4 that now because the context is quite different. The  
5 protections in place are quite different and so, you  
6 wouldn't see those kinds of issues happening today. That's  
7 how I read that.

8 Q. And as a general proposition though, would you agree that if  
9 you don't analyse why abuse has occurred in the past and  
10 wasn't picked up, you can't be sure that the same gaps don't  
11 exist in the current system?

12 A. Which is why I'm keen to do these, very much so.

13 Q. And just in regard to that, is it right that from the 1950s  
14 up until now, all state education services would have been  
15 subject to external inspection by government agencies?

16 A. It would have been ERO [Education Review Office] or their  
17 predecessor, yes.

18 Q. If we talk maybe the 1990s, the inspections would have been  
19 done by the Department of Education?

20 A. Yes, and then I believe that prior to 1989 there was an  
21 inspectorate, yes, that existed before that.

22 Q. And perhaps in about the 1990s, that responsibility would  
23 have passed to the Education Review Office?

24 A. Yes.

25 Q. ERO?

26 A. Yes.

27 Q. And I know ERO is not part of the Ministry of Education but  
28 you said that one of its functions was to evaluate and  
29 report on the education and care of young children in  
30 schools?

31 A. Yes.

32 Q. And residential special schools would have come within ERO's  
33 mandate?

34 A. They would have.

1 Q. And so ERO would have been reporting on the Residential  
2 Schools?

3 A. That's my understanding, yes.

4 Q. And presumably didn't identify the abuse that has then been  
5 alleged in these subsequent claims?

6 A. If they had done, it would have been acted on at the time,  
7 so I would assume that's correct.

8 Q. And so, that function of reporting, so that the Ministry was  
9 saying, well, the system is now significantly different, but  
10 for at least the last 30 years odd, ERO for example has had  
11 this function of reporting?

12 A. Yeah, I think there's a whole lot of different policy and  
13 practice settings that are quite different today. The  
14 licensing criteria around school hostels, for example,  
15 requirements around safety plans, requirements around safety  
16 checking and Police vetting. There's quite a bit that has  
17 changed in the context.

18 And there's also a change in what we deem to be  
19 appropriate today.

20 Q. I suppose though, with institutions like ERO who do have a  
21 reasonable amount of longevity, they would also benefit from  
22 a close analysis of Historic Claims and say, did we miss  
23 something? Was there something we could have done better?

24 A. That might be the case. ERO also evolves and changes its  
25 processes. So, that hasn't stood still. The entity might  
26 still exist but what they do and how they do it will have  
27 evolved over time.

28 Q. I suppose, would it be the case that the Ministry is now a  
29 central repository for quite a lot of this information?

30 A. Mm.

31 Q. And there could be many different players in the education  
32 sector which would benefit from -

33 A. I think everyone in the education sector has an interest in  
34 child safety, so I'm sure they would be interested in any  
35 findings that might be relevant to them.

1 Q. And at the moment the Ministry is not disseminating any  
2 findings that it might have made but going forward it would  
3 look to do that?

4 A. It's one of the things that, as I say, with the role being  
5 recommended, that analysis function is something we will  
6 look at going forward absolutely and we will share that  
7 information with our education sector partners, absolutely.

8 **MR OPIE:** I don't have any more questions.

9 **CHAIR:** Thank you.

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3 **HELEN HURST**  
4 **QUESTIONED BY COMMISSIONERS**  
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6 **COMMISSIONER ALOFIVAE:** Just one question for clarity,  
7 thank you, Ms Hurst. You've talked about residential  
8 schools and special residential schools, thank you for  
9 that. But the current education component in our  
10 Youth Justice facilities today, where does that fall?  
11 Can you just expand on that for me, please?

12 A. I'm not sure if I can. So, let me think about that for a  
13 moment, my colleague, it might be that I need to provide  
14 some follow-up information about that.

15 We clearly have a role but I can't tell you where the  
16 responsibility starts and stops.

17 **COMMISSIONER ALOFIVAE:** Okay, that's fine.

18 A. Maybe if we could come back with some information on that.

19 **COMMISSIONER ALOFIVAE:** All right. And one other  
20 question, thank you, you've explained that you've been  
21 building your team incrementally, in response to the  
22 questions by Mr Opie.

