ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
LAKE ALICE CHILD AND ADOLESCENT UNIT 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) Ali'imuamua Sandra Alofivae Mr Paul Gibson
Counsel:	Mr Simon Mount QC, Ms Kerryn Beaton, Mr Andrew Molloy, Ms Ruth Thomas, Ms Finlayson-Davis, for the Royal Commission Ms Karen Feint QC, Ms Julia White and Ms Jane Maltby for the Crown Mrs Frances Joychild QC, Ms Alana Thomas and Tracey Hu for the Survivors Ms Moira Green for the Citizens Commission on Human Rights Ms Susan Hughes QC for Mr Malcolm Burgess and Mr Lawrence Reid Mr Michael Heron QC for Dr Janice Wilson Ms Frances Everard for the New Zealand Human Rights Commission Mr Hayden Rattray for Mr Selwyn Leeks Mr Eric Forster for Victor Soeterik Mr Lester Cordwell for Mr Brian Stabb and Ms Gloria Barr Mr Scott Brickell for Denis Hesseltine Ms Anita Miller for the Medical Council
Venue:	Level 2 Abuse in Care Royal Commission of Inquiry 414 Khyber Pass Road AUCKLAND
Date:	28 June 2021

TRANSCRIPT OF PROCEEDINGS

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Hearing opens with waiata and karakia tīmatanga by Ngāti Whātua Ōrākei

[10.05 am]

CHAIR: Tēnā koutou katoa, tēnei te mihi ki a koutou katoa, ngā mōrehu me ngā tangata ki runga i tēnei ruma, and -- I can't say it in -- the computer, the internet looking in, welcome, welcome, welcome to you all. Just to explain that we appear to have somebody missing but we don't. Commissioner Gibson is in Wellington and joining us by Zoom and can see and hear everything we do and will participate that way. So with those words, I'll now hand over to Mr Molloy.

MR MOLLOY: Good morning ma'am. We have today I think the last witness for the hearing. It's Madam Solicitor-General, Una Jagose, and I'm going to hand over to my friend Ms Feint.

CHAIR: Very well, thank you. Kia ora Ms Feint.

MS FEINT: Kia ora, tēnā koe Madam Chair. Ata mārie ki a tātou katoa, tēnā koutou e ngā Kaikōmihana, huri noa tēnei te mihi ki a koe e te Solicitor-General kua tae mai nei hei tautoko te mahi o te Kōmihana Karauna, kia ora tātou katoa.

CHAIR: I welcome you back, Ms Jagose, thank you for coming back to go through the evidence that you have prepared. Can I just ask you to take the affirmation before we begin.

A. Yes.

Q. Do you solemnly, sincerely and truly declare and affirm that the evidence you will give to the Commission will be the truth, the whole truth and nothing but the truth?

A. I do.

Q. Thank you very much, I'll leave you in Ms Feint's hands.

QUESTIONING BY MS FEINT: Thank you. Tēnā koe Solicitor-General. Can you confirm for the record please that your name is Una Jagose and that you are the Solicitor-General and you have prepared a brief of evidence which you are going to present today?

A. I can so confirm, yes.

Q. Thank you, I understand that you have an opening statement that you wish to make before you start your evidence proper, so I welcome you to do so.

A. E ngā mana, e ngā reo, rau rangatira ma tēnā koutou katoa. E ngā mate, haere, haere, haere atu ra. Kei te mihi ki te mana whenua o tēnei rohe, tēnā koutou. E ngā Kōmihana, tēnā koutou. E ngā mōrehu o Lake Alice, tēnā koutou katoa. Ko Una Jagose ahau, ko Te Roia Mātāmua o te Karauna.

I greet you Commissioners, I greet the mana whenua of this whenua, I greet and acknowledge the survivors of Lake Alice and the advisory group and I acknowledge those

who have died. I acknowledge too those who have courageously spoken in public before this Commission about your experience at Lake Alice, the pain and suffering you have endured and the impacts on your lives. Tēnā koutou katoa.

Along with many other survivors, you will forever be associated with the courage and the persistence you have shown in your long fight against the behemoth that is the State and its bureaucracy. I particularly acknowledge the impact of your evidence to this Public Inquiry, so that the story of the children of Lake Alice can be heard right across the motu, because your story has never previously been publicly acknowledged by the State in this way, by an independent and very public reckoning of what happened at the Lake Alice Child and Adolescent Unit, but also in the processes that followed as you sought accountability, answers, and redress.

And you have here also unprecedented opening of the Government's files and the appearance of senior people in State agencies coming to explain decades of practice. I've heard the pain of your evidence and the long fight that you've had, but I've also heard your strength and your very strong belief that what you deserve is public acknowledgment that what happened to you at Lake Alice was wrong and should never have happened. And you deserve public accountability by the State for the decisions taken and the impact that that has had on you. I want to especially acknowledge that you've had a long fight with the State for what you knew was right. I know you have heard from other State representatives in the last two weeks.

For my part, and as I said at the beginning, I'm Una Jagose, the Solicitor-General of New Zealand, and my part in this narrative relates to that role as Solicitor-General. In that role I am the junior law officer of the Crown and along with the senior law officer, the Attorney-General-, I'm responsible for the conduct of Crown litigation and for determining the Crown view of the law. It is appropriate that I appear before this Royal Commission to explain the Crown litigation and legal advice response to the Lake Alice claims.

And as I said when I came last year to this Inquiry, I will not defend everything that has happened, some things can't be defended, and they will be acknowledged and apologised for. But I will try as best I can to explain the context and the perspective of the events that I will now address and on which I stand to be questioned by the Commission, by its counsel, and by counsel for the survivors.

I sincerely hope that my part in this Inquiry, being open before the Inquiry, taking on board your criticisms of Crown Law, being open to learning how to do better goes some way to acknowledge and to engage with the experiences that you have borne and sought

redress for. Tēnā koutou, tēnā koutou, tēnā tātou katoa.

MS FEINT: Madam Chair, just to explain the Solicitor-General said she's going to lead herself through her evidence and present a summary and we anticipate that will be done by the morning adjournment.

CHAIR: Very well, we'll let you lead. Just remembering speed, time is of the essence, but it's backwards time, it's slow time we require, thank you.

A. Thank you Madam Chair. I'm sorry for trying to do everything, but last time I think it was acceptable to you that I went through my evidence-in-chief in a summarised form, I'm not going to read everything out.

Q. Absolutely, as you will know we've had the advantage of having been able to read your brief in advance so that's helpful. Mr Molloy.

MR MOLLOY: Ma'am, if it's any help, the morning adjournment is a worthy aim, if you need a little more time than that I think you should take it rather than cut it short.

CHAIR: Yes, that's right.

A. So I'll use the headings in my brief just to orientate us to where I'm at and I'm going to start at page 6 which is the division of the Solicitor-General's criminal and civil functions. I've been asked how Crown Law divides the responsibilities that the Solicitor-General has in the conduct of prosecutions and the commencement or defence of civil claims involving the Crown.

These questions are very important and very important ones for us to be clear about not just in this Inquiry but generally, because in New Zealand we place very high constitutional value in processes that are open and fair. Fair to the defendant, to the witnesses, and to the victims and survivors of crime and reflect proper interests of society.

I've set out there something from the prosecution guidelines, but that really makes that point and it's important that prosecution decisions aren't affected by irrelevant considerations, which include the Crown's potential civil liability for the conduct of its employees and agents. I set out, and I will now address the institutional arrangements that are in place, which make me confident that prosecution decisions have not been influenced by such considerations. I do accept that there is a tension and a dual role that the Solicitor-General- carries in those two things, defending civil claims and being responsible for the Crown's prosecutions.

So the Solicitor-General-'s functions are set out in relation to civil claims in the Cabinet directions for the conduct of Crown legal business, which sets out that, with some exceptions, litigation in the High Court or the higher courts is to be conducted by Crown

Law or briefed to other external counsel and the Solicitor-General is responsible for that. The Solicitor-General- is also responsible for maintaining general oversight of public prosecutions, that's now in the Criminal Procedure Act.

That's a relatively recent recognition in statute of an old law officer responsibility for public prosecutions and it's important to recognise that this is -- this responsibility is conducted by a supervision of the prosecutorial process and in particular, through superintending the arrangements whereby Crown solicitors who hold a warrant to conduct Crown prosecutions that they do so on behalf of the solicitor.

I've set out at page 7 that Crown Law is now divided into five groups. There are four legal practice areas and one corporate group. Since about 1995 there has been a Deputy Solicitor-General with responsibility for supervising Crown solicitors, those external lawyers who conduct Crown prosecutions. There is now also a Deputy Solicitor-General of public law and a further Deputy Solicitor-General responsible for what we call Attorney-General- work, which includes Bill of Rights, human rights, Treaty of Waitangi work.

In relation to public prosecutions, I've said already supervision is the responsibility of the solicitor. The Solicitor-General- and the Crown Law Office don't commence prosecutions ourselves. So that is done by agencies, most commonly the Police, who commence Crown prosecutions. They are conducted in the courts by the Crown solicitors who I've already mentioned. Those Crown solicitors are independent from the Police and other prosecuting agencies and indeed Crown prosecutions are required to be conducted independently from the agency that commences them.

So the oversight that the Solicitor-General has of prosecutions is undertaken in a number of- ways, through the supervision and management of Crown solicitors, as I've just mentioned. In that function, through my office, appointments are made of Crown solicitors, there are regular performance reviews and audits of how well they are going with stakeholders, Police, courts, the community sometimes.

Other prosecuting agencies, and just by way of an example, MPI, Ministry of Primary Industries prosecutes - has a prosecution function for certain Agriculture and Fisheries related- legislation. So, they're an example of a prosecuting agency.

The Crown Law Office conducts assessments and collects data just to try and understand prosecuting agencies' decisions and to provide oversight about how they should be - broadly how they should be run.

To help with that, the Solicitor-General-'s guidelines for prosecutions have been

developed. There are a couple of sets of such guidelines. One generally for prosecutions, and one particularly for prosecuting sexual violence cases. Those guidelines are developed in my office for the Solicitor-General to issue and because there is no central decision--making- agency for all prosecution decisions, those guidelines are essential to setting the sort of core and unifying standards that are expected in public prosecutions.

The law officers, the Solicitor-General and the Attorney-General- have a number of functions in relation to particular prosecutions. Perhaps relevant to this Inquiry is worth mentioning that the Attorney-General has some statutory function to consent to certain prosecutions being brought, and the Inquiry will have noticed that the Crimes of Torture Act in New Zealand requires the Attorney-General's- consent to a prosecution for the crime of torture.

It might be worthwhile interpolating there that the reason for adding a layer rather than leaving it to prosecution agencies, adding a layer of consent, the Attorney's consent here, it does vary across the statute book, but some crimes need - have to be cast quite broadly in their definition in statute. Some crimes have extraterritorial effects, so you can be prosecuted in New Zealand if you're a New Zealander for something that you did not in New Zealand. Some crimes have a very significant State to State relationship. Those are the sorts -of if I had to sort of summarise- the types of crimes that the Attorney-General's- consent is required for, they have the sort of slightly larger perspective that might need to be taken in account.

The example of a broad definition of a crime is needed - it is thought to be needed to have the Attorney's independent view there to make sure that the proper sorts of cases are brought to the courts, not everything that might fall within a broad definition.

Nevertheless, even when the Attorney-General has that function, because of the risk of there being seen to be political interests being deployed in such decisions, by long convention, the Solicitor-General- exercises those functions for the Attorney by delegated authority. In fact, it's very important for the ongoing independence and high reputation for prosecution, for how prosecutions are run, that again by convention the Attorney-General has no role in prosecutions, that will -be if- that role is required it will be delegated to the solicitor, for that very reason of the risk of a conflict or a perceived conflict between political matters and prosecutorial matters.

Q. Does that include under the torture, crimes of torture as well?

A. Crimes of Torture Act?

Q. Yes.

A. Yes.

Q. So although the Attorney-General holds the statutory power, it's in its entirety delegated to the Solicitor-General, is that right?

A. Yes, in fact the delegations operate in that anything the Attorney-General has as that law officer function in statute is permanently delegated by legislation to the solicitor, so they can exercise any function the Attorney can exercise. So it is convention that that leaves those matters to the solicitor.

Q. Thank you.

A. I mentioned before that my office has four legal groups. One of them is the Criminal Law Group. Within those teams, lawyers provide advice from time to time to prosecuting agencies in respect of legal issues that they may want advice on. But it is not common for those lawyers to give advice in respect of individual cases. I think you heard last week from Malcolm Burgess an example of this. That within agencies their own lawyers would tend to give advice to the prosecuting decision-maker, or perhaps Crown solicitors in the area where the prosecution decision is being made. They might become involved, but -- and there is such an example here in this matter, sometimes Crown Law is asked for advice about a particular prosecution.

My point being that it is quite rare. And as the Commissioners will know, in this Inquiry, Deputy Solicitor-General-, Nicola Crutchley, gave some advice to the Police about whether there was sufficient evidence to bring a prosecution in respect of the matters at Lake Alice, and I'll come to that. Perhaps just worth saying here that the advice was there wasn't presently a sufficient evidential basis, but the recommendation was more investigation was certainly needed, given what was seen.

The principle really underlying all of this is that regardless of who provides the legal advice, whether it's my office or an external lawyer or a lawyer in an agency, the decision to prosecute is one that is taken independently by the prosecuting agency and usually, and in the context that we're here today, the Police.

If a prosecution is commenced and it becomes a Crown prosecution, that's in the Criminal Procedure Act, the Crown Solicitor, again the external solicitor acting on warrant from the Crown to prosecute crime, they must also independently come to the view that the prosecution has been properly brought, that the charges are ones for which there is an evidential basis to put the matter to the court.

Sometimes Crown Law might be involved in a peer review of that Crown Solicitor's view if the matter is very complex. That's a really important principle that I just

want to emphasise, that it is the prosecuting agency that must decide.

Then the prosecution guidelines that I've mentioned already are the foundational guidance for whether to commence a prosecution or not. I recall that this Inquiry has heard something of this test already. First, the agency must be satisfied that there is a sufficient evidential basis to provide a reasonable prospect of a conviction. If that evidential basis is there, then the prosecutor must consider and actually only at that point the prosecutor must consider is it in the public interest to bring a prosecution. And the prosecution guidelines, which the Inquiry will have, they're publicly available on the Crown Law website, sets out a range of factors, not all of them, it does not claim to be entirely exhaustive, but sets out a range of factors to be considered when assessing the public interest.

Then I come to some of the checks and balances on that on- the decision to prosecute. I've mentioned the Crown Solicitor already who, even once a charge has been laid, must come to the - must review it and come to their own view about whether it is proper to continue the prosecution. The court, of course, is a significant check on the power and the decision to prosecute. A defendant can apply for charges to be dismissed or stayed by the court for a variety of reasons, delay, abuse of process. The Attorney-General- can grant a stay of proceedings. Anyone, a defendant or anyone in fact, could apply to the Attorney to consider a stay. As I've mentioned that would come to the solicitor for decision. The Independent Police Complaints Authority can hear a complaint about a prosecution in respect of conduct by the Police, and of course the courts again in the appeal process where a defendant has a right to appeal against sentence or conviction, and that appeals process can subject the charge and the sufficiency of evidence to close scrutiny.

There is less oversight in a way where a decision is made not to prosecute. But a prosecuting agency that decides not to prosecute can ask can- be asked to review that. If it was a Police decision, the Independent Police Conduct Authority could look at that. If a complaint was to be made about the Crown Solicitor's role, perhaps if a decision has been decided at that point if the prosecution can't continue, the Solicitor-General- or the Law Society might be appropriate bodies, and private prosecutions can be brought, although that is rare.

So, the separation of those functions, given that the Solicitor-General isn't responsible for the decision to prosecute but supervises how the process is conducted, the conflict question that I've been asked -isn't I- don't find it very apt because a conflict of interest is really the sense that there are competing duties that are in conflict with each other. But here, the duties, they are really all owed to the Crown.

But I think the question that I'm being asked is, could lawyers within the Crown Law Office improperly influence a prosecution decision whether to bring one or whether to stop one, so as to get some advantage for a department, a minister, a Crown in the conduct of a civil case. I think that's the question that this conflict point is getting at.

And I find it very hard to imagine the malicious or malevolent use of the roles without that being detected, because I've mentioned the Solicitor-General- is a supervisor, not a decision-maker of prosecutions and lawyers within or briefed by Crown Law work with and act on instructions from agencies and sometimes directly from ministers of the Crown.

So while I accept, and I accepted this last time I was here too, that Crown Law is influential in its legal advice, decisions about how to - whether to bring certain steps in a civil case are not entirely Crown Law's. And I mention this only because I'm trying to think of a situation of misuse of the power.

Those decisions are made in collaboration, yes Crown Law determines the Crown's view of the law, so it is influential in its advice. If there are disputes about how matters should be conducted in the court between, say, my colleagues in another department and my colleagues at Crown Law, I would expect that that would be elevated up through agency hierarchies and sometimes to ministers. In fact, we see something of that here in the Lake Alice litigation, or rather the pre-litigation steps in relation to the Grant Cameron cases, which we'll come to.

