ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
STATE REDRESS INQUIRY HEARING

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

TRANSCRIPT OF PROCEEDINGS

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(Opening waiata and karakia)

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

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

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

CHAIR: Yes.

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

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

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

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

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

A. Thank you.

CHAIR: Thank you, Ms Aldred, tena koe.

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

UNA RUSTOM JAGOSE - AFFIRMED

QUESTIONED BY MS ALDRED

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

A. I have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

CHAIR: Would that be right?

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

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

CHAIR: Thank you for that.

MS ALDRED:

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

A. Yes.

Q. Shall I let you talk from there?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Absolutely it does.

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

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

COMMISSIONER ERUETI: Thank you.

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

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

MS ALDRED:

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

I think you were at the end of 2.20.

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER ERUETI: Yep, thank you.

A. I think I can come to chapter 4.

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

A. It probably is getting a little croaky.

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

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

CHAIR: Are you?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

COMMISSIONER ERUETI: Thank you.

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

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

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

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

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

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

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

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

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

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

A. Mm.

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

A. I think it was still taking that framing.

CHAIR: The legal framing?

A. Yes.

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

A. Yes.

CHAIR: That could render them unmeritorious?

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

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

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

CHAIR: We did.

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

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

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

A. Mm.

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

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

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

It's easy perhaps with hindsight -

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

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

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

A. Yes.

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

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

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

A. Mm.

Q. Particularly at 27.

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

Q. Thank you.

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

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

MS ALDRED:

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

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

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

CHAIR: It was one that was put up.

MS ALDRED: It was the same paper, yes.

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

A. Mm.

COMMISSIONER ERUETI: What were the options on the table?

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

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

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

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

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

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

MS ALDRED:

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

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

And you'll see there -

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

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

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

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

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

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

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

A. Mm.

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

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

Q. Oh, in relation to limitation?

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

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

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

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

A. Mm.

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

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

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

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

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

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

A. Mm.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

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

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

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

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

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

Q. Yes, sorry, yes, 12.7.

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

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

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

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

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

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

CHAIR: Good afternoon, Ms Aldred.

MS ALDRED: Good afternoon.

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

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

A. Thank you. Good afternoon.

CHAIR: Good afternoon.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The White litigation -

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

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

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

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

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

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

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

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

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

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

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

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

Beyond that -

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

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

CHAIR: Okay.

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

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

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

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

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

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

CHAIR: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR: Proactive?

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

MS ALDRED:

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

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

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

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

investigating to the civil standard in matters that are crimes.

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sorry, Ms Jagose.

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

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

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

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

A. Perhaps I should start at 3?

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

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

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

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

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

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

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

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

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

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

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

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

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

Whoops sorry, for hitting the microphone.

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

Q. We think it's 36.

A. Okay.

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

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

A. I'm sure.

MS ALDRED:

Q. I'm sure it did.

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

A. It is.

CHAIR: Compared with others?

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

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

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

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

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

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

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

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

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

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

A. Right, yes.

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Sorry, I beg your pardon.

CHAIR: You sought the order?

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

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

MS ALDRED:

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

A. No.

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

A. It was notional, yes.

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

CHAIR: Just looking at the time.

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

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

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

CHAIR: Yes, Ms Aldred.

MS ALDRED: Thank you.

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

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

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

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

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

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

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

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

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

A. Yes.

CHAIR: That you referred to right at the beginning?

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

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

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

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

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

MS ALDRED:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS ALDRED: Thank you.

CHAIR: You have nothing further, Ms Aldred?

MS ALDRED: No, nothing from me.

(Closing waiata and karakia)

Hearing adjourned at 4.17 p.m.