23 Resourcing has really been quite a significant issue?

24 A. So, we've resourced the team from within our baseline. So,  
25 the nature of when you have relatively small additional  
26 resource to put in, that doesn't meet the threshold for a  
27 Treasury bid. So, while we've been funded for settling  
28 claims and the legal costs associated with that, the team  
29 itself is resourced within Ministry base lines.

30 We have responded as the volume of work has changed. So,  
31 yes, there's a lag between identifying the spike, recruiting  
32 the resource and putting them in, but we started with one  
33 part-time principal advisor, they became full-time, we added  
34 a data analyst, we supplemented from time to time when there  
35 were a volume of privacy requests, for example, with extra

1 resource for a period. We then brought a senior advisor in,  
2 then two more senior advisors and a team leader and we now  
3 have more assessors as well. So, we have built that up over  
4 the course of the 10 years as the volume of claims has  
5 changed.

6 What we found with the two senior advisors that we  
7 appointed early last year, is that that hasn't significantly  
8 sped up the rate of claims being processed, as we hoped it  
9 would. And we put that down to the extra complexity and  
10 breadth of the claims that we are now in the process of  
11 assessing but that's one of the reasons we think we have to  
12 really look at our processes as well as the resourcing.

13 But five people are not going to be able to process the  
14 131 outstanding claims in a timely way.

15 Q. And so, knowing what you know and understanding your fellow  
16 colleagues in other agencies like MSD and in the Ministry of  
17 Health, you would have anticipated the patterns that they  
18 were seeing, at least in MSD, given that everything was  
19 almost premised on the model that they were using?

20 A. I think some of the more recent claims weren't within the  
21 scope of our original Historic Claims Process because they  
22 are what we would deem to be contemporary claims. They're  
23 post-1993, they might relate to schools that have closed but  
24 primary schools weren't originally within the scope, it's  
25 only since 2018 I think we made that change and said, yes,  
26 we're going to broaden out the scope of our sensitive claims  
27 processes, we now call them, in response to that.

28 So, it was a little bit different and while the numbers  
29 increased, they didn't increase anything like they did for  
30 MSD.

31 **COMMISSIONER ALOFIVAE:** So, am I hearing that this is  
32 now becoming a significant area, a priority within the  
33 Ministry?

34 A. I think it's always been a priority but, yes, at the moment  
35 it's very much something that in my part of the Ministry we

1 see as a priority to do some things differently because, as  
2 I say, what we've got in place is not going to work going  
3 forward.

4 **COMMISSIONER ALOFIVAE:** Thank you, Ms Hurst.

5 **COMMISSIONER ERUETI:** I have just a couple of  
6 questions, please, tena koe, Ms Hurst.

7 So, I've got a few questions about the Treaty, about your  
8 Treaty policy, and just hoping to help me understand what's  
9 happened.

10 Since around about 2009/-2010 when this process is being  
11 built, it's largely modelled on the MSD process that's been  
12 established at that time?

13 A. Correct.

14 **COMMISSIONER ERUETI:** And we saw with Linda  
15 Hrstich-Meyer's evidence, that there was an effort to  
16 engage with I think nine survivors and some of them  
17 were Māori?

18 A. Mm.

19 **COMMISSIONER ERUETI:** It doesn't seem in this case  
20 with MOE that during this process of building the  
21 waka, if you like, engagement with any Māori?

22 A. That's correct.

23 **COMMISSIONER ERUETI:** So, just looking at your brief  
24 of evidence and those last paragraphs where you talk  
25 about the changes afoot, again in relation to MSD's  
26 proposed changes, they seem quite tentative, you know?  
27 We could look at this, it's likely. Like, for  
28 example, when you were speaking earlier about, when  
29 Mr Opie was asking about the prospect of a collective,  
30 you know, redress performance, that it was  
31 interesting, something that you could look into.

32 I mean, it gives me some - I need some more assurance,  
33 you know. Why is it so tentative and why is there nothing  
34 more concrete and specific in the brief, considering also, I



1 mean I know you have this review and that's still ongoing  
2 but it still feels very tentative to me?