Q. Before you leave that point, can I just maybe elevate the question. I appreciate the way you've set that out, because it is difficult to grapple with what this conflict might be. Having heard from the survivors at length it seems to me the question might be framed just slightly differently, and that would be, could the lawyers and the Crown Law Office improperly influence a decision to prosecute or not in order to prevent the Government or its agencies from being held accountable. So rather than limiting it to defending a civil claim in that narrow sense, but there is a strong sense, I believe, from the survivors that somehow the decision not to prosecute was one done in order to protect the Government from reputational risk or indeed accepting general accountability?

A. Yes, thank you, yes, I understand that question and having listened to a lot of the evidence of this Inquiry these last few weeks and read all of the material that survivors have - their written evidence, I can understand why that, not being able to see into the system the way I can, I understand that question.

My answer is that the decision not to prosecute - sorry, the decision to prosecute or

not is not taken in Crown Law, it is taken, in this case, by the New Zealand Police. And you heard, of course, from the Police last week on that. I cannot see how Crown Law's interest in defending a case, even in the most maliciously intended processes, which I reject that we have, but even imagining somebody really wanted to force that issue, the independence is the answer.

Q. The independence of the Crown Law Office?

A. Of the Police.

Q. Of the Police, to make the decision?

A. Yes.

Q. Yes, I see. Thank you.

A. Actually, the first defence against that sort of misconduct that I just imagined actually comes from the integrity of statutory office holders like Police, like the Solicitor-General, like my colleagues in the Crown Law Office, and my colleagues in other agencies, and I accept that that might seem like a very selfserving point, but we have duties to the court, we have duties as public servants, that really is the first line of defence against misconduct. We have standards set by the Public Service Commissioner, new title name, colloquially speak out, you know, public servants are encouraged and protected from saying nothing if they see something wrong. That is very real.

But also, there are institutional arrangements at Crown Law that limit the potential for what I have said in my brief would be a rogue lawyer or set of lawyers trying to subvert the processes. I've mentioned the independent prosecution.

If we at Crown Law were aware of a criminal appeal in our office relating to an individual against whom allegations were made in a civil action, we would take steps to separate those things probably by briefing the criminal matter outside of the office. There are plea arrangements that can be agreed between prosecutor and the defendant, that at a certain point they must be approved by the Solicitor-General or a Deputy -Solicitor-General-. My example here, not relevant in this matter, but a plea arrangement where somebody is charged with murder but will agree a plea to a lesser charge that has to be agreed at the highest level in my office.

Where Crown lawyers conducting civil cases need to speak to a person against whom criminal allegations are made, we make it clear that we are not that person's lawyer and it needs to be clear to them that the information gathered is not protected in that way that you would have if you were talking to your own lawyer in a privileged sense, privilege sense.

Civil litigation is conducted with the department and the agency responsible. In this case the Ministry of Health in relation to Lake Alice. These days, although I accept not in the 1990s, litigation planning is a formal part of the engagement between my office and the department. Litigation management plans set out strategy, difficult issues, places where there are weaknesses or strengths. Sometimes ministers get involved in setting or agreeing a litigation approach and the Inquiry has already heard of what is now the historic claims resolutions process by which Cabinet and the Government approves the approach to be taken.

Another place where that rogue lawyer idea that I've spoken of would need to - would be caught or caught out is where civil claims are settled. They themselves are subject to Cabinet directions so that matters can't be swept aside and settled unless that's a proper approach. There are financial limits, at some point ministers or Cabinet need to agree to settlements and Crown Law needs to endorse settlements of civil claims.

Q. An example of that, of course, is the Lake Alice settlement that came via Cabinet.

A. Yes, that's right. I'll just take a moment to check, I don't want to say anything too detailed. I've set out how the office goes about responding to civil claims but I'm happy just to leave that as written.

Q. Yes.

A. Perhaps one thing just to emphasise, because I think it's relevant here, is that if an allegation, which is what we call something said in a statement of claim filed in court, if the defendant, the Crown in this case, in these cases, doesn't deny it, it will be admitted, so it doesn't have to be proven by the person who makes the allegation. That language of deny doesn't mean we don't believe it didn't happen, but rather we put the person who makes the allegation to proof in the court. Sometimes that means that depending on where you are in the process the defence might say the allegation is denied until further steps are taken, speaking to witnesses, information gathered and reviewed.

The Commissioners will remember my earlier advice that in the context of historic claims there is quite a separate process now for how those claims are brought and put through an alternative disputes process. Sometimes they end in the court, but there's quite a different process now taken.

I'm up to page 14 and looking at questions that arise or issues that arise in the information-gathering process, because of course once a claim is filed, the first thing to do is to talk to the agency and go and get what material is available.

When allegations of crime are first tested in the criminal process, there is a very

strict procedural process by which the accused person is given information, is afforded a fair process, a naturally just process in order that any prosecution is fair.

In civil claims, that same process in relation to the person alleged to have done a criminal act doesn't apply. As I've discussed already with the Commissioners last year, many plaintiffs or survivors in historic claims don't bring their claims to the Police, and so the first-time criminal matters are being looked at is in a civil setting.

And sometimes the first-time factual matters are being determined is by the civil courts, often where the alleged offender, individual is not even for the court in that proceeding. So that does put a burden, sometimes a tension on Crown lawyers dealing with civil cases in which criminal acts are alleged.

Sometimes that will require those factual allegations to be tested and lawyers and others instructed by lawyers might go and interview and investigate to try and work out what has happened. Given that there is a potential for those individuals who are said to have committed a crime to be at some point charged with criminal offences, that civil process of contacting and interviewing needs to be careful that it doesn't jeopardise any future criminal case.

The question that arises, of course, is whether the Solicitor-General- should, could or is obliged to refer allegations to the Police of criminal conduct, and if so, at what point.

This issue arose squarely in my experience at Crown Law in the mid-2000s when, and as I said last time I was here, that was about the time that significant numbers of historic abuse claims from people who had formerly been in psychiatric institutions or in children's institutions, those claims were being brought. I won't go through it here orally, but I've set out the thinking and the process that we went through in the mid-2000s to try and balance those tensions with the Crown having allegations of criminal wrongdoing in a civil case and when that obligation might arise to do something more than respond only in the civil arena.

And as I've said at 3.47, I was one of the lawyers involved and I concluded then that an allegation alone didn't have to be referred to the Police. Partly because that would be referring a lot to the Police, perhaps raising expectations that criminal processes would follow. But I thought where certain factors where there were certain features of the allegation that might warrant sending matters to the Police, would include where there were allegations made about people who were still working in children's institutions in particular, or in any institution, that perhaps had some other record, either the number of complaints or a record in the file that brings the matter more - just to a higher point of being referred to

the Police.

But to directly answer the query that's been put to me by the Commission, Crown Law doesn't have a formal policy on this. In preparation for this hearing, I have rethought that point too. The thinking from 2004 and 5 continues to guide an individual, rather case-by-case approach to this question. Because it is challenging, and individual claimants, and in particular in historic claims, we now know very clearly from those survivors many of them do not want to go to the Police. You will have heard in the redress hearing last year that now the High Court, and confirmed by the Court of Appeal, has put in place a process by which, if in civil litigation, the Crown wants to refer, or an agency wants to refer allegations in a claim to the Police, they need the leave of the court. So, another balance I think in the mix that I've been talking about.

I would anticipate that the court would give leave, even if opposed by a plaintiff, if there was evidence of serious criminal offending. In the case just to be relevant to this hearing, in relation to torture, if there was a reasonable basis to suspect torture, I'm confident the court would give leave for that to be referred to the Police, because that is - we'll come to this - an obligation under the United Nations Convention Against Torture for matters that are a reasonable basis to suspect torture has been committed.

So, we continue to think about this question. I will be greatly guided by this Inquiry as to whether a written policy in my office will help and what that might address. Certainly, the consent of the individuals making the allegations would be important but not determinative probably, admissions of liability versus allegations which should be treated quite differently. Torture or reasonable basis for suspecting one, again would be treated differently.

When I look back in this context at the Lake Alice history, and I observe that in the Ministry of Health's assessment in the 1970s there was sufficient to refer to the Police, Dr Mirams did that from the Ministry of Health, Crown Law didn't appear to think that referral to the Police in reference to Ms McInroe's case was required. It doesn't appear on the file. I have no personal involvement with that case. There's nothing on the file.

But I would say by 1998, the large number of allegations, the same criminal conduct being made, the significance of those allegations, the knowledge at least within the system of the 1977 complaint, I would say that by the mid-90s or perhaps by 1998 Crown Law should have thought what is the role here for us to refer this to the Police. I don't see anything on the record that says that we did. I don't know whether that was discussed. I know Mr Cameron said, well, I think that he said from my listening in last week, that he

said he didn't want to refer those of his clients who were prepared to go to the Police, he wanted to wait until after the resolution with the Crown. Whether that was discussed as between Crown lawyers and Mr Cameron I don't know, I don't see a record of it.

We have a much greater awareness now of this issue and problem. We have developed a draft protocol, still in draft, with our agency colleagues about how we might grapple with allegations being made with our greater understanding of Bill of Rights and United Nations Convention Against Torture obligations to see if there is a process to draw earlier tension to problematic issues. Again, I would reference the plaintiffs' and survivors' own - their own interest or what they want to do will be relevant. But also, Crown Law has started its own work in thinking about how do we triage or how do we think through allegations so that if they are proven, or accepted, they would be a torture or one of those cruel inhumane conducts that the Bill of Rights Act and UNCAT speaks to, then we would spot them early.

Now we haven't had such a protocol in the office. We are working on that now, informed absolutely by this Inquiry, by what's already gone, by the evidence that's been given and by the issues that it has made us face. So, we are in that process currently.

I'm up to page 18. I want to just very briefly touch on the question that was asked about whether Crown Law had any role in the 1977 inquiry into Lake Alice conducted by Magistrate Mitchell. I've dealt with the detail here. The very short answer is that yes, Crown Law was involved in that one of that the -Solicitor-General was asked to produce a lawyer to assist the inquiry, much like this Inquiry has lawyers to assist. We don't have other records in the office about whether we were involved in how that inquiry was established. Mr Patrick Keane, as he was then, he was a Crown counsel at Crown Law- and he represented the Crown parties at that inquiry. There are some very limited record of what he presented to that inquiry and we don't have any record of any advice he gave during it to those agencies.

Q. One of the things that gives rise to is this question of holding records, isn't it, of inquiries and the like. The common theme is, the papers were lost, there's no record, it's gone etc. And maybe one of the big learnings here is that whenever there is a public inquiry that it's somehow - it's surprising to me it didn't end up in archives, for example, where is the record of this inquiry?

A. Yes, well today it would be in - today's expectation is that material will all be held.

Q. Yes.

A. Public Records Act requires it, the Inquiries Act requires it.

Q. Yes.

A. But in the '70s I guess we didn't have that same focus on the record.

Q. Right, thank you.

A. The outcome, not everything that went into it.

Q. Yes, but when the outcome is disputed or later challenged, there's no basis for going back and checking, so it is a deficiency of that time, isn't it?

A. Yes. If I can turn to the litigation that involved Ms McInroe, who I acknowledge is here today. There have been a series of questions asked in relation to that litigation, and I accept the criticism that was made of me last time I was here that I didn't have enough information about that proceeding to answer some of counsel's questions. We have conducted a very thorough review of that proceeding and I will speak to it now, although of course I wasn't at Crown Law at that time and I am really speaking from the record.

There are two preliminary points to make. First of all, the Crown most certainly caused unnecessary delays in Ms McInroe's claim being advanced in the court and that shouldn't have happened. I see that there were some delays that were just the sort of delay that does happen in litigation. But what the Crown didn't do, as it should have, was meet deadlines for steps, notably discovery, information exchange, and filing its defence, it just didn't get to those deadlines without a reason that I can see.

Sometimes in litigation you miss deadlines, but it is expected, certainly by me but also now by the court, that you don't do that without excuse or without leave of the court generally. But that is Crown Law's responsibility. And even though the record shows that the Ministry of Health was a bit slow, quite slow in getting documents out, that obligation is still Crown Law's. Crown counsel has that obligation to meet the court's deadlines, or to do something about that. I find it remarkable and not good enough that it wasn't until the court threatened to throw out the Crown's defence of the file that documents - that the list of documents was filed. I think that's a terrible and I don't think it's too strong to say disgraceful that that is how Crown was conducting itself. Delays without excuse are not good enough. That's one point.

The second point is that I've already said last time I was here that the apology that was given to Ms McInroe by Crown Law for the delays was inadequate. And I said at the time it didn't seem to express any real regret for what had happened, it was very pro forma. Having reviewed the file in more detail, I can also say it wasn't just the delays that the Crown Law Office should have apologised for, they happen, but with proper communication they can be accommodated.

But what I think the delays were symptomatic of, is a lack of empathy for consideration that there was a person in this file, that there was a person's life, Ms McInroe's life in this proceeding. And that is what I think the Crown didn't - the Crown Law Office didn't see. Maybe this is a modern view, but Crown counsel need to understand that it is no small thing to have the power of the Crown with you, that we are frequently dealing with people at their most vulnerable and that we hold a significant part of their lives in our hands. And that's a responsibility we have to be aware of. And in fact, I went back from this Inquiry last year and held a whole office hui at my place to emphasise that this is my expectation.

And I must say that in 2020 and 2021 that is not a surprise to my colleagues. I think we are shifting and continue to shift. But that is what is obvious to me from reviewing this file. A particular example that stands out to me, I saw Ms McInroe address in her evidence last year, was the obtaining access to her personal diary and not treating it and Ms McInroe with the dignity she deserved. She was entitled to be treated with dignity in all of that, no matter how vigorously we brought legal defences to that matter. We did not meet that expectation.

Actually, I see it again when I see how the office dealt with I think a failure to connect Ms McInroe's case to the alternative dispute resolution that was being negotiated in relation to other Lake Alice survivors in a timely way. Again, we didn't treat her in a way that she mattered rather than just the file was progressing.

And to that, and I take this opportunity on behalf of Crown Law, to apologise unreservedly to you, Ms McInroe for that. We did not treat you with respect and dignity. We caused additional trauma with what was already a very difficult part of your life to face. I have agreed to meet with Ms McInroe once this part of the Royal Commission is complete and I sincerely hope that doing so will go some way to redressing the pain that we have caused.

The second point that I want to make before I look into the file in a bit more detail, is that the question to me is prefaced by my earlier comment last year, that the proof of what happened at Lake Alice was in the file.

When the Lake Alice claims were first received, they were primarily analysed by reference to legal defences, as I think I have said already, with very little attention given to the underlying facts. It wasn't until 1999 when the incoming Labour Government determined it wouldn't take a legalistic approach, but it would rather face the matter head on, that the files themselves were analysed, and it was there that it was revealed that the

plaintiff's allegations that they were admitted to Lake Alice as children who were perhaps troubled rather than suffering a recognised psychiatric illness, and for whom psychiatric treatments were administered - sorry, psychiatric conduct like a treatment, I don't accept that they were treatments, were administered to alter their behaviour. The files showed that those things did happen, the administration of certain practises, whether it was ECT or the use of ECT machine, the administration of Paraldehyde were recorded in the record. The Government did not want to put that - the key question of what purpose was that conduct engaged in to the test. It accepted and apologised in these terms that it could see that what happened was unacceptable and should never have happened.

So that is what I mean by it was in the file. But to put that into context in Ms McInroe's claim, from the time that was filed until that change of Government position, the instructions were to proceed defending the case with statutory defences that were available.

Q. Those instructions came from?

A. The Ministry of Health in the first instance. I was just wondering if whether the Minister of Health - no, that comes later in the Grant Cameron-related claims, the Ministry, yes. So, when I look at the file now, and I see that many of those facts are recorded, what I also see was that the focus was on defending them on the basis of accident compensation, limitation and Mental Health Act barriers. So, there was no attention to the facts. The three statements of defence that were filed primarily denied the allegations. Again, my point earlier, not that we were saying they didn't happen, but that they were not being engaged with and therefore they needed to be either accepted or denied, and we weren't at the point of even looking at them because the law and the barriers to the claim being brought were the focus.

So it's, I suppose, a very legal point I make now, which is to say that wasn't that Ms McInroe wasn't believed, but that liability, the Government or the Crown's liability was barred, that was the focus.

I've set out the steps, in quite a lot of detail, and I won't go through them, you'll be happy to know. The detailed approach to what was done to prepare the statement of defence. I need to correct at 5.11 there's a date there that is wrong. Just to put it in context for people listening, reviewing the files indicates that we sought instructions from the Ministry of Health in October ‘94, they didn't come in until sometime in February ‘95, but we also sought documents from the relevant health authority which were provided in March ‘95 that date should be.

Perhaps it's worth my reflecting that the only place we spoke to was the Ministry

of Health in preparing the defences, not Social Welfare which when I look at the whole of the record now I think that was - that should have been a place to have also sought input.

There was significant delays getting the documents, but one of the things that I can't explain was that no-one seemed to draw the connection between the 1970s inquiries at Lake Alice to this claim. And it's hindsight I know, but I find that very surprising, that in particular the Ministry of Health didn't connect litigation about the very same things in the very same timeframe that had already been subject to two inquiries and I now know a Police investigation. Another failure, borne of thinking about the legal defences.

There was some, and it's detailed in appendix A of my brief - sorry, will my brief be made available particularly to Ms McInroe and other -

Q. Yes, it's going to be published on the website, so everybody can read it.

A. Yes, because it's quite detailed.

Q. Yes, it is.

A. All of the steps we went through to evaluate the strength of the claim between '94 and settlement.

Q. Yes, you can leave detail out with confidence that people can read it if they wish.

A. I've been asked about why there was no psychiatric expert evidence called prior to the strike-out. I think the answer must be that a strike-out application is determined on the basis that the facts that are pleaded are true. And so there wouldn't have - it seems there wasn't a need to get a psychiatric evaluation at that point.

I'll come to this later because I think this is another place where Crown Law Office did not do as well as I would expect it to. Actually, I might just come to that now because it makes more sense. A strike-out application, as I've just said, requires you to think that everything that is pleaded, broadly speaking, is true. The threshold for strike-out is very high. It is that the claim is so untenable that it couldn't possibly succeed.

The High Court was right to say, if we assume that what Ms McInroe says is true, then Crown you do not meet that high bar and I haven't seen on the file any analysis that grapples with that question. Today I would expect that question to be grappled with in the litigation plan that the lawyers - here's my threshold, can I get there. I didn't see that.

I've been asked about Dr Leeks' attendance at the mediation in 1998 and whether the Police were informed that he came to New Zealand for the purpose of that mediation. I don't think the Police were informed, I don't see that on the file. What I do see is that both the mediation and the potential for a settlement were seen - sorry, that confidentiality was seen as important in that. There was no warrant for his arrest, and I didn't understand

anyone to have recognised on the file that the Police might be interested in any event.

I recognise now, and I apologise for the effect that having to go to that mediation with Dr Leeks has had on Ms McInroe. Again, there is nothing on the file to indicate that that was recognised, perhaps going back to my earlier point that Ms McInroe wasn't recognised. This was being looked at as a legal engagement.

Although there is on the record mutual agreement between the lawyers at least that Dr Leeks would attend. If I can just touch on a point, it's not in my written brief, but it's come up in the evidence. Sorry, I'm just wondering - oh, that the effect on Ms McInroe of going to an assessment with Dr Brinded at the Mason Clinic was also one of significant deleterious effect on her. I think it has been said, and I just need to correct it, I think it has been said that venue was insisted upon. I see in the record at my office that Mr Liddell, the lawyer, established that Dr Brinded was available and suggested the Mason Clinic as the venue, but also indicated that if there were other venues that should be considered, we would look at those. I just point that up that it was an offer made and not recognised. In fact, I see again in the record Dr Brinded saying after the fact that he hadn't appreciated, and he wished he had thought earlier that the venue would be problematic, and that he and Dr Armstrong hadn't thought about that in time. So...

Q. So there was carelessness all around wasn't there.

A. Yes, indeed. I've moved to page 27. The impact of the Grant Cameron litigation. The question was, how did that Grant Cameron-run litigation affect the strategy in relation to Ms McInroe's claim. And in some ways, there was a direct - an absolutely direct impact. I can see on the file that counsel on both matters were coordinating responses and recognising the need to understand where each other was at. In fact, Ms McInroe's litigation was seen as a potential forerunner for how the prospects of the group claim, if I can call it that, what the legal prospects of that might be.

In the end, the Government said when it agreed to settle the Grant Cameron claims, and settle Ms McInroe's - there was another party in that claim - claims in the same way, but I've already touched on, I think I read Ms Cunningham, as she was saying how frustrated she was to see in the media that the Government was working towards a settlement with the Lake Alice group of claimants, and again I say that that is where Crown Law should have done better in it knew, inside itself, that these claims were related. If we had been thinking about the plaintiff, sorry, Ms McInroe as a person, we might have thought also let's tell their lawyer that we're having these discussions. That didn't happen, it wasn't until the Cabinet made it clear that both things were to be progressed to settlement

that - I was going to say suddenly, but I don't mean that because, of course, delay has been significant in Ms McInroe's claim, but at the end the settlement moved relatively swiftly when Cabinet said settle these ones and Ms McInroe's claim in the same way.

So, to be clear about this, I want to end this part about Ms McInroe's claim by saying that Crown Law was responsible for and I take responsibility for unjustified delays in conducting that proceeding, there were some specific delays, filing the defences, providing the documents, the common courtesy of replying to counsel's correspondence.

Also, there are a number of steps that could have been taken perhaps concurrently. One after the other after the other. This matter took I think nine years, it is too long to have, without going to a court in any substantive way. I've already mentioned that the application to strike out, I don't think it's as well thought through as it should have been. If there was assumed no contest on the facts then the strike-out bar was just not going to be reached.

And I also accept responsibility for, well just not being as closely connected with Ms McInroe through her lawyers in relation to the Grant Cameron matters. Although, this is just for completeness rather than as an excuse and it's set out on page 102, that at some point the Crown Law Office was in discussion with Mr Cameron about the other two claims that were on foot, as it were, and could they be joined in to the Grant Cameron claims. And it seems that that was not acceptable to Grant Cameron. So, there was at least - I raise that there was some understanding of these things being connected. But there was an attempt to pull them together, that was rejected by Mr Cameron. I've set it out there at 16.31 in particular on page 102.

And I think the anxiety perhaps I see reflected in that file is that Mr Cameron perhaps was worried that that would slow down the achievement for his clients of a result. Nevertheless, in all of those at least five things, I repeat my sincere apology on behalf of Crown Law to Ms McInroe, and as I've said, I have agreed, if she is still willing, to meet with Ms McInroe to see what further we might be able to do to assist in some of that redress that is needed.

I'm on to the Grant Cameron-led litigation. Again, in appendix B I've gone through a very detailed chronology from the file of this matter and so I will try and hit highlights here rather than the detail.

So as the Commission has already heard from Mr Cameron, he approached the Government in July '97 directly to ministers with his objective of achieving an alternative process rather than a litigation process for his clients. That process began rather slowly

also. Some of that delay was, I'm not criticising, but Mr Cameron pulling together all of the material that he said he would provide for an assessment of whether claims should be settled.

And it took some time before - I think what it shows in the file is that litigation steps or litigation ideas and alternative dispute resolution ideas were being considered at the same time. Because, as I've set out in Appendix B, Crown Law continued to be asked by the Ministry of Health for advice about the strength of the claims and the potential for liability on the Crown, even while the Government's ministers and departments were thinking about what might an alternative dispute resolution look like. And I don't think that's too surprising in that the decision about what an alternative method might look like will be informed by an understanding of risk and liability, that's how it appears to me on the record. So that included getting patient and staff and other relevant material together. There was an information management agreement entered into with the agencies so that we could by contrast with Ms McInroe's file a wider cast net of agencies including Social Welfare and Health to try and get the relevant material together.

I've set out at 6.8 on page 30 the steps that were taken to assess the strength of the claims. I observe that one of the steps taken was engagement with a place called 'The Investigation Bureau' to identify and conduct some interviews with former Lake Alice staff members and the instruction letter, which the Inquiry has, made it clear that it didn't mean that the matters were going to court, but that their evidence might also give the Crown some position from which to accept the plaintiff's allegations.

So, while it might not have been obvious to the survivors and to Mr Cameron, that these two things were quite related to the alternative dispute resolution development rather than think the criticism is that Crown Law became divorced from the Prime Minister's interest in settlement and became very set on a litigation pathway. I disagree with that. I don't see that from the record. What I see is, if you think about the system as a whole thinking how might we settle this, with specific questions being asked of Crown Law and a process that continues, a legal process that continues alongside.

In particular, I just want to address Mr Cameron's evidence where he said he thought there was a disconnect between the Prime Minister and Crown Law. And as is evident, I disagree with that. And the record shows I disagree because the record shows that Mr Cameron raised those complaints at the time and the -Solicitor-General became involved. He invited a Deputy -Solicitor-General- who hadn't been involved to look at the conduct of the files to see what Crown Law had been doing and her advice to the solicitor

was that there hadn't been a misunderstanding of instructions and that the matters were being pursued simultaneously in order to A, understand alternative options, but B, if the matters did end up in court, that we were more ready.

The Solicitor-General- confirmed his view in a letter to the Prime Minister. You have all these files.

Q. Yes.

A. In a letter to the Prime Minister in which he reassured her that Crown Law wasn't misconducting itself and provided draft letter to Grant Cameron which said so. Now I don't know whether that letter ever went, I've only seen the draft, but there was a draft provided to the Prime Minister. So, I just want to make it clear that we don't agree that even on the record that's a sustainable challenge.

I see the time.

Q. We could stop now and take a break and you could maybe consider where you're going to go after that, it's up to you.

A. Thank you, I'll be in your hands as to time. I do have more than I had earlier anticipated.

Q. It always happens.

MR MOLLOY: Ma'am, I think the protocol agreed was a couple of hours and we're well short of that.

CHAIR: We are well short of that and we didn't start your evidence until about quarter past. I suggest what we do, take a break now, you can look over it and work out where you're going to go, I'm sure you have already, but just to assess that, and we'll come back and you can finish in your good time, is that all right?

A. Yes.

Q. All right, we'll just take the morning adjournment.

Adjournment from 11.28 am to 11.51 am

CHAIR: Thank you.

MS FEINT: Madam Chair before we start again with Ms Jagose, I've been remiss this morning, I'm a bit slow on the uptake on Monday mornings. I overlooked introducing Nicholai Anderson who's here from the Crown Law Office to support the Solicitor-General.

CHAIR: Thank you, good nearly afternoon Mr Anderson.

MS FEINT: Also, at the back of the room we have Aaron Martin who's the Deputy Solicitor-General for Crown Legal Risk which is the public law team.

CHAIR: Indeed, thank you.

MS FEINT: So they're both here to support the Solicitor-General and the work of the

Commission today.

CHAIR: Thank you.

QUESTIONING BY MS FEINT CONTINUED: Ms Jagose, you're doing so well leading yourself I'll leave it to you again. Please, haere tonu.

A. I thought I would start this part just by just a brief chronology of the Lake Alice claims in relation, I'll call them the group claims, to talk to Grant Cameron's process. I think it's relevant that he started in August 1997, he and Mr Edwards came to see Minister English, then the Minister of Health, who was open to the idea of exploring alternatives and a process - as between officials and Grant Cameron, and if a process was engaged in to work out how to get relevant information, briefs from the survivors and so on.

CHAIR: And that was Minister English in his capacity as Minister of Health?

A. Minister of Health, yes. And then a year later, or late 1998 the Minister of Health changed and was the Honourable Wyatt Creech who took a very different stance from Minister English and I'll come to that, but his stance was no, let's test this all in the court.

A year later, 1999, the incoming Government says otherwise, no, let's look at resolving this in an alternative way and about a year later the resolution is reached. And I emphasise that because I think I caught some criticism of the speed of the process from Mr Cameron. In fact the file indicates also that he was inpatient with the pace.

Actually on that chronology with two different administrations and three different ministers of health all with different views about how it should go, I actually don't think that's such a long timeframe for a significant resolution as this one was.

I'm on about page 32. I won't go through the detail, but Crown Law was still involved, of course, advising at the Ministry of Health's request the strengths and weaknesses. And I think it's relevant to observe that I see in the record the advice, of course, about the law, but the advice also saying it would be foolish not to look at the wider context. These were children that were treated in this way, while it was a long time, relatively long time ago, the allegations are very significant, so they were both advising on the legal barriers which were significant, but also pointing up, I think I'm right to remember the word is "foolish", it would be foolish to ignore that wider context, just in terms of what's the strength if this is tested in the court.

So there was some process going on about getting the records together and thinking about it when the Minister changed and changed perspective, therefore you'll see at 6.15 I've said on 2 March 1999 Crown Law advised Mr Cameron that the Minister of Health thought ADR was premature and litigation was needed to clarify the issues. So

I highlight that only to put in context why the lawyers kept going on a legal basis. That was not only needed for the ADR understanding, also Minister Creech then said no, let's keep going.

So I've set out that Labour-led Government, as it came in, undertook to do things differently. And I've detailed in appendix B those steps. But the paper, this is at 6.18, the paper that the Labour Government sought and got from Ministry of Health and the Crown Law Office about the former Minister's decision to litigate, I think it's interesting, it is for me to observe in the context that you can see at paragraphs that follow different departments had different advice for the ministers. Ministry of Health thought there was sufficient risks that the Government should revisit the decision to litigate, Crown Law advised -- this is just my own summary at 6.20 -- Crown Law advised although there were technical defences available, the law wasn't clear and the claims presented considerable litigation risk. The Treasury thought litigation was the better option because the law was uncertain and because of the precedent of adopting an alternative approach. So it's classic ministerial decision frame where officials might have different and competing perspectives for the ministers to decide.

Q. Just while you're there, I'm sure Mr Molloy may come back to this later, but it jumps out at me at 6.20, "The Ministry of Health considered there were sufficient risks particularly regarding adverse public opinion for the Government to revisit the decision." Can you elaborate on that? I take it that comes from some correspondence.

A. No doubt, yes. There certainly was comment, I'm only going off my memory of the records just for that. There was certainly a question about, might be later in the narrative actually, there was some question about well, you, incoming Government in opposition said you would do something different, and now if you don't there's a risk that you'll just be shown out to have just made, you know, to be unreliable or not delivering on your promises.

But also, I recall there being material in the papers about the nature of the allegations that are made, significant criminal conduct alleged to have been done on children was being emphasised to ministers about the risk, I think, of taking a sort of strict legal approach in the face of what will look inexplicable in the public eye. I think that's probably what is -- I think I see that in the file, could have seen that in the file, the risk for the Government.

Q. If they don't take positive action to somehow prosecute in that wider sense these claims, or to resolve them?

A. To resolve them, yes.

Q. Yes, okay. Because another way of looking at it would be the risks of adverse public opinion if the facts all came out in public, that's another possible way. I'm just saying that reading that, that's a way it could be interpreted, but I don't know whether it's backed up by the correspondence and I don't know if you're able to answer that, whether there's any whiff of that happening?

A. I don't recall it that way. But that does put me in mind of something else, if I may. That there is in the record discussion about whether the Crown should seek indemnity from Dr Leeks.

Q. Yes.

A. In the event that it is found by the court to have been the criminal conduct alleged and he was the perpetrator, the Crown was thinking about how do we immunise ourselves against the impact of that, and it would be in a financial immunity being sought.

Q. Thank you.

QUESTIONING BY MS FEINT CONTINUED: Just before you leave that point, I note that it's covered in 10.6 on page 77 of your appendix B. I think unhappy wording in the main brief but it explains it more clearly in the appendix.

A. The risks there said -- related to the nature of the claims, the number of the claims, the nature of the claimants and adverse public opinion. It might be the document is even more helpful about the tone of that.

CHAIR: That may be something that can be followed up later.

A. So I was just pointing out before that officials all seemed to take slightly different views to their ministers and ministers decided to set aside a funding package of $8 million to attempt to settle the claims through either a direct negotiation or some hybrid mediation and arbitration model. And the record does show that Crown Law and Grant Cameron engaged in a lot of detailed discussion about what that model might be. And I think it's fair to note that there was quite a lot of dispute in the record between Crown lawyers and Grant Cameron about how to advance, because the Cabinet or Government hadn't -- it had agreed to explore and approve this package to try and settle or find some hybrid method if we couldn't settle directly, but it hadn't said stop and let's settle, it said explore that.

And Grant Cameron criticises then on the record and now, as I heard last week, Crown Law and on the record Crown Law criticises Grant Cameron, and I think probably in fairness what the record shows is that there's a significant difference or some significant differences of opinion by lawyers on both sides trying to do their best with their clients' interests that they have.

One example that Mr Cameron used last week was his experience with Cave Creek had been so different. And I don't know if it became apparent last week that the Cave Creek experience was utterly different in that there was no dispute about what happened, but also there had been an inquiry before, so all the facts had been determined, any contest was over. And then the Government was able to move quite swiftly to a group settlement in relation to Cave Creek. So yes, it was different and perhaps his expectations that the Crown would move as fast, they were clearly not met.

So after a lot of that on the record, toing and froing and disputes about various steps and requirements, as I say at 6.30, in the end the Solicitor-General and Mr David Caygill, who was a lawyer brought in to not act for Grant Cameron's clients but to really sort of finally broker the deal between really now- between Crown Law and Grant Cameron as to what that alternative model would look like. So that clearly did need some intervention, I would suggest, from the file, and that was it coming in.

I go on to settlement numbers, because the -- I've been mentioning in the course of this morning that the question is, and I'm referring there to the questions that have been put to me by the Commission, so sorry if that hasn't been clear, but I was asked by the Commission what advice Crown Law gave in relation to the settlement figure. Crown Law was consulted on the Cabinet papers that ultimately approved 6.5 million as a settlement figure. And I can't find anything that shows that we did any particular analysis of that figure.