3 A. I think my response on that particular one was that it was a  
4 new concept for me, that we had - I think that's something  
5 that we inevitably would come into the work that we'll carry  
6 out next year.

7 We haven't worked in partnership with Māori to establish  
8 our claims process to date and that's something that we feel  
9 is important. So, it's something that - we did have a look  
10 at the work that was being done with the current review and  
11 it really didn't go far enough. So, pretty much all we did  
12 is we talked to a small number of organisations that have  
13 experience working with Māori claimants but not in this kind  
14 of context. And the advice was; you need to do this  
15 properly, you need to engage more fulsomely, don't rush it,  
16 do a good job, and that's what we're planning now.

17 So, one of the pieces of work that the team leader is  
18 putting together is a plan for how we do that in the New  
19 Year.

20 **COMMISSIONER ERUETI:** Okay. This is all part of the  
21 external review that you speak of in your brief, this  
22 work?

23 A. It was one of the areas we asked the external review to look  
24 at and advise us on, and their advice was do more work.

25 **COMMISSIONER ERUETI:** And I see to that, you also have  
26 a new Treaty policy?

27 A. Mm.

28 **COMMISSIONER ERUETI:** Is that for the Ministry - is it  
29 Ministry-wide or is it for the specific redress  
30 scheme?

31 A. It's Ministry-wide, yeah. And it's part of a process of  
32 really, I guess, upskilling the Ministry as a whole and  
33 repositioning our partnership approach with Māori. So, it's  
34 in that context.

1 **COMMISSIONER ERUETI:** Okay. And you talked earlier  
2 about the new recruits and hiring new people.

3 A. Mm.

4 **COMMISSIONER ERUETI:** You've got five full-time staff  
5 and now seven assessors -

6 A. None of them are Māori.

7 **COMMISSIONER ERUETI:** And none of them are Māori?

8 A. So, we really wanted both assessors, particularly assessors  
9 but also we were hoping to get someone who could bring Te Ao  
10 Māori lived experience to the Claims Team. We weren't  
11 successful. We've got some very good people in our Claims  
12 Team but we don't have anyone who is Māori.

13 **COMMISSIONER ERUETI:** Okay. My other question was  
14 about independence and I think it was in answer to a  
15 question from Ms Aldred, you explained that  
16 independence for you, people misunderstood it because  
17 they didn't appreciate that there is this distance now  
18 between schools, Boards of Trustees and the Ministry.  
19 But there's still the question of independence that  
20 relates to residential schools, for example, special  
21 residential schools, pre-1989, is it, those schools?

22 A. Mm.

23 **COMMISSIONER ERUETI:** I wondered what your response  
24 would be to that question because it arises often with  
25 survivors about the lack of independence about the  
26 redress schemes.

27 A. I think what I was saying is I can understand the perception  
28 that people have but I think the effect of schools and the  
29 Ministry being separate entities for the last 30-40 years,  
30 30 years, 30 years, is that actually the staff in this team  
31 do not see themselves as part of the schools, if you see  
32 what I mean. They see themselves as someone independent.

33 We do have external assessors to have that one step  
34 removed again from the work of the team but I wouldn't call

1       them independent because we employ them but they are  
2       external and one step further removed.

3       **COMMISSIONER ERUETI:** And with your external review,  
4       it seems to be focused more on process issues, you  
5       say, rather than these kind of core questions about  
6       impartiality and independence?

7       A. That's right and they didn't touch on that point.

8       **COMMISSIONER ERUETI:** Okay, thank you. Another  
9       question about, I'm just trying to understand the data  
10      on the pervasiveness of abuse in schools compared to  
11      the actual claims made about what is that data. I  
12      mean, how big a problem in relation to the scale of  
13      the problem, prevalence today, and we saw that there's  
14      a certain number, we had information about the numbers  
15      of claims that have been made in relation to Board of  
16      Trustees schools. Do you have any data on the actual  
17      reports of abuse and neglect in schools?

18     A. We don't have good data. We've only recently been looking  
19     to try and start collating some of that. And, as I say,  
20     we're not confident that schools have always reported it to  
21     us, so it's quite patchy what we do have.