I did find one bit of advice where there was some really large sort of potential -- largely, sorry, disparate potential options and I've set that out 6.33, that one piece of advice thought that there was a sort of 40 to 50% chance that the Crown would be liable from anything between zero and $345,000. Seems to be so broad as perhaps not being terrifically helpful except to point out this was a complex and unclear state we were in.

I've noted there part of it lies in, because since 1972 we've had the bar against general damages in ACC legislation. There isn't a history of law that tells us what certain claims are worth but I've set out there the Solicitor-General's note to the Prime Minister, or part of it, emphasising- that the 6.5 or $8 million doesn't bear a relationship to a legal analysis of liability, and he observed "the investigations, medical examinations, legal research undertaken do not establish clear liability on the Crown, to the extent that there is legal risk it arises in relation to some -- only in relation to some claimants, but the Committee's decision -- that's Cabinet Committee -- reflects the Government's desire to resolve this potentially difficult and contentious dispute in a fair and principled and

expeditious way, whether or not the Crown was in technical legal terms liable to all claimants, this is the spirit in which the settlement discussions were carried out."

I think that's a good helpful framing of it, about the law really didn't play a part in assessing that financial figure.

Next I go on to the appointment of Justice Gallen. So he was appointed as an independent expert to determine how the financial sum should be apportioned between the claimants. And the starting point was that the first million was to be divided equally and then the rest on a basis that he was able to come to on his own reckoning, based on principles of fairness, justice, equity and good conscience.

And so he was invited to disregard things like the ACC regime. He was able to deal with it really entirely in his own hands, and he did that independently. He could regulate his own procedure, the Crown, the Government, the Crown Law Office played no part in how he went about that. He was briefed and instructed by the Ministry of Health, but otherwise he did his determination in his own -- to his own method.

And as I think the Inquiry knows now, that that was sort of for the first round of claimants who were represented by Mr Cameron and it is shown further in the record, but I will just summarise it to say, it became apparent that there were more survivors who came forward and a second round was entered into on similar principles. Again, Sir Rodney, with a relatively free hand, although he was invited to give a minimum amount to everybody and then he was able to apportion according to those same principles of fairness and justice.

Because the first round of people had been represented by Mr Cameron, the Government invited the second round people to have legal assistance funded by the Crown which was done in the form of, as he was then, Dr David Collins QC, so to assist the claimants engage with the process for Sir Rodney to determine the second round. And as I know that this Inquiry has heard particularly from Mr Zentveld, this is an unhappy part of this second part of the resolution, in that the Cabinet knew that part of the first round arrangement was that Mr Cameron would take his fee from the sum, nothing wrong in that, very common method by which a lawyer will do work for the promise of something if anything is obtained.

The second round claimants Cabinet knew wouldn't have that cost and so they made a decision which invited officials to implement something that would sort of, I think it said something like equity in terms of money in the hand, or there's some phrase like that in the record.

I think that was a fair point for Cabinet to think of, that the second round claimants wouldn't have something taken from their sum by a lawyer and so let's make sure that there's equity about who gets what in the hand. I think it is fair to say that the implementation of that was done badly. Sir Rodney's instruction did not affect that decision that Cabinet took and so officials' implementation of what Cabinet wanted was not done well. Perhaps it wasn't done at all, to the point that Sir Rodney's round 2 determinations were then, it would appear to the survivors, arbitrarily reduced by officials by some 30% in an attempt to get to that equity in terms of what the person gets in their hand.

So I agree with Mr Zentveld that that decision, I'm not sure that he said "botched".

Q. Would be a good word.

A. Someone certainly has botched in the execution. District Court used another word, cafkaesk(?) if you've heard the judgment indicating the process was again inexplicable and was not the effect of the determination that Sir Rodney had entered into with individual survivors.

So also I would say Mr Zentveld was right to challenge that to the District Court. He got a very good judgment, not just in his favour but then also able to be used for the rest of the round 2 claimants to have their sum returned to what Sir Rodney had actually determined.

Just in terms of the Crown Law's role in that, I observe, again not - I can't now think if I was in the office then or not, but I wasn't involved in this matter, but I see on the record the -Solicitor-General advice to the Ministry of Health saying "Do not defend Mr Zentveld's- case. He will win, he is right and you shouldn't - you risk losing." That was of such a matter of dispute between the -Solicitor-General and the Ministry of Health that both agencies, as I mentioned earlier, escalated it up through the hierarchy, the Solicitor to the -Attorney-General, Ministry of Health to the Minister of Health, and the Minister of Health was invited to note that the Ministry intended to defend the challenge. And I'm being careful there, it wasn't a minister's decision, they noted that. The -Solicitor-General didn't want to have Crown Law represent that matter. The Ministry was authorised- to seek external representation and sought an external firm to represent them in that matter.

I see that sense prevailed when it was thought, or thought was given to an appeal of the District Court judgment and again the solicitor and the Attorney and ministers thought no, let's not do that, the right decision. And as I've mentioned, the round 2 claimants were then "topped up" was the colloquial expression to meet the actual award

that Sir Rodney had determined.

The next question that I was asked about Sir Rodney -- about this was about Sir Rodney's report and one of the features of the report was that it was, sorry, of the process, was that it was confidential. Confidential as between what the parties told Sir Rodney and also in respect of how he apportioned the settlement sums.

But as I say at the bottom of page 38, on a day in October 2001 the Solicitor-General's- office was told by the newspaper that they had a copy of the confidential report and Crown Law immediately applied for orders preventing its publication.

I think the question that's being put to me here by the Commissioners, why did Crown Law -- I think the words of the question are, try and suppress the publication of that report. And it seems that the judge in the court could agree that there was a confidentiality and that it was probably breached. But there were two -- sorry, there were three parts to Sir Rodney's report and only one part had the particulars of how he came to the dissemination of the settlement funds and parts 2 and 3 were his record of his -- of what he heard and his response to what he heard, and the court was a bit doubtful whether that was really the subject of the confidentiality.

Anyway, the Crown Law Office and the Evening Post eventually agreed, sort of within a week by the looks, that what the Crown was seeking to avoid was the exposure of the interpublic of how Sir Rodney went about his method of determination, because there were other people yet to have the same determination applied to them, the reason it was confidential was to make sure that everybody came to Sir Rodney fully with their own story that he could judge rather than any knowledge of the things he might weigh more heavily. That was the Crown's interests about confidentiality of that part of the report, given some people still had to settle.

Just setting it out there at the top of page 40, that is ultimately what happened, most of part 2 was already in the public domain in any event, and the Crown was able to agree to orders by consent that one part be maintained in confidence and the rest would be published. And as the Inquiry will know, Sir Rodney's report is very hard hitting. He believed what he heard and he did the best he could with the money he'd been given by Government.

My next set of questions came about Crown Law's engagement with the New Zealand Police about Lake Alice. And I deal with that at page 40. There are three particular points in time where Crown Law has been asked by the Police for material about Lake Alice. The first time was in 2006 and the Police were asking for documents that

related to Mr Zentveld, in particular they were after a bound book of materials that Mr Zentveld said he had given to Crown Law.

The lawyer couldn't remember the book, but said to the Police that if Mr Zentveld would agree we would happily give over the material that we did have about him. There doesn't appear to be any record of how that was ultimately resolved. Which is an excuse -- which doesn't have the excuse of some decades ago in terms of record-keeping, but we don't -- I don't know if Police have that, but we don't on our record.

In 2009 Police again asked -- sorry, Police asked for copies of statements made by people who had worked at Lake Alice who had given statements to the Crown Law Office as it was preparing for civil proceedings and the Police said "We've got these witnesses, we would like to see your records", and Crown Law had some of those witness' statements that we had taken and eventually that was released to the Police. I say eventually, because -- and again, I see now that we took too long to get to this point. I was involved directly, I haven't been involved in a lot of this narrative, as I said; I was involved directly in these questions in 2009 and dealt with Malcolm Burgess myself, and Mr Zentveld as I will tell you.

So the record shows, and I did have to rely on the record because I actually couldn't remember this, but the record shows that I called the Ministry of Health and said Malcolm Burgess is after these records, some of them are subject to litigation privilege, because privilege attaches to material done in contemplation of litigation, and we'll need the Attorney-General's- waiver. And that is true of all matters that are privileged, if it is to be put out into the public, the Attorney is the person who holds the privilege for the Crown and that person is the one who says "Yes, I waive" and that people can be made public or "No, I don't". So there is some material like that, and about that I said to the Ministry of Health we should apply to the Attorney for privilege to be waived, and I noted at some point that the public interest seemed to me significant to the point where the Police should be able to get to the material.

I say at some point, because I don't step away from my earlier comment that it took too long; there was another set of documents that the Ministry of Health held, or perhaps that we had them on behalf of the Ministry of Health, which weren't privileged, they were just the documents, the files, the records that we also thought the Police should get access to. And the paper trail is clear that Crown Law Office, me in part, was saying to the Ministry of Health this is just Official Information Act stuff not waiver, and it seems to me that there is sufficient to outweigh -- public interest to outweigh any reason to withhold

that material from the Police.

And the Ministry of Health didn't agree, they took a very different and very strict approach saying the Police should go to the court and get an order and a warrant for this material. And what I see now, and again, apologise and take responsibility for, is that we should have been more forceful about that. That is a role where the Crown Law Office should have said we actually are the ones that are authoritative within the Crown about the view of the law and the view of the law you are taking is one we don't agree with.

We eventually got to that point but it was too slow. I see that eventually we got to the Attorney possibly even over the top of the Ministry of Health's perspective to say "We think you should waive privilege in these", and we gave those identified briefs to the Police.

In the course of this, this is something that's come up in the last couple of weeks, I see there's a file note of a phone call I had with Mr Zentveld, who rang me annoyed, fairly, that we weren't producing the material for the Police. And he said, and it's recorded in the record of the note I took, that we were hiding behind legal privilege.

And the record shows that I had said to him these are privileged, we need the Attorney to waive that privilege, and I'm talking with the Ministry of Health about that. That file note is the same day that Mr Zentveld -- there is a record that I think the Commission has seen, my counsel can help me with this.

QUESTIONING BY MS FEINT CONTINUED: So to be clear, you're talking about the e-mail dated 23 October 2009 from Alex Sie who worked with Tau Henare who was the secretary, I understand?

A. That same day 23 October was my file note, the same day Mr Henare's office records Una Jagose Crown Law says "Ministerial waiver preventing Police from seeing the affidavits of staff members taken in 1978, youngest child receiving ECT was 4, held by Ministry of Health and Crown Law." It's got some Crown Law names and the Detective Malcolm Burgess name.

I think I can see that, when I read my own file note and I record this record, it seems there was some mis-translation of what I had said, which was that they are privileged and we need a waiver. It wasn't affidavits from '78, it was contemporaneous material about the '70s. But it just seems that that was a slightly mistranslated version of what I had said on the phone to Mr Zentveld, and I'm assume, though I don't know, that this person has had a phone call from him too and has recorded -- that's what I think I understand from this.

I see this seems to have Crown Law letterhead but actually you can see it is cut

off, it isn't from Crown Law this note.

CHAIR: I think we understood it came from the Minister's -- from Tau Henare's office.

A. From his electorate office I understand.

Q. From his electorate office, yes.

A. It was the same day, same phone call, similar stuff, I think that was a mis-translation.

QUESTIONING BY MS FEINT CONTINUED: So to be clear, Ms Jagose, have you ever seen any Government records that indicate the youngest child receiving ECT at Lake Alice was 4 years old?

A. I haven't, but I also haven't seen a lot of the record.

Q. All right, thank you.

A. That was 2009. And in 2020 the Police again remade their requests for material from Lake Alice and we're still in that process actually, because we started in early 2020, the Attorney again had to waive privilege over certain documents. Governor-General had to agree to release the, what documents there were from the Mitchell Inquiry to the Police, and we've been going through a process of getting waivers under the Privacy Act from some former Lake Alice patients authorising the release of their personal information.

So including a hiccup when we were all in lockdown through the first part of last year, that process is still going. I think there are still a few matters that Police want from us that I think we have. I understand that all of the statements have been released, but perhaps not all of the records and the underlying interview notes, and if the Police want them we can expedite that. We've employed a couple or three more staff to help us get through the process of going back through the records.

So I acknowledge that has also been slow. I don't understand the Police to be waiting on us for anything, but I've asked my office to check that now.

So I'll go on to the next point that also involves the Police. This is the question about the advice that Crown Law did give the Police in relation to the investigations that you would have heard from Malcolm Burgess last week, in 2003 the Police asked Crown Law for an opinion about whether there was sufficient evidence to consider laying charges in response to a complaint made by former patients. I'm pretty sure that the patient was Mr Halo, yes, who you have heard from.

Again, this is from the record as there's noone left at Crown Law that has knowledge of these matters. But the Police asked -Detective - sorry, the Police asked Deputy -Solicitor-General- Nicola Crutchley to review the file and to advise that question. Is there enough information here to bring a prosecution?

Ms Crutchley asked one of her team, Crown counsel Mr Lamprati, who I think was an Australian QC who was on secondment in our office, to look at that matter. And it was noted in that paper actually as I said earlier, it's not very common to have that question of us, it would often be asked of Police legal or perhaps a Crown Solicitor.

Anyway, the process was conducted and it was concluded that the material available didn't justify laying of charges, but that there was certainly enough there that further investigation should be conducted. The view expressed was that ECT administered as a form of punishment was reprehensible conduct and quite likely criminal behaviour. Also noting that the alleged misconduct occurred against young people who were virtually at the mercy of those in charge of them and they must be looked into. So it was a strong, I would say, advice to investigate further.

The criticism I have of this, is that the process took nearly a year between the request from the Police and the answer from Crown Law, and there is no material on the file to explain that delay. Ms Crutchley's note does say at some point that she's sorry that it's late, so it's acknowledged being late but I can't explain why it took so long when the matter didn't -- the matter, "there's more to see here", seemed, well perhaps with hindsight, seems quite apparent.

And there were some specific queries about whether that team of lawyers knew about the civil claims that were then the Grant Cameron group claims, and also Ms McInroe's claims, all of the claims were at some point in our office. There's a record that Ms Crutchley, the Deputy Solicitor-General, records to her lawyer colleague who she's asking to do the work, that there are these civil claims- and she says they are political. I assume she means by that is they are being dealt with by ministers rather than the claims themselves are not political. So all I can understand from that is that she's saying these matters have a political aspect and that ministers have them.

That's all she records, there's no record to say that there were any particular reference to specific files. Mr Lamprati's advice only references the Police, what the Police provided in his assessment that there's not enough here and you should go and investigate further. So it appears that there was no looking at the civil file or any of the material that was in the office in another part.

The Commission also asked did we look into that, did we say to the Police how are your further investigations going? And again, it doesn't appear that any such contact occurred, at least not on paper. But also, I wouldn't expect that once an agency has told you should do X, we would expect them to do it and exercise their own judgment about whether

or not they would continue or whether or not a prosecution should be brought.

I come to the eighth and final part of my evidence which relates to the United Nations Committee against Torture communications. I've set out how Crown Law responds to individual's communications and how we involve ourselves in the periodic reporting. I think the Commission will know that two different ways of engaging with the United Nations Committee Against Torture. One is a regular periodic review that the State will put up, or the Commission will ask questions, the State will put up answers and information across a whole suite of areas, Corrections, Police, they're common areas, places where the State hold individuals; historic claims is a very common part of the periodic reporting over the last few cycles. Separately, communications, or a complaint I suppose, brought by individuals here, Mr Zentveld has brought one successfully and Mr Richards has a similar complaint or communication with the Commission, hasn't yet been reported on.

So the role that Crown Law takes there is primarily one of being involved in an agency, well actually often quite a number of agencies' process of determining what it should and how it should put its, in the periodic reporting, what it should tell the Committee. By that I don't know what it should hide, I just mean how it tells the Committee about New Zealand's commitment to the international obligations at issue. It's often coordinated by a lead agency, usually the Ministry of Justice in relation to the Committee Against Torture, Convention Against Torture.

So we would be participating in, commenting on drafts. We might be asked for legal advice on a particular issue, and I recall now, perhaps only vaguely, from the record-specific advice being sought about how we viewed the crime against torture in respect of things that happened in the 1970s when we didn't have such a crime.

There's a legal question about whether the Committee has jurisdiction and the State, New Zealand, took the position that it didn't have the jurisdiction to look into the '70s with a torture convention that was only entered into in the late '80s, and a domestic crime from that time. The Committee doesn't agree, but we would have given advice about those legal points.

Foreign affairs also is involved because it refers the communication, asks for advice, coordinates the matter to the United Nations. I've put out in 8.6 that for both the communications, Mr Zentveld's and Mr Richards', my colleagues from our constitutional and human rights teams liaised directly with the Ministry of Health and the Police to make sure that the information that responds to the allegations is all in the State response. And

that goes around agencies and gets approved by ministers for submission. This is a State, you know, New Zealand Inc response to the Committee.