22     **COMMISSIONER ERUETI:** Okay. My last question is this  
23     question about multiple agencies that Mr Opie has been  
24     raising.

25             You will know that in the Cabinet Paper released in  
26     December 2019, one of the recommendations made is that  
27     officials will be asked to inquire into this idea of a  
28     unitary redress scheme. I asked the same question of MSD,  
29     so I'll ask it of you, has there been any work done on that  
30     to date?

31     A. I don't believe so in the Ministry. I am not aware of it if  
32     there has been, other than passing conversations.

33     **COMMISSIONER ERUETI:** Okay.

34     A. So, no specific work that I am aware of.

35     **COMMISSIONER ERUETI:** Thank you.

1 A. Thanks.

2 **CHAIR:** I've just got two areas that I'd like to cover  
3 with you. One picks up a little bit on the data  
4 question.

5 You told us earlier that you haven't to date kept  
6 demographic data but that you believe about half the claims  
7 made are by Māori?

8 A. Mm, from speaking to the assessors, that's correct.

9 **CHAIR:** So, from speaking to the assessors, it's a  
10 pretty rough number but a significant number?

11 A. Mm.

12 **CHAIR:** Do you have a similar sense, because I suspect  
13 you don't keep any records, on how many disabled,  
14 people with disabilities are bringing claims?

15 A. So, given the initial claims were related to residential  
16 special schools, I would expect there to be a quite high  
17 proportion but, you're correct, we don't have that  
18 demographic data either.

19 **CHAIR:** Is it possible to do a sort of retrospective  
20 count up?

21 A. Yeah, I mean, we won't necessarily have all of that  
22 information, but we could have a look at and see what we  
23 could get from the ones that we've worked on to date.

24 **CHAIR:** I think that's something that's very important  
25 to the Commission that we know just how many children,  
26 young people and vulnerable adults (a) were in care  
27 and (b) what proportion of those were abused. Our  
28 evidence to date, or our research to date, suggests  
29 that that might be very high, so that's something we  
30 need to know, and if you were able to provide some  
31 further figures?

32 A. We will do some work.

33 **CHAIR:** I am sure we would be grateful for that. And  
34 then that leads me to the consequent question; You  
35 have said that your assessments and your claims

1 process you're doing is survivor focused. I'm  
2 wondering if there's any special training or processes  
3 or expertise within your assessors for looking at  
4 claims made by people with disabilities? You've said  
5 that you use sign language if necessary, what about  
6 people with neurological problems, mental illness,  
7 intellectual disabilities?

8 A. So, the first two assessors that we appointed were both  
9 educational psychologists and had a special education  
10 background, so that's particularly what we were looking for.  
11 The subsequent five will be mixed, I suspect, in terms of  
12 their particular expertise, but I think across the assessors  
13 that we do have, we have people with the right skill set to  
14 be able to match those to the individual claimants.

15 **CHAIR:** All right. That was the first area. My  
16 second area is very specific and it relates to health  
17 camps. As I understand it, there are health camps set  
18 up to build bonny babies, whatever the equivalent was,  
19 by sending them camping, and then schools developed  
20 that were associated with that. I take it the claims  
21 made to the Ministry of Education related to the  
22 school, the education component of the health camps,  
23 is that right?

24 A. That's right.

25 **CHAIR:** But there were other components of health  
26 camps and I believe from the survivor accounts that  
27 we're hearing privately, that there were doctors  
28 employed, that there were camp managers etc. who, I am  
29 not sure if they were employed by the Ministry of  
30 Education or not?

31 A. I'd need to check that.

32 **CHAIR:** Yes.

33 A. Yep.

1 **CHAIR:** So, have you had any claims from health camps  
2 where there's been this divide of responsibility, to  
3 your knowledge?

4 A. I'm not particularly familiar with all of the claimants'  
5 cases. So, again, I'd like to check that.

6 **CHAIR:** Okay. So, I just flag that that's another  
7 area of interlocking and multi-agency accountability  
8 and responsibility.

9 A. Yes.

10 **CHAIR:** I said two but there's a third, and it arises  
11 from my colleague's question about a unitary system.