CHAIR: That was an opportunity, wasn't it, for the Crown Law, Ministry of Health -- sorry, Ministry of Health, Crown Law in both its civil claim role and in its role advising the Police, to have coordinated all of that stuff. Do you know if that happened? Because there seems to have been a disconnect as you've already identified within Crown Law.

A. When you say "all of that stuff", sorry.

Q. Sorry, all of that stuff, not a very clear phrase. You've told us that Crown Law in giving opinion to the Police didn't seem to have much, if any, reference to the civil claims.

A. Mmm.

Q. And equally there's some issues with the Ministry of Health having its own views. This seems to have been an opportunity, just on the face of it, for all of that to have been brought together in some way. Do you know if that opportunity was taken, to get an overview of the whole case, both civil, criminal and political?

A. I might ask if I can come back to that question because I suspect that there was such a co-ordination. By the time that, you know, these are recent events now.

Q. That's right, yes.

A. And there's significant material in public, you've got the Government's acceptance.

Q. Yeah.

A. And apology from 2010?

Q. Yes.

A. Year 2000, sorry, struggling with my -- am I still getting my dates wrong? Anyway from the Prime Minister. Can I come back to you?

Q. Please do, yes, thank you.

A. I was just going to go on to say also, in the periodic reporting, the State appears in Geneva to stand before the Committee and to answer it. And Crown Law has been both a contributor to the State's written response, but also counsel have attended the New Zealand delegation with other officials, and I just take this opportunity to point up that I have never been there. I think Mr Zentveld's evidence was to say that I said that I had been at Geneva, I think. I haven't, I don't think it's a matter of great forensic interest, but I just wanted to clarify for the record that I have not ever been invited to be part of the United Nations delegation to Geneva.

The sixth and seventh periodic reports in particular include a lot of information on the historic abuse claims and how they're being resolved, and Crown Law would have been

heavily involved in assisting agencies put together the full record of claims of dispute resolution processes, of the CLAS, Confidential Listening and Assistance Service, just to sure that the whole picture goes in for the committee. So we would have been very involved with our colleagues at the Ministry of Justice on that.

The final question that was requested of me was about why New Zealand, the State in it's answering Mr Zentveld's communication, didn't mention Ms McInroe's complaint. I agree that New Zealand didn't, and we have in the course of preparing this tried to ask our colleagues to find out why. All we can understand is that they didn't put -- connect the things as relevant to answering Mr Zentveld's communication. That will be the same for Mr Richards' communications and the State's response, and we're still awaiting Mr Richards' -- sorry, we're still awaiting the UN Committee in response to Mr Richards' communication.

But I anticipate that they will agree with Mr Richards as they have agreed with Mr Zentveld, and you've seen the result of that, which is that the Police are again investigating and deciding what action, if any, to take, directly as a result of -- I mentioned it at the beginning, this long and persistent fight for what survivors believe to be right, Mr Zentveld was right again, the UN very strongly have indicated that the Police should take the step they're now taking, or rather New Zealand Inc should take that step in the right part of that system.

Q. Includes the Police response, yes?

A. Well, there's only the Police really to investigate criminal allegations. That, I'm happy to say, is the end of leading myself through my own evidence.

MS FEINT: Thank you very much Ms Jagose. I don't have any further questions because you've done such a good job. But for the sake of completeness, I have located the document, when I say I have, I'm referring to the royal "we"; the Ministry of Health briefing that you were asking about Chair.

CHAIR: Mmm-hmm.

MS FEINT: So this relates to paragraph 6.20 of Ms Jagose's evidence and this is the briefing that the ministry gave to the incoming Labour Government. It's a briefing dated 30 March 2000 and the relativity reference is CRL0044430_00114. And if I may, I'll just read out a paragraph from the executive summary from which that evidence was drawn.

CHAIR: This is on the adverse public opinion point that I raised?

MS FEINT: Yes, correct. So it says:

"The Ministry of Health considers the risks with proceeding by litigation are

sufficient for the Government to review the previous Government's decision. The risks relate to the nature of the claims, number of claims, the nature of the claimants themselves and adverse public opinion. There may also be a sense of moral obligation towards these people over the treatment they received as adolescents while in the care of the State."

So that's at paragraph 5 and then a bit further in at paragraph 35.12 it says in relation to public opinion:

"Public attitudes are likely to harden if they perceive that the Government is adding further distress to the claimants through litigation. Unless publicity can be well managed there will be further undermining of confidence in public services, especially mental health and Child Youth and Family services."

So that's the public opinion point.

CHAIR: That's very helpful, thank you. Do you want to comment on that at all?

A. Now that Ms Feint has taken us to it I remember seeing that, which is, I think I was grasping at in answering you earlier.

CHAIR: Thank you for clarifying that, Ms Feint, it's helpful.

MS FEINT: You're welcome. So now Ms Jagose I understand Mr Molloy has some questions for you.

CHAIR: Thank you Mr Molloy.

QUESTIONING BY MR MOLLOY: My name's Andrew Molloy and I'm Counsel Assist with the Commission. I think we've got probably 15 minutes we can make a useful start. Just to start, does the Crown accept that what occurred at Lake Alice was torture or cruel, inhuman and degrading treatment?

A. Well, I am going to have to give quite a long answer to your question I'm afraid. The reason is this: First of all, without stepping back from anything that the Government has said that this conduct should never have happened and has apologised for that, and accepting and not stepping away from that the allegations have all of the features of torture, the reason I'm having a slightly sort of slow way around answering it, is because the matter might well be before the criminal courts with Police decisions, I need to be careful, as the most senior lawyer of the Government, not to do anything that risks putting that process in jeopardy so that a person might say I can never have a fair trial because that lawyer has already determined the matter without the court hearing from me. So I'm being careful for that reason.

But torture has three elements. Infliction of pain and suffering, mental, physical; no doubt that has been met. By an arm of the State or a person acting on a part of the State;

also no question that has been met.

The key question is the purpose for which that pain and suffering was inflicted. The allegations are that it was done for a punishment and where those allegations are made out by a fact-finder might be the Inquiry, it might be the court, then that is three elements met, torture.

If a fact-finder found to the contrary, that the imposition or the infliction of that conduct or infliction of that pain and suffering was for a pursuit of a therapeutic purpose, then it wouldn't meet that second limb. As alleged, that conduct meets the three criteria for torture.

Q. I suppose the point of the decision of the Human Rights Committee was that the inquiry which would enable the finding that you're referring to to be made has not yet been made?

A. Yes, and the Committee also said the threshold has been reached for the State to have a reasonable ground to suspect a torture may have been committed, and I completely agree that that threshold has been met. A reasonable basis to suspect and test that question.

Q. So perhaps to avoid the risk that you have identified, perhaps we'll talk about that. When do the Crown accept that level of information was available? Roughly, I don't mean a date.

A. I think that by the time some hundreds of people had come to the process saying the same thing but not -- I don't mean in a collusive way, I mean independently coming and saying this also happened to me, or this happened to me, certainly the time at which the State or the Crown, sorry to use both -- I'm saying the State because of New Zealand Inc having this obligation, there was enough there to suspect the reasonable ground had been reached, sorry, not suspect, that to say a reasonable ground has been reached.

Q. And having reviewed certainly the litigation files, and again I'm not asking for a date or anything as precise as that, but if you were to identify approximately when that might have been, where would you put it in terms of time?

A. In the late '90s, somewhere in there. And obviously I'm not including then the filing of Ms McInroe's claim, which has the precise same information in it. And, you know, I'm open to criticism that this was a missed point by Crown lawyers and others, but the way in which that claim is brought, a civil claim alleging breaches of civil and fiduciary duties, some five years after New Zealand had entered into the Convention Against Torture, only a few years after the Bill of Rights Act came into force, I think that the setting was immature if that's the right -- it's probably the wrong word, but it was different from how it is now.

I think the connection of those allegations and that civil frame to a criminal torture just -- it wouldn't have been a natural way for people to think. Contrasted to today I would

say, in fact in my own experience I can think of two particular instances which I will not talk to, where claims are brought to our attention that don't say this is torture, but that we look at it and we say oh, we can see here there are elements of either torture or cruel and degrading inhuman treatment.

So in part it's the way the file is brought, and so that the many -- by the time many, some nearly 200 claims, or instances of the same sorts of allegations with the modern, then modern speaking to psychiatrists and others who were casting doubt on what occurred, some point in the mid to late '90s would have been the time I would say that point was reached.

Q. So when we ratify a convention, what does that actually mean, what do we do with that? And we don't directly incorporate its terms into domestic legislation, where does it sit, what do we do with it?

A. Well, I'll use that as an example. Because it's probably true in all cases, that the ratification of obligations will -- they will go in all sorts of places. So here we see the enactment of the Crimes of Torture Act which was meeting one of the obligations which was to make crime a -- sorry, torture a crime. That's one place we see it. But we see it across the statute book too in the establishment of national preventative mechanisms, which is an independent body that is required to attend on institutions or places where the Crown or the State holds people, hospitals, children's residences, prisons, maybe managed isolation facilities in today's world.

Q. Did that come in later under the 2007 optional protocol?

A. Yes, it comes in different ways, but it also comes in different enactments, so the independent Police conduct inquiry, the Children's Commissioner, those bits of -- so it will be there as well, and of course the parliament formally accepts that it is taking on State obligations. And so I think I'm answering your question to say, what happens is that it gets implemented into our domestic lives across a range of places.

Q. Incrementally, but nonetheless, we ratify it as a nation, so if it says we have an obligation, the assumption the international community can make is that we intend to abide by that?

A. Yes, and as I was just touching on just at the end there, those periodic reviews are about the Committee testing that proposition.

Q. Ma'am, I think rather than indulge for two or three minutes, perhaps we take the break now?

CHAIR: Yes, let's be efficient about this, we'll take the luncheon now and return, the timing would you like to come at 2 or 2.15?

MR MOLLOY: Shall we say 2? I think we've got plenty of time but I don't want to tempt -- you always think that then you run out.

CHAIR: Let's start at 2 o'clock, thank you.

Lunch adjournment from 12.55 pm to 2.02 pm

CHAIR: Some people never learn. Just for your information we made an edict nobody was to stand when we came in, but habits of a lifetime are hard to amend. Thank you Mr Molloy.

QUESTIONING BY MR MOLLOY CONTINUED: Do we have an obligation under the convention to investigate?

A. Yes.

Q. How long has that been accepted?

A. That we have an obligation?

Q. To investigate under that convention, yeah?

A. As long as we've been party to the convention.

Q. Right. And so it's a question, or is it a question then of what an investigation means, is it -- and a more than one way to investigate it, I guess?

A. Mmm, agree.

Q. If you were looking at this instance, the Lake Alice cohort, what form or forms would you say the investigation has taken to date?

A. Well, obviously the criminal Police investigations, there were two inquiries in the '70s, although we weren't subject to the obligation then. There is the Royal Commission of Inquiry today.

Q. Indeed.

A. There's been some engagement with the facts in a civil -- in the civil proceedings, but they, because of the settlements, that might have been a mechanism to investigate which didn't go to its investigative end because it was settled.

Q. Would you agree it's an imperfect means of investigating?

A. Well, I'm not sure I would agree with that because the convention leaves it open to the State to investigate, it's not prescribed, doesn't have to be a criminal investigation. So there might be -- it's possible that civil proceedings meet that requirement, depending on what the plaintiffs want, how that goes, how that is progressed.

Q. And indeed there was a settlement reached?

A. Mmm.

Q. Which brought the litigation to an end, in early 2000s, so there was some degree of addressing concerns at least to that extent. And we'll come on to the Police, which I think

you've helpfully alluded to this morning in your evidence, we'll come on to that a little bit later. But it's uncontroversial, isn't it, that the State has an obligation to care for its children, or to take care of the children in its care?

A. Yes.

Q. And it has an obligation not to harm children in its care?

A. Yes.

Q. And there must also be a public interest in identifying that that may have occurred?

A. The public interest being so that we learn from it and don't do it again do you mean?

Q. Indeed, I mean we've talked about the public interest, there is no -- it's not a single thing, is it?

A. Mmm.

Q. And I guess one of my questions is going to be how that has been weighed, how the various competing aspects of that may have been weighed at different times.

A. Mmm.

Q. Or even if they were weighed. Because it seemed of that in some of the litigation, and I take your point Crown Law takes its instructions from its client at the end of the day, I guess, we've seen that under Minister English there was a particular line pursued. It flipped 180 under the next Minister, then it flipped again under the next Government, so accept all of that.

But it might be helpful just to look at how we were -- "we" I mean all of us, Crown Law representing us -- how we were looking at these issues in the '90s when they were first raised in the 1994 litigation, and then later when the mass of similar claims came in two or three years later.

I think that Janice Wilson, who was Director of Mental Health at the time, gave evidence the other day, which you may have seen. She swore the affidavit in support of the strike-out application, but she confirmed that there had been some discussions beforehand and that she wasn't comfortable even then saying that she found it implausible or anything of that nature. And I think that there is a health report in 1997 which -- it will be in your bundle, but I think I can summarise it, signed by her and by Ron Paterson informing the Government at the Government's request that these claims had come in, the Cameron claims, and that there may well be something to see here. And I think Ms Wilson's evidence was that at the time it made perfect sense to her, it was entirely plausible, without making a judgment about it obviously, and she said that she thought that most of her contemporaries would probably have viewed it in the same way.

So I suppose, if you're patient enough there'll be a question in there somewhere for you I'm sure. I guess my interest in the extent that you can identify the competing interests that come into this, I think you touched on it with the Treasury perspective and the Ministry of Health at different times. How does that play out when you're advising the ministers?

A. There's such a long tail to your question that I'm just thinking about it all as it came. But I've drawn attention to a couple of points where Crown Law's advice was saying the law isn't the only answer here, there might be other things to factor into your assessment of whether we should do something different, and in my experience those aren't legal points, of course, and it's certainly not for public servants to make points about politics to ministers, that's for ministers.

But elevating to their attention that there is some non-legal issues here is something that was done and that I think is part of our function. But I think we see it in this case more strongly, or in these cases more strongly from the Ministry of Health, that very strong view about well how do we deal with this now, given that Dr Wilson, her affidavit wasn't to say "nothing to see here", rather files are lost, people have died, time has passed such that there is an impediment to defending; that was, as I recall, having looked at it just since you asked me obviously, but I think that was the point of her evidence.

Q. The gist of it, yeah.

A. Then, as you say, alongside, or similar timeframe but later perhaps, she and Ron Paterson are raising more, I guess, mental health relevant issues about there might be something that strongly suggests we don't just take a legal view. So I see those points sort of dovetailing in how officials give advice to ministers.

Q. But is there nothing legal in there? I mean is there anything to stop you saying we may have breached our obligation not to harm children, you our client, the Government may have breached that obligation. Is that not a legal question potentially?

A. Yes, it is.

Q. It could be framed that way, couldn't it?

A. Yes, it could be.

Q. I don't think, and feel free to correct me, I don't think it was ever framed like that, certainly not in the late '90s?

A. Nor indeed would it be today. I mean because --

Q. Wouldn't need to be today.

A. -- with respect, between you and I we can see that's not a cause of action.

Q. Indeed, yeah.

A. I mean because things come framed in their cause of action, even though we accept as a general proposition State agencies shouldn't harm children.

Q. So is the only function of Crown Law to provide litigation advice, or is it to provide legal advice more broadly?

A. It is both, in fact I would say it is wider than that, but for this purpose let's say it is both litigation advice and legal advice, and as you'll see here, and 20 years on I think it's even more strongly a feature, but as you'll see here, Crown Law pointing up things that here is our legal advice, about Limitation Act and ACC and so on. There are these other matters that you should think about. They go into your point, I think, the broad proposition that State has a wide obligation here, or a different set of interests to weigh and protect.

Q. But that was still framed as emotive, or that kind of language, it was sort of wrapped up in that?

A. Mmm.

Q. And I wonder if there's sometimes a disconnect, and you might even have referred to it yourself earlier on, we do kind of have a legal lens looking at things, but sometimes we lose the rather obvious humanity in it, which can still be framed in a legal context. Was there that kind of disconnect on this file in the late '90s potentially?

A. I would have said not in the late '90s, because by then the Ministry of Health, Social Welfare, there were other agencies involved, and as you can see from the Ministry of Health's -- actually you can see it from the advice from us going back to the Ministry, you're investigating whether there should be an alternative process, in that context you've asked us what is the legal position, what is the likely liability, what might the damages be. So actually it seems to me by that then you can see a rounded picture of other officials who don't come at it with that legal lens, carrying a different stream of advice to ministers.

I think the criticism, if it is to be one, is better made for the early '90s when there wasn't that wider lens being brought. It was in Ms McInroe's case, a long time spent on the barriers to this even getting in front of a court.

Q. But there were, I mean again, was it really -- was the impediment primarily political? Because as you say, the preface too high, but, you know, there were murmurings in the file from an early time where merits could be seen beyond the time limitation arguments. Does it come down to a political will to address these, is that really what it's about?

A. In this case it was political in that it wasn't the politicians, not technically political, but --

Q. Yeah, in that sense.

A. -- their instinct or their inclination need not always be that way. It might be that an agency

itself says we don't want to defend it for whatever reasons. And whether they be because they themselves don't think it's the right approach, for whatever reason they don't have to take those legal tests, legal questions. But even the court can't deliver compensatory damages if the Accident Compensation bar exists, even the court couldn't hear a claim if it was barred by the Mental Health Act. So that does require a different perspective to come in over the top and say let's go this way to settle it.

Q. Understand that. Again, some of the language I think in terms of Crown Law advice, and doesn't matter whose it was, but the language is around -- this comes around about 2000 I think -- cautious about the potential for conflicting outcomes, undesirable if there was inconsistency between McInroe litigation and the Cameron litigation. And that's -- it's not quite really what's meant is it, because there's not a concern about inconsistency as such, but the imperative is to keep it as low as possible across all the claims, would that be fair? I'm not even criticising that necessarily, but it kind of gives way to a litigation strand, if you're litigating you're trying to achieve the lowest possible fiscal liability. Would you agree?

A. I'm not sure that I'd agree with lowest possible, but I agree that that fiscal --

Q. At the lower end.

A. -- size and what potential a Government might have to pay is relevant.

Q. But when it's framed in terms of consistency, what you're really looking for is to set the benchmark at the lower end rather than at the higher end?

A. That's -- yes, I think that's fair.

Q. And again, it comes down to, I suppose that's one of the corollaries of having it being dealt with in a litigation context, would that be fair? Again it's not a criticism.

A. Or even in a non-litigation context actually that still might be relevant.

Q. In a mediation or an arbitration.

A. If you settle with one person for $100 then the second person you're more likely to need to settle with for $100, that is part of the calculation of, as Ministry of Health was asking, what's our likely liability.

Q. And with -- this might be something that's -- there's more consciousness of now, but at any point was there ever a sort of principled analysis of what it might actually be worth from an objective perspective to compensate people?

A. I think I drew the Commissioner's attention to one bit of advice that I'm aware of where there was some quite wide-ranging, I think from zero to $346,000 or something and the reason, even in that advice being given for why that was a very difficult task was because

we don't have a jurisprudential --

Q. Indeed.

A. -- list of claims that we can say these ones the court thinks are worth that, and it's a very difficult thing to judge what it is worth.

Q. Indeed.

A. Absent court findings, you can look overseas, sometimes we do. Again, there's different settings, different framework, different legislative framework, it does make that rather hard.

Q. Has that task been -- may well have been part of the redress function of this Commission, I suppose, but has that task been at least addressed in recent years?

A. Over the more recent years we've certainly taken at different points a more researched attempt to say this is sort of the range of things that might be relevant. It is hard to do, but we can use, and we do use, from the Employment Court jurisdiction we can get some sense, from the Human Rights Review Tribunal we can get some sense, from overseas jurisdictions, so we have done more than I see on these files in more recent times, maybe last five to eight years in historic abuse claims, trying to work out some sort of calculus for what an independent decision-maker might come to.

Q. And was there ever any suggestion that somewhere in the mix there could be an attempt to assess what the collateral cost had been and would continue to be of not addressing these problems?

A. Not that I've seen. Do you mean collateral cost meaning the lost opportunity to the survivors?

Q. Yes, I mean the idea that if you settle it solves all the problems and if you don't there's no cost because you haven't had to pay anything out.

A. Sorry, I misunderstood what you meant.

Q. In other words if we don't resolve these issues, if we don't front-foot them, acknowledge them, try and put them right there, is a cost, how do we address that.

A. I've not seen that analysis. I'm not sure how it would go. Do you mean like a social cost?

Q. I think it would be outside of lawyers certainly.

A. Mmm. I've not seen that analysis being done.

Q. Within the context, I mean given the settlement that was reached in 2001, and the compensation that was paid, looking back, do you think that was the result of an adequate investigation into allegations, credible allegations of torture, or was it one part of it?

A. Well, it was part of a -- part of what I would say was a redress approach. The settlement was expressly done on the basis that Government didn't want to put the issue in doubt or

test its veracity, it accepted the allegations. So that end there wasn't an investigation as such. I don't want to be criticising the settlement because I think that was an important part of a redress obligation that the State has. But it didn't investigate and make factual findings.

Q. No. And that's potentially a shortcoming, unless there are prosecutions that follow, or at least an inquiry into the possibility of prosecutions, which may address the shortfall?

A. I'm not sure I agree with that as a proposition. If the matter settled, and that was satisfactory to those who settled, is there a further obligation to go back into it again in some other way to determine the facts? I don't think so, I don't think that's an obligation.

Q. I suppose that depends whether people wish for a further type of accountability for the people who inflicted the harm. So you have a State acknowledgment and an ex-gratia payment to address in whatever way the harm that was done. But I think here there were -- I think Mr Cameron on behalf of 34 of his clients sent complaints to the Police?

A. **[Nods]**.

Q. And I think CCHR another half dozen or so, which led on I think to the Inquiry made, as you say, somewhat unusually to Deputy Solicitor-General Crutchley I think.

A. Yes.

Q. So that was, I suppose, the intent or the desire of those people to take the matter further, and to seek a different kind of accountability. And I think you mentioned that it was unusual for that kind of - the- approach that was made by the Police at that time, seeking advice on the basis of one, I think one of those individuals. If that was being dealt with now, would anything be different and how would it be different? In your office, if someone approached Deputy Solicitor-General-, asked for some advice, the advice she gave was pretty robust, not enough yet but there's more you can do, would that be it or would there be more to follow?

A. It's a bit hard to say in a sort of factual vacuum, but I don't criticise what happened to say there's not enough, there's enough to suggest you should do more investigate.

Q. I don't criticise that.

A. And then not following up and saying to the Police, "Hey how are you going?" I imagine that it might -- that might play out in the same way.

Q. I suppose what's of interest is that it's not in a vacuum because it's in the context of Crown Law having recently settled litigation where there was something like 100, maybe even 200 similar claims. So it's not in a vacuum, it's only one. And so I suppose the interest is, is there more that could have been done, and is there more that should have been done just to

follow-up with the Police, or do you simply leave the Police to do their job, and it's an open question?

A. I think that I would say the same again, that the Police would be advised to go ahead and continue investigating and that's their function, and that they are the independent assessor of whether or not to commence proceedings, and when I said it was in the factual vacuum, I didn't mean in the past, I mean if you're asking me today what would Crown Law do but with the identical facts, I think probably something very similar.

CHAIR: Can I just ask there, if it were not the Crown Law's obligation to follow-up and I can see the reasoning there, given that there had been this massive settlement of millions of dollars to hundreds of people, wouldn't some arm of the Government be interested to see what was going to happen after that?

A. Interested yes, but --

Q. Interested certainly, and if they were, were there any avenues for anybody in the Government, or around in NZ Inc as you refer to it, to actually say, you know, we've got a big problem here, we've solved one bit of it, there is a question of accountability, who's going to drive the bus on that accountability question, if it's not Crown Law?

A. And I'm resisting the idea that there is any -- that there is a good idea to sort of supervise what the Police do. One of the essential parts of our system is that we have an utterly independent function. Still, it's not trod upon if you say "How are you going, how are you going with that investigation?" To that end there would be no reason why Crown Law, or indeed anyone, couldn't have said, actually anyone perhaps except ministers, because I think there is the risk of a perceived --

Q. Political inference.

A. -- political interference to say carefully, "How are you going?" But against that, the settlement was a matter of public knowledge, the Police knew that too. I'm not certain that today we would also follow-up with the Police at a different time and say "How are you getting on?" Because one of the good things about the civil process was that it did put into the public what had happened, not in a way this Inquiry is doing, which, as I've said, is a significant and important step, but, for example, Sir Rodney's report was also available to the Police, it was very publicly available and spoken of.

QUESTIONING BY MR MOLLOY CONTINUED: Looking at the -- sorry ma'am -- looking at the guidelines that you developed in 2006 around reporting.

A. Yes.

Q. If the settlement had been perhaps just before that or just after that, how might those

guidelines have shaped what Crown Law might have done with some of the information that it had available at that time?

A. Well, I can speak to that in relation to indeed what we currently do in relation to historic claims, and I have previously made a distinction between what happened at Lake Alice and other historic claims for their Lake Alice survivors very clear, same allegations. As I've said, often the factual matter recorded in the file, so there are distinctions. But today's model of thinking about where do we have our -- when does our obligation get triggered to refer this to the Police, and you weren't here Mr Molloy, but I did cover this in my evidence last year, where we sort of got to the point where, as between many survivors and their counsel and ourselves, we've almost gone the reverse way, where Crown Law and other agencies have been very keen to refer some serious allegations to the Police, and we've met significant and reasonable -- I mean I'm not criticising, but significant opposition from survivors to say "I don't want to go down that route."

Q. Absolutely.

A. So we're currently in the position where the court is supervening that, that says "Yes you will have reason from time to time to take matters to the Police, you need our leave now in historic claims." And I think that just -- that also helps A, sharpen the question for us, why do we say we need to go in, on what basis, and if we can't invite and encourage the survivors' agreement, then the court will do that for us.

Q. So you may, would it be fair that you may have canvassed some of the survivors to see if they would consent and they wanted that and then you might seek the leave of the court if that be necessary?

A. Today that would be the difference, yes. I said I hope in my earlier evidence today that it is a surprise that there is nothing on the file showing that Crown Law grappled in 1996, 7 with this question.

Q. So you would have potentially expected the same sorts of dynamic to be at least being thought about --

A. Yes.

Q. -- within the office? Of course at that time there is also the litigation and so people may well have expressed a preference just to pursue the civil litigation to its end?

A. That was Grant Cameron's express view, yeah.

Q. Indeed, yeah. So I'm not suggesting that should have been done overriding the consent of the people involved. But am I right, if the same thing were to present now, you would turn your mind, you being Crown Law, would turn its mind to whether people wished the matter

to be placed in the hands of the Police, and if there was the necessary information, the necessary will among the potential victims, and if you could secure the court's leave, that would be something you'd consider?

A. Yes, and that's only in a historic sense.

Q. Indeed, understand.

A. It would be a very different matter if a current, yeah, contemporaneous complaint of criminal offending was made, particularly in relation to an institution or a place where the person still was and people might still be in harm's way. I think if there was a current complaint that would be very different. Part of the historic aspect does put challenges in how urgently that referral to the Police should be done.

Q. Right. There may not necessarily be the same protection of the public imperative?

A. To the person, to the individual, yes.

Q. Yeah. Would you have expected any alarm bells to ring in 2009 when the Police who had sought an opinion back in 2003 came back Crown Law and said "Can you provide us with these staff statements"?

A. Alarm bells because the length of time?

Q. Yeah.

A. Quite possibly. I suppose if Deputy Solicitor-General Nicola Crutchley had been asked, not that she was there in 2009, but if she had been asked "Can we have those documents" she might have thought heavens, are you still investigating.

Q. I guess that's my point really, is that you've got civil litigation commenced in 1994 and then a Police investigation following hard on the heels of that, the solution of that, which is finally brought to an end in 2010, 16 years later.

A. Mmm.

Q. And I guess you may or may not be able to answer this, but at what point, where was the disconnect there? How can something continue for such a long period of time and then end up in a situation where the Ministry of Health invokes a privilege and the Police close their files?

A. Did that happen?

Q. Well, I think you were saying the Ministry of Health, I may have misunderstood you, the Ministry were asked for staff statements, said "They're privileged, we can't provide them"?

A. You did misunderstand. Crown Law's asked for the statements, we said they're privileged, we asked the Attorney-General to waive privilege and we gave them to the Police.

Q. Indeed, but shortly after, the investigation came to an end I think?

A. May be so, but not because we were withholding material from them, we'd given them the material.

Q. You're quite right, but nonetheless the material which you had since whenever you'd had it, and don't get me wrong, I accept the request was made in 2009, I'm not holding Crown Law responsible for that, but there clearly was a disconnect there somewhere?

A. Well, there is a disconnect between how civil litigation is run and how criminal prosecutions are taken, thank goodness there needs to be a disconnect between those two systems for our criminal system to operate fairly and independently.

Q. Indeed, I think you mentioned before the integrity of individual offices is absolutely crucial to that, and so I'm not suggesting for one moment that anyone's integrity is a source of concern. But I suppose the difficulty is if there is a personal failing, or an institutional failing, for example hypothetically with the Police, then the system falls down, doesn't it, where is the check and the balance on that, does there need to be one, or is there one?

A. I understood the police's evidence, I might be wrong about this, last week to be that the inquiry that Malcolm Burgess ran between '06 perhaps and '10, was under-resourced, he was doing it on a less than full-time basis, the solution to that is not to say these things should be merged, these two systems that need to be kept separate for the integrity of the criminal justice system, but the solution or the accountability is surely with the Police Commissioner or the IPCA who might also be able to inquire into and to investigate the conduct of the Police.

Q. If the Human Rights Committee is making an observation -- and I'm morphing now, same point but it's slightly different tack -- my understanding is the Human Rights Committee made an observation in its 2009 periodic review expressing concern about the lack of investigation into historic abuse claims, what happens domestically when that kind of concern is expressed by the Committee, what do we do with it here?

A. I anticipate that we -- we the system, whoever the agency is running it, in this case the Ministry of Justice -- would advise those parts of the State that need to know what's in the report, and so while I've said Police are independent and not a Government department, they are part of the State, I would anticipate that that was brought to their attention. But I just have to correct, or at least say I haven't seen on this file that that happened.

Q. I think you mentioned that you were involved, or your office was involved in the briefings of perhaps the Ministry of Health, as a result, you know, as a result of those observations you then have a briefing to find out what's going on, is that right?

A. I think I was talking about going back the other way, in order that the State respond to the

Committee engaging with other agencies to put together the full story for the Committee.

Q. So you would expect, and you don't necessarily know, but you would expect that the Ministry of Justice would feed back the observation to the Police?

A. Mmm.

Q. And that the Police, faced with an expression of concern from the Committee, could presumably use that to say to the Government, or the minister, "Help us out here"?

A. I presume so, yeah.

Q. I just want to come back briefly to the resolution of litigation, I think you mentioned the outcome of the costs litigation in the District Court and that Mr Zentveld had taken the matter on. I think you also referred to the Solicitor-General's advice, very clear advice that the matter shouldn't be contested and I think the Ministry of Health, I think, obtained separate counsel to represent it in those proceedings. It's obviously led to a situation of some inequity between the two rounds of claimants.

Could you understand the perspective of those litigants in the first round who say "We spent however many years wrestling a settlement out of this situation, aided by a lawyer who acted effectively on a contingency basis, and at the end of the day 30% or whatever it was of the award that was made to us comes out of our pocket." And the Crown effectively says that "The costs of convincing us to admit that you may have been mistreated in our care should fall on you." Would it surprise you if that was the perspective of people in that situation?

A. No.

Q. Can I ask you to go one step further and accept that it probably is inequitable that they be in that situation?

A. Well, I can see their perspective is that there has been a difference in what they get versus what round 2 got.

Q. Indeed?

A. And I can accept they might say and yet the burden and the angst of it mostly fell to us to fight, yeah.

Q. With the directions or the observations made by the Human Rights Committee last year, what steps have we taken since then to meet any obligations that were identified by the Human Rights Committee in the Zentveld decision? I think one in particular was to disseminate the decision widely, so taking that as a start, do you understand what's happened there?

A. Yes, that Committee's decision was published on, I think, the Police's website, not sure if

there were further websites that it was published on, but it was published.

Q. Is that as far as it needs to go, and who would make that decision? Don't answer the first question, who might make that decision?

A. I'm not sure that I know who makes it. Any individual agency could post it on their public facing website and that's just a decision for an agency to make.

Q. I suppose that comes back to what do these decisions mean for us domestically. Who takes ownership of that and takes responsibility for what happens as a result?

A. The Ministry of Justice in that case, Torture Committee, they are the coordinator and the one who would say here is the decision, this decision needs to be made public, has it -- how will it be made public.

Q. And is there a particular office within the Ministry that might be responsible?

A. I'm not certain, I suspect it gets run out of one of their legal policy teams but I'm not sure. Sorry, I didn't answer, but a significant answer to your question about what are we doing, what are we, the State, doing after Mr Zentveld's successful communication with the Committee is investigate, the Police are investigating.

Q. Indeed, and thank you for that. I understood that.

MR MOLLOY: Ma'am, what I'd like to do is take a short break to see if there's anything left to ask, I'm also going to ask counsel for the Human Rights -- sorry, Citizens Commission for Human Rights --

CHAIR: Yes, certainly you'd like some time to deliberate?

MR MOLLOY: Yes, just to check if there's anything they want to ask.

CHAIR: Certainly, we'll take a short adjournment.

MR MOLLOY: 10 minutes?

CHAIR: Yes.

Adjournment from 2.44 pm to 3.32 pm

CHAIR: Yes Mr Molloy.

QUESTIONING BY MR MOLLOY CONTINUED: Madam Solicitor, you wanted to correct something?

A. Thank you. I just mentioned to Mr Molloy that when I was out in the back I realised that I had scrambled in my answers, it's the Ministry of Justice that is responsible for the periodic reporting and, as my brief actually sets out, the Ministry of Foreign Affairs sends individual communications to the Crown Law Office to engage with relevant agencies to form the response, the State response back to the United Nations Committee. I'm pretty sure I got that around the other way, just as we were speaking at the end.

Q. So if we asked Crown Law to provide an outline of the response, you'd be able to do that within a timeframe?

A. To the Committee?

Q. Yes.

A. Do you have it already?

Q. We have that already for the most recent one.

A. For Mr Zentveld and Mr Richards, yes.

Q. If we wanted to go further and find out how the report has been disseminated, whom shall we address that?

A. I'll answer.

Q. You will answer it?

A. Yes.

Q. I have three questions, one's a detail one, the other two are a little more broadbrush. The detailed one you may or may not know the answer. I think in 2009 you were talking about privilege was waived with the consent of the Attorney-General, it was either six or nine statements were provided?

A. Six.

Q. Six. I think in the current Police investigation a similar request was made and I think all of the statements were provided maybe in the high 30s I think?

A. I think that's right, all of the statements that -- all of the statements that we took have been provided.

Q. So I'm just wondering, can you help me understand, it's literally help me understand because I don't know, why is there a difference between the two numbers, the numbers that were disclosed in 2009 and the ones disclosed more recently?

A. As I recall, and I might check my notes, but as I recall it was that in 2009 the Police asked us for specific people, witnesses of particular people and we held statements for six of them that they had identified. It might be that the next one --

Q. Simply asks for all of them?

A. Bringing -- in 2020 and 21 they provided us with 58 privacy waivers from former patients authorising release of their personal information, we've shown them material that they said "Yes, we don't have that", so we are providing that to them.

Q. Okay. Thank you. The other more general question goes to I think something you said this morning, an initiative you've taken in response to various things that have happened and to actually have a bit of a hui at your place to impress upon them the need to -- well, actually

you characterise it, what was the general tenor of the discussion?

A. Well, it's a bit unkind to call it a discussion because in the hui of the whole office I get the speaking stick and I get to speak, but the tenor of it is about just reminding ourselves and continuing a discussion more actively perhaps about what is our responsibility and how do we make sure that we continue to remember that behind every file on our desk is a person and a life that we need to treat with dignity.

Q. And can that be lost sometimes when you're not like a private law firm where people walk-in off the street, and you don't necessarily have individual clients?

A. It can be lost, I would say even in the private law firm, but it can be lost as I said last year here, and I accept again, it can be lost sight of in the moment in what are the legal issues and of the engagement with a person who is another lawyer. Last time I was here we were -- there was exchanges about some of the record between lawyer and lawyer, it's not really how you would speak to the individual if you were thinking about them, and that is something that we are conscious of. Although just to continue with that, there has -- the hui followed with conversation. I know that at least in one of the groups where all of these claims get brought and they have regular training and development hui through the year, at least on a couple of occasions it has been centred around how do we think about this, how do we think about kind of, cement into ourselves and into our practice this more thoughtful and more respectful perspective without, of course, being any less diligent about advising our client the Crown about their risks and interests.

Q. All these international conventions start, don't they, with a preamble about the dignity of the human being?

A. Mmm.

Q. Which of course applies in the macro sense but also in the individual sense?

A. Yes.

Q. And it is easy to get lost, isn't it. So is that likely to be part of an ongoing --

A. Yes.

Q. -- professional development process? Look my last question is really around has the Crown done its own review, I suppose, of the Lake Alice affair and if you have, what have you learned?

A. This is it. I mean this is part of the State's responsibility under the UNCAT to the ongoing redress and we're criticised for being very late, but this is an independent body set up to do exactly that. We will learn from it, we have already, but the Crown Law Office hasn't done its own mini review, to the extent that my evidence shows that we got out all of the files

and looked right through Ms McInroe's file in particular and the Grant Cameron files, shows that we've taken a closer look than ever before. But I would say that this Inquiry is actually the thing that the State is doing that shows it's looking -- allowing someone else to look, independent look and see what comes.

Q. Thank you for that. Thank you for making yourself available. We would expect no less, but we have been assured from very early stage that you will be available and we've never been in any doubt about that. Thank you. I have no further questions ma'am.

CHAIR: Thank you Mr Molloy. Ms Joychild.

MS JOYCHILD: My intermediate colleague Tracey Hu is going to ask a subset of questions then I will ask others.

CHAIR: Right, come forward Ms Hu to the microphone.

QUESTIONING BY MS HU: Good afternoon Commissioners. Ms Jagose, my name's Ms Hu, I'm assisting Ms Joychild with the Lake Alice survivors. Many of the survivors have described how disappointed they are with the fact that Dr Leeks has not been prosecuted, many of them have made complaints to the Police and those complaints have not gone anywhere to date. So I refer to paragraph 3.25 of your brief of evidence which outlines what you describe as possible checks on the decision not to prosecute.

A. Mmm-hmm.

Q. To lay charges against a particular person. And I anticipate that a live issue in this proceeding might be the extent to whether those checks and balances are sufficient. So just running through that list at 3.25(a), that describes a prosecuting agency being asked by a complainant to review its non-prosecution decision internally?

A. Yes.

Q. Are there any guidelines around how that internal review is to be conducted that are set down by Crown Law?

A. No.

Q. Okay, would you -- so the agencies are free to set their own internal guidelines about how such a review is to be conducted?

A. Yes.

Q. The review might be referred in that case to the very same person who, or a person in the same team as the person who made the initial prosecution decision?

A. Well, it might be, and I would expect that would be not a very useful review, or at least not one that was openly able to be said to be sort of scrutinised. Depends what the reason for a different review is. I mean as you know, often in judicial review a court will send a matter

back to the same decision-maker because they haven't thought about three important things, say, and they need to, but if the decision -- if the reason for the review is "I think that person is biased against me", then you wouldn't expect that same person to make it, and I say that because a decision process for review would likely have legal eyes on it, either my office or the agency's own lawyers, and I would expect them to make those sorts of points, is there a reason to impugn the original decision-maker, if not they could probably make it again, if so they shouldn't.

Q. But that's -- those eyes on this decision, that's not the same as saying there are a set of guidelines?

A. No, there are not a set of guidelines, yeah, agree.

Q. Looking at 3.25(c), complaints against Crown solicitors may be made to the Solicitor-General or the Law Society. So in terms of a complaint to the Law Society, would that have to be shoehorned into the parameters of an ethical complaint?

A. Yes, the duty of the Crown Solicitor, yes.

Q. So the complainant will have to show either unsatisfactory conduct or misconduct?

A. Yes.

Q. And those are fairly high standards, would you agree?

A. Yes.

Q. And would you agree that those standards and those parameters might not be adequate to handle a complaint about a decision not to prosecute, if the decision was made based on perhaps, for example, a disagreement about whether a complaint is credible or not?

A. In that example that's right, there wouldn't be an ethical complaint about the lawyer probably, yes.

Q. What about a complaint based on an allegation that the person has misapplied the -Solicitor-General-'s prosecution guidelines, would that fit easy within these -- within the parameters of unsatisfactory conduct or misconduct?

A. No, not to the Law Society, no.

Q. So a complaint to the Law Society really doesn't provide adequate means to address a non-prosecution decision or to hold, or to provide a check and balance on that decision, would you agree?

A. No, depends what the reason is for challenging the non-prosecution decision.

Q. But you've just accepted that - sorry, I might leave that point. And in terms of a complaint against a Crown Solicitor made to the -Solicitor-General-, can you explain what that might look like?

A. It might be the one you posited before, that the Crown Solicitor said this matter that's been filed can't continue and it should be withdrawn, and somebody might say that person isn't following your own guidelines, they might say to the solicitor.

Q. How often are those complaints made?

A. I don't know the answer to that, although off the top of my head I'm not aware of any complaints like that.

CHAIR: Are there -- sorry to interrupt you but it's an interesting point. Are there situations where a Crown solicitor might be considering withdrawing a charge and comes to -- and says "I'm about to make this decision, could you double-check it", peer review it or whatever, does that happen?

A. I can think of one such -- I couldn't say now how common that is, but it has occurred, that they say --

Q. That's like a self-review, isn't it?

A. Yes, a self, yes. I'm concerned there isn't the reference - sorry, the -Solicitor-General- might -- sorry, the Crown solicitor might say I'm concerned there isn't the either public interest or the evidential sufficiency, they might want that peer-reviewed, yes.

QUESTIONING BY MS HU CONTINUED: And building on that question, what about, have you ever had a complainant who has been told by a Crown Solicitor that the Crown Solicitor will not be proceeding with the charges, the subject of the complaint, have you ever had a complaint like that come to you?

A. Not to me personally, no. I can think of one such complaint, but I wasn't in the role, but I can only think of one.

Q. And so looking at 3.25(c) of your brief where you posit that a possible check of the non-prosecution decision is a complaint to yourself, would you agree that that has not been -- not many people have availed themselves of that?

A. That's right.

Q. Could you comment on perhaps why that might be the case? If you can't that's fine.

A. I mean it would be rare for the focus of an investigation to complain that they haven't been prosecuted and then --

Q. Or the complainant?

A. Yes, so then we'd be thinking about complainants or other interested parties. Why might they not complain? They might be satisfied with the decision that the Police explained to them about why a prosecution isn't going ahead. They might not know there is a path to complain to, is another reason, they might not know.

Q. Looking at 3.25(d), you point to the possibility of a private prosecution being filed by potentially a complainant or another interested party. That requires the leave of the District Court, of a District Court judge under the CPA --

A. That's right, yes.

Q. -- under the Criminal Procedure Act? And would you agree it would be difficult to obtain leave if the Police had already made a non-prosecution decision in that case?

A. That's probably right.

Q. And at 3.26 of your brief you mention the possibility of a judicial review application. That's a civil proceeding, is that right?

A. Mmm.

Q. And the complainant will usually need to find a lawyer, prepare a statement of claim, go through discovery, prepare briefs, that sounds like quite an expensive undertaking, does it not?

A. It does, although there are plenty of good self-represented claimants who have successfully taken cases to the highest courts representing themselves, but I hear your point, that engaging a lawyer is an expensive undertaking.

Q. It's an expensive undertaking that makes judicial review applications not a sufficient remedy to address --

A. Yes.

Q. - cases of systematic misapplications of the -Solicitor-General-'s prosecution guidelines?

A. Well, actually I was going to agree with you, but your reference to systemic, I'm sorry, I think that if there was a systemic example --

Q. Take systemic out, would you agree with that proposition?

A. I would.

Q. And in all of these checks and balances that you've listed, they depend on a complainant taking action, or bringing the complaint somehow to an external body?

A. Yes.

Q. That's correct?

A. Yes.

Q. Is there any way of holding, or is there any way of introducing accountability into this process that doesn't require a complainant to take proactive action to complain to someone, is there a way of holding the Police or the Crown Solicitor to account that doesn't require a person to go out and hire a lawyer or, you know, find out who the Solicitor-General is and make a complaint to her or to find out who the IPCA is and make a complaint to the IPCA?

In the absence of the complaint is there a way to hold prosecuting agencies accountable for the decision not to prosecute?

A. Prosecuting agencies could have their own review processes, I mean this is really a matter perhaps more for the Police than for me to answer because I don't know what their processes are, but that is self-review, self-assessment.

Q. Is there anything that Crown Law does within its supervisory jurisdiction that would review these non-prosecution decisions?

A. Not directly, no. Not of the non-prosecution decisions, we take data and information about prosecuting agencies and how they achieve their policy outcomes through prosecution, and we try and understand and engagement with the agencies why one agency might prosecute more or differently from another. But again, the non-prosecution doesn't get picked up there.

Q. And perhaps given what you've read of the survivors' accounts and their attempts to, say, obtain some kind of redress from the Police, do you think that's an issue that Crown Law could address?

A. Well, I would be very cautious about agreeing with that proposition because in our system it is so important that the Police decisions are independently taken and absent bad faith or, same thing, mis-using the prosecution discretion, if the Police decision is to say there isn't enough evidence here to bring a prosecution on, or it is not in the public interest, our separation of matters requires that to be independently theirs.

Q. But surely there must be some -- there should be some mechanism for you to - for Crown Law to check on whether they are applying your guidelines correctly, right? By your guidelines I mean the -Solicitor-General- guidelines?

A. Yes. Well, the prosecution -- sorry, the Crown solicitors who hold warrants are subject to regular audits as I think I mentioned earlier.

Q. Not by you, not by your office?

A. By my office, yes, by talking to the Police, by talking to the courts, by talking to victims' advisors about their performance, about their decision-making performance. So if, for example, the Police thought that Crown Solicitor constantly withdraws my charges and is always in my way, we would hear about it through that method. But that's not a review of the Police decisions.

Q. No, it's not. Ms Joychild may have further questions. Thank you.

CHAIR: Through Ms Hu.

QUESTIONING BY MS JOYCHILD: Good after Ms Jagose. As you know I'm here to put the

survivors' interests and questions to you. So firstly, to what extent did the Crown Law Office pay Selwyn Leeks' fees when he was defending the Leoni McInroe litigation along with the Attorney-General, do you know that, the answer to that?

A. I didn't -- I don't -- I don't understand the Crown to have paid his fees.

Q. So as far as you're aware the Crown did not pay his fees?

A. As far as I'm aware.

Q. Because it was only after about six years that the Crown decided to kind of turn on Dr Leeks, wasn't it, and to seek a contribution, or to file a document saying that they would seek a contribution. Up until then the Crown had worked quite closely with Dr Leeks, hadn't it?

A. The Crown -- both the defendants had worked in concert, that's right, they both took a strike-out, they both took certain steps, yes.

Q. And when someone rang the Crown Solicitor's office and said "Dr Leeks is coming back into the country, what are you going to do about it?" The Crown Solicitor alerted Dr Leeks' lawyer to that and it was agreed that they would make sure there was -- the matter was kept confidential?

A. I don't know what the phone call is that you refer to, but I do agree that Dr Leeks attending the mediation was to be confidential.

Q. So the opportunity for the media to put pressure on Dr Leeks was lost?

A. No doubt. They didn't know he was coming.

Q. Well, the Leoni McInroe's evidence is that she was expressly ordered that she was to keep absolute confidentiality about Dr Leeks' coming into the country and that was by, I think, Ian Carter or whoever the Crown lawyer was, and the mediation would not go ahead if there was any possibility of the media finding out?

A. I agree, I understand that was an important part of his attendance at the mediation, the confidentiality.

CHAIR: Before you leave that, can I be quite clear, so we know that Ministry of Health, Dr Leeks were co-defendants?

A. Yes.

Q. Did Dr Leeks have his own private lawyer?

A. Yes.

Q. And to your knowledge was that lawyer paid for by the Crown or by Dr Leeks?

A. I don't know, I've never heard of this suggestion that the lawyer was paid for by the Crown. It's not to say that it wasn't, but I have not seen it anywhere.

Q. Is that something we could perhaps find out?

A. I can find that out, yes.

Q. That would be useful if we could find that out, thank you very much.

QUESTIONING BY MS JOYCHILD CONTINUED: Thank you. Now Ms Jagose, you said at the beginning of your evidence that in 1994 when Leoni's claim first came in it was only five years after the convention had been ratified, and so there was not a natural, I might get your words wrong, but it was not a natural way for people to think that the setting was immature. You said that?

A. Something like that, yes, I did.

Q. So I mean this is five years after New Zealand's ratified a convention. Surely it should be in the top of your mind that, or not yours personally, but the Crown Solicitor who's dealing with the files mind that these allegations look like they are raising issues under the Convention Against Torture?

A. Well, my evidence was the opposite point, that at that stage with a claim being brought in the civil jurisdiction looking like breach of fiduciary duties, it just wasn't an obvious step, and that can be criticised and I'm not saying that it shouldn't be criticised. Today my point was more to say that today that would be a more natural thing to think through the implications of such allegations in a torture and/or Bill of Rights frame.

Q. Okay, but New Zealand had signed the Universal Declaration of Human Rights in 1949?

A. Yes.

Q. And that says that no State is permitted to have cruel and unusual punishment. It had ratified the International Covenant on Civil and Political Rights in 1978 and that specifically says no-one's to be subject to cruel, inhuman or degrading treatment or punishment, and in particular no-one shall be subjected without his free consent to medical or scientific explanation(sic). It seems to me that human rights obligations that New Zealand has were just not well embedded in the Crown Law Office at that time. Would you agree with that?

A. Yes.

Q. That's a failing, really, isn't it, because the Crown Law Office is the pre-eminent legal advisor to the Government, and if the Government's not going to find out about its legal obligations or possible breaches from the Crown Law Office, where is it going to find out about them?

A. Well, I accept your criticism, I mean the Government might also find out in a variety of other ways, but I accept the criticism.

Q. So then we move on the year 2000 when part 1A of the Human Rights Act came into force, and the Crown was subject to the New Zealand Bill of Rights Act for the first time. And my recollection of the papers preceding that was that it was the Government's intention to develop a human rights culture within the public sector so that any problems would be picked up at the first possible opportunity. Is that your understanding of the purpose of bringing in that piece of legislation in the form it was in?

A. I don't quibble with that that is one of the purposes of the legislation, yes, and we see in the system a number of places where that check, where you see it in Cabinet papers. In my offices in particular a specialty of human rights with a human rights group in the office -- Cabinet paper, sorry, I mean that Cabinet papers require you to assess is there a human rights implication here, Bill of Rights vetting for legislation, you know, we see these places --

Q. Yes, but there seems to be an omission where litigation is concerned, where there's no-one looking to see whether this case raises international human rights obligations on the Government?

A. That is Crown Law's role and I agree and accept that we didn't do it in 1994.

Q. Neither did you do it in 2000?

A. When?

Q. When you were settling the Grant Cameron claims, not you, but the Crown Law Office.

A. Yeah, no no.

Q. Nowhere in any of the communications or documentation I have seen is there any advice to the Ministry of Health or to the Government about the fact that there were now scores and scores of claims all strikingly similar without much -- without an inability to collusion(sic) and that we better look at what our obligations are in terms of resolving them?

A. Yes, I think you're right that there is no -- I also don't know of any advice to that effect, but we were in our periodic reporting to the Committee starting to include how we deal with historic claims and in particular how we deal with Lake Alice.

Q. The problem is that the -- because of that lack of awareness in the top of anyone's head about the need to rehabilitate people, there was a very simplistic approach, I put it to you, taken to resolving these claims which was let's throw some money at them, and that is not -- that approach was not complying with the obligations under the Convention Against Torture.

A. Is that a question sorry?

Q. Yes, I'm asking you what your response to that is?

A. Well, I disagree that throwing money at it was the response. That was an agreed settlement with a group of people represented by a lawyer that included an apology from the Prime Minister and the Minister of Health, yeah, the Minister of Health, it included an independent person to hear from the people and make an assessment of the apportionment of the money. So I disagree with your "throwing money at it" reference. But also, I mean the reason that New Zealand has entered a -- sorry, I can't off the top of my head remember the word, in relation to the UNCAT obligations.

Q. A reservation?

A. Thank you, a reservation, is because the Accident Compensation Scheme is intended to provide for compensation and rehabilitation.

Q. Yes. Now, there were at least 56 people who fell outside that scheme, weren't there, because this happened to them prior to 1 April 1974?

A. Well, the Accident Compensation Scheme does look backwards. I don't know the detail that you mentioned, but it does now look backwards pre-1974.

Q. Well, the evidence is that while Leoni McInroe obtained cover for medical misadventure, most people have not obtained any cover under the Accident Compensation, those who were eligible?

A. Sorry to ask a question, but is that the -- because they haven't applied or they haven't --

Q. No, they've been turned down.

A. Mmm-hmm.

Q. So what I'm putting to you is, we've got the Convention Against Torture is the background in New Zealand, we've got undoubted claims that raised the issue of torture, we've got the Crown solicitors getting advice from independent psychiatrists who are saying wrongly diagnosed, absolutely not the correct treatment, no reason for this treatment, should never have been applied, this was not a treatment therapy of any sort. So the Crown actually knew when it was settling the Grant Cameron allegations that there were all the criteria of the Convention Against Torture had been met. Some Crown people knew that. Now we've got people who are impoverished, deprived of an education in many cases, so there are literacy issues, broken people dealing with daily PTSD, relationship struggles, struggling with bringing up children, and the only discussion that is being had is a discussion about money rather than other support and rehabilitation.

I put it to you that that's a failing of the Crown, because its duty is to ensure compliance with the obligations under the Convention. What's your comment about that?

A. Well, I don't agree that the State, you know, in total has failed to meet its obligations and

I call in aid of that answer this Inquiry. And yes, we have to look over a long scale for my answer to make sense and there can be criticism about speed. This Inquiry will have recommendations, I imagine, that will address that point. But the Crown was approached in a frame that was about liability for which we in this country mark that by a payment of money, those are significant kind of points in our legal system. So where a Crown says "I'm not going to dispute that, I'm not going to put you to proof about all of that, I'm going to accept that -- I'm going to believe you and we're going to settle it with an apology and money." I suppose the criticism is, why didn't -- your criticism, why didn't the Crown think about counselling and other measures.

Q. Well, for example, when the St John of God case settled, which was a huge case, people there were given a house each by the Christian Brothers or whatever, the organisation was, were given accommodation. We had people at the time of this hearing living in cars. So there was no thought given to what does this person need to rehabilitate them, and it might have been different for every person. But the approach taken, I'm putting to you, was just not consistent with how one would deal with a claim under the Convention Against Torture.

A. I just don't agree with that. I agree with you that there was no further discussion from the Crown side with Grant Cameron's clients about what else in the social need setting was required, so I agree with that, but I don't agree that was not meeting our obligations under the Convention.

Q. Well, the evidence seems to be that someone in Government suggested 4.2 million and Grant Cameron came back with 6.5 and they settled it. But nowhere is that looking as to whether that is sufficient to deal with the damage that has been done to these people because of torture?

A. I agree with you.

Q. So in one of the briefing papers, which I accidentally in my opening submissions said was a briefing paper prepared by Tony Timms, it was actually by Grant Cameron sent to Tony Timms, he refers to Treasury having earmarked or set aside $132 million to resolve these claims. So they must have been laughing all the way to the bank when they got away with 13 million, or thereabouts, would you agree?

A. I'm not aware of Treasury setting aside 100 and something million.

Q. I wonder if that's something that could be looked at as well?

A. Sure, yes.

Q. When there was Crown advice about 40 to 50% might have -- be successful, in relation to

the others, that was the Crown looking at defences of limitation, wasn't it?

A. Probably.

Q. Wasn't really relating to credibility?

A. No, absolutely not.

Q. So then we have the extraordinary situation of the Police dealing with a complaint of torture of children, the most vulnerable children in the care of the State who are tortured, and we have the Police deciding that it's not in the public interest to prosecute. Well, I put it to you as the Senior Legal Advisor for the Government now, that has to be completely wrong, that decision, would you agree?

A. I understood the police's decision to be that there was not an evidential -- sufficiently evidential basis to make it likely that there would be a successful prosecution.

Q. That's wrong. Commissioner or Superintendent Burgess, sorry, Mr Burgess, said that he had formed the opinion there was evidential foundation and he sought two external opinions from criminal defence lawyers as to whether the public interest would be met.

A. And what did they say?

Q. They said no, both of them.

A. They said there wasn't evidential foundation.

Q. One raised the evidential foundation as well, but it's not -- but he was asked to comment on the other matter and he did comment on it. Well, it seems, Ms Jagose, that not only is the Crown Law Office at that time in dire need of some training as to its international human rights obligations but so were the Police. Would you agree with that?

A. That's a matter you need to put to the Police.

Q. Well, for anyone to come back and say that there was no public interest in prosecuting this case, when it's a case under the Convention Against Torture, and someone who has been involved in a senior powerful position can get away with that, that's got to be entirely against all the spirit and intent and principles of the Convention.

A. No, I disagree. If there is not an evidential foundation that makes a prosecution -- there's a reasonable prospect of success, then you can't get any further with the public interest. Public interest isn't a way to avoid what the Police saw and -- sorry, what the Police's legal advice and Mr Hall's confirmation of it, was that there were significant evidential and other barriers in the way of a prosecution. It is really important, the point I'm making, that public interest can't be the driver on its own.

Q. Of course, there's no problem with that. But looking back now, there was actually ample opportunity for the Police to find evidence that this had gone on, there were many, many

statements that it never did one evidential interview to make. So really it was a pretty faulty decision of, although Mr Burgess had found there was evidential sufficiency and he'd only referred it out for the public interest. So there seemed to me to be major failings in the Police handling of this, and as the pre-eminent legal advisor, I'm putting it to you that you should be very concerned about how the prosecution was handled.

A. Well, as I said at the beginning today, I'm very cautious, the state we're in now with the Police with an existing investigation, I really feel unable to say anything that might be said to get in the way of a prosecution if one is brought.

Q. Okay, I'll leave you there. You talked about the importance of the divisions between the criminal and the civil in the Crown Law Office. So just one little diversion. As I understand it, and correct me if I'm wrong, but Crown counsel in earlier cases had delayed a Police interview with an alleged sexual offender when there was a civil action going on, I think it was Mr Moncrief--Wright, and I can't recall the Crown counsel - Ms McKechnie, that's in the evidence and also there's other evidence that the Police asked Ms McKechnie not to question Mr- Drake, who was another sexual offender, and she went along and questioned him. So it's hard for the survivors to believe that there really is this, you know, no interaction between the two and each respects the role of the other.

A. In referring to -- I remember the story that you're referring to there, not the story but the narrative you're referring to. But what it shows is that there is a separation, because Ms McKechnie is and was working in the civil side, she was defending the Crown in respect of claims brought by people who alleged that both of those men had sexually - had conducted sexual crimes. It was at the Police's suggestion that she could speak to Mr Moncrief---Wright, so clearing the way from the criminal prosecution for her to do that, which just shows that those systems are separate. And it's the criminal allegations being brought in a civil setting that I can understand that it looks like everything is all just connected.

Q. Well, I guess I'm putting to you the fact that when you've got a claim of hundreds of children having been tortured, this actually requires from the Crown Law Office some type of system where there was cooperation between the Police and the Crown. For example, all the files should have been offered to the Police, all the documentation should have been offered to the Police, so that the Police are assisted in their task.

A. I've already said, and apologised for the delays that Crown Law went through to get material to the Police. I don't want to quibble with you, but a process would have to be a bit more careful than just producing material --

Q. Yes.

A. -- for the Police, but I agree with you, that a more - if Crown Law had spotted in the mid--90s what you are now putting to me, that engaging with the Police would have been a considerably better -outcome -I- don't know about the outcome, considerably better process.

Q. Right.

A. Although Mr Cameron didn't want to engage with the Police until after that process. I mean I think that's a matter he might have referred to last week. And even then, only some of his clients wanted to go through that process, and that's why I say, it needs to be done with some care.

Q. Of course it does.

A. I'm not trying to take the blame off Crown Law with that comment, but that's the sort of care that I would want to make sure was in play.

Q. There's no doubt that that's so, and likewise here, some people don't want to go near the Police. But other people are dead keen to do so. And once again, Mr Cameron for his own reasons may not have wanted to, but for those people who wanted to go to the Police there and then, that is again something that the Crown Law Office could have been aware of when it's looking at its duties under the Convention.

A. I'm not sure about that, in the face of the representative of those people saying they don't want to go to the Police. It's possible that there's still an obligation to go regardless of what the individuals themselves wanted.

Q. No, but to at least advise Mr Cameron that these are serious allegations under the Convention of Torture, time runs, it's better to hear things as soon as possible and he might consider those of his clients who do want to go contemporaneously making complaints to the Police, the Crown could do something like that in a proactive way?

A. Yes, and I agree that there is nothing in the record that suggests that that was done.

Q. After the Justice Gallen report, are you aware that the Crown Law Office was involved, I've only heard of this, in advice to Government about what should happen by way of an inquiry, whether there should be an inquiry?

A. There was discussion about whether there should be an inquiry prior to Justice Gallen's involvement, and it's in the record in front of the -- of this Inquiry, that there had been some -- quite some discussion given to whether there should be an Ombudsman inquiry, I recall that. I recall that the record indicates that Mr Cameron thought that a Commission of Inquiry wasn't what was wanted, I don't want to speak for him but I got the sense that he

thought that there would be a quicker route to resolution without an inquiry. So the Ombudsman inquiry was considered and advice went up to maybe through the Ministry of Health. But that was pre--Justice Gallen, I'm not aware of after that. I mean those matters were fully and finally settled through the Justice Gallen process, so I'm not surprised that there's no evidence of a further inquiry being considered.

Q. Okay, now just looking back at Leoni McInroe again, you acknowledged that what happened with her diaries was far from ideal and you've advised all the staff about the need to think of the person behind the file, which is wonderful, but as people get involved in litigation again and time goes on, have you backed that up by having some sort of protocol relating to the handling of personal items?

A. No.

Q. I think, well, it's suggested that it would be an idea, so in your response Ms McInroe still doesn't know what happened to those diaries in the years the Crown had them. She knows some pages were photocopied, where are those pages now, how many people handled -- I mean there could be a protocol developed whereby people do know how many people have handled their personal items?

A. There are protocols in place, not just in Crown Law but right across public service about maintaining people's privacy in their material, but I think this is a point, a further point that is worth considering about how do we -- it's actually quite rare to have such material, but in any event, I think it's a point worth considering, how do we make sure we don't do that again.

Q. Thank you.

CHAIR: Was that obtained as part of the disclosure or discovery processes?

A. Yes, I understand so.

MS JOYCHILD: That was specifically requested against her wishes, but she handed it over in the end.

CHAIR: But she handed it over, yes.

MS JOYCHILD: She complied.

CHAIR: One would have thought there should be some form of protection of personal items handed over in response to a request, I think you'd agree with that.

A. Yes, I do.

MS JOYCHILD: I think that's all my questions, thank you.

CHAIR: Thank you Ms Joychild. Did you have anything in re-examination Ms Feint?

MS FEINT: No, I did not.

CHAIR: Thank you.

COMMISSIONER ALOFIVAE: No, thank you Ms Jagose, no further questions from me.

CHAIR: I have asked the questions I wanted as I went along, so it remains for me to thank you again. For, as Mr Molloy said, for coming back, providing a very extensive brief of evidence which has been extremely helpful -- I'm sorry, I completely forgot my virtual Commissioner, Mr Gibson.

COMMISSIONER GIBSON: Just checking I can be heard?

CHAIR: Yes, I can hear you, can you hear him?

A. Yes.

Q. Yes, please.

COMMISSIONER GIBSON: Thanks Ms Jagose, a few questions. Starting off around Crown approach to referrals, I think 3.50, you talked about that the approach was based around psychiatric claims being mostly historic changes to structure and things, does that include psychopaedic hospitals as well?

A. I don't see why not, it's sort of a general approach that we think about referrals.

Q. How we think about this whole group of people, both -- the approach include both the area of pre and post institutionalisation(?) and what our terms of reference refer to as in direct State care.

A. Sorry I'm not following the question, could you ask it again?

Q. I think 3.50 refers to the changes in structure in psychiatric institutions. A lot of the changes there was post-institutional care, not in the same scale often but often delivered indirectly by the State, the State contracting out some of those responsibilities.

A. I'm sorry, I still don't understand what the question is, I think it's about Police referrals.

Q. I suppose it's about the Crown's, Crown Law Office's approach, comparing to Social Welfare institutions where there seem to be an acknowledgment that there was ongoing issues of structure and potentially people still involved in care settings?

A. Sorry, okay, yes, sorry, I can answer your question I think, which is yes, that if the allegations are about a person who isn't directly in a State institution but who might be a contracted or some other form of slightly distant relationship doing work for the State in relation to children or other vulnerable people, the same thinking would apply, are there allegations there that we need to think about referring to the Police or getting the agency to find out more about before we form that view about referral. The same thinking.

Q. And a general understanding of the context of what's going on?

A. Yes.

Q. I think we've heard a lot internationally and in New Zealand that there's a period of 20 years for some forms of abuse to come forward, and it's almost like in this Lake Alice case, although there are individual instances coming forward pretty quickly, there was almost -- a roughly 20-year period when allegations came forward en mass. How was that understood at the time and what we need to be looking for, not just in terms of responding to current, but what is the role in prevention when there is this long lag?

A. Well, I think one of the other changes in the system is the National Preventative Mechanisms, which is a mouthful of a phrase from the UNCAT requirements that where the State has people particularly vulnerable there are independent players who -- independent agencies who proactively go in and see people, so prison inspectors, mental health inspectors, the Ombudsman, the Children's Commissioner, they all have proactive powers to go in to settings and institutions to inquire into that very point, so that we don't wait for 20 years before people can face that question that they have somebody right there speaking to them or seeing them or being able to be seen.

Q. Torture, cruel and inhumane treatment or punishment occurs not just in places of detention that are monitored under the UNCAT mechanism, but some examples that have come up in the last five years ago, things like seclusion, solitary confinement in schools, different things, in direct care and learning disability institutions where on the face of it it seems like those three criteria for what constitutes torture could be ticked off. How does the Crown Law Office, how has the Crown Law Office dealt with those more recently?

A. We would only come across those in respect of a complaint or litigation. So we would take the same approach that I've outlined already. We don't have another sort of overarching obligation or function over a whole lot of different agencies of the State.

CHAIR: Sorry, can I just ask a question about that, sorry to interrupt you but it's relevant. The agency oversight agencies, I've forgotten their name again now as well, but the Ombudsman.

A. National Preventative Mechanisms.

Q. Can they lay a complaint in circumstances that Commissioner Gibson's talking about? Could the Ombudsman find things and lay a complaint with the Police, does that happen, or the Children's Commissioner?

A. Or anyone can lay a complaint with the Police, so yes. I seem to recall the Ombudsman had something to do with allegations of seclusion in schools, even though they're not a traditional, as Mr Gibson says, not a traditional place in which the State takes people into care. I might be more useful to the Commission if I come back on some of those questions,

because they could complain to the Police, so could