12 You have been quite clear in your evidence that you  
13 believe that the expertise within the Ministry of Education  
14 is important to being able to properly evaluate claims that  
15 come from the education sector. But I'm sure you are aware  
16 that many of the witnesses that we've had to date on redress  
17 have advocated for a single independent system.

18 So, apart from the local knowledge, the special  
19 skill sets that people in your Ministry have, what are some  
20 other reasons why you say that it's important to keep the  
21 assessment of claims within the special Ministries?

22 A. I think that skill set could be employed wherever, to be  
23 fair. I don't think it has to be based within the Ministry.  
24 And I think that's just about who you employ and who you  
25 assign to what cases.

26 I think that point I made on my reflection at lunch  
27 around the learnings, that's probably the key thing, is how  
28 would we make sure that we did capture any learning that  
29 came out of the redress process.

30 **CHAIR:** Right.

31 A. But I don't have a strong view about whether this function  
32 should sit within or separate.

33 **CHAIR:** Thank you very much for that. Are there any  
34 questions arising?

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**HELEN HURST**  
**QUESTIONS ARISING FROM MS ALDRED**

Q. Just two very minor points of, I suppose, correction that I'd like to do.

The first point is that in your evidence-in-chief, Ms Hurst, I referred you to a document which was a training document and it broadly set out the responsibilities of the Ministry versus other agencies. And I think I put it to you, and you accepted, that that was published on the Ministry's website?

A. And it was really the criteria in that around who was eligible for a claim that is published but the document itself is not published online, so the same information. That wasn't quite right.

Q. Thank you. I just wanted to make sure we weren't providing the wrong information.

And in a similar vein, I think in answer to a question from my friend, you were talking about the number, you mentioned the number of claims resolved and I think that you mentioned a number of 36?

A. As opposed to 46, did I?

Q. Yes.

A. It's 46, sorry.

Q. All right. So, I just wanted to confirm that the updated number you provided, it was actually in paragraph 4.23 of your evidence, was correct?

A. That's right.

**MS ALDRED:** Thank you, I was just conscious to do that because we've already updated a bit.

A. And we're losing track, thank you.

**CHAIR:** Thank you, because I'd forgotten the numbers too.

1 **MS ALDRED:** That's all from me.

2 **CHAIR:** Was there anything arising, Mr Opie?

3 **MR OPIE:** No.

4 **CHAIR:** It remains for all of us to thank you very  
5 much for your evidence today, it's been very important  
6 to have the perspective of the Ministry of Education  
7 and we are very grateful for the efforts you have put  
8 into for preparing your evidence and sitting there  
9 enduring what is a pretty hard gig, I have to say, so  
10 thank you very much for that.

11 A. Not at all, thank you for the opportunity.

12 **MS JANES:** We had canvassed whether it would be  
13 worthwhile starting with the Ministry of Justice  
14 witnesses. In discussion with Ms Aldred and Mr Opie,  
15 we feel confident that we can do it all tomorrow and  
16 we thought we may then adjourn.

17 **CHAIR:** We are allowed out early?

18 **MS JANES:** You are allowed out early.

19 **CHAIR:** Ms Janes, I am conscious because we know but  
20 the world doesn't, there may be changes to our  
21 schedule. Is it appropriate to announce those now or  
22 would you like to do that at a later stage, just while  
23 we have members of the public here?

24 **MS JANES:** Absolutely and at a nod from the Crown  
25 counsel, we can update what is happening on Friday.

26 The Solicitor-General is unable - due to health issues,  
27 she is not available on Friday, so we will be taking a  
28 non-sitting day on Friday and we will recommence on Monday  
29 with Ms Jagose QC. The expectation then is that the closing  
30 submissions that were expected on the Wednesday will now be  
31 on the Thursday.

32 **CHAIR:** Thank you. And I take it that those details  
33 will of course go on the website, so that the rest of  
34 the world knows what's happening?

35 **MS JANES:** Yes.



1     **CHAIR:** Thank you for that. On that basis, we want  
2 squander our free half hour for which we are all very  
3 grateful. I believe that we have our kai-karakia  
4 here, we do.

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(Closing waiata and karakia)

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**Hearing adjourned at 4.35 p.m.**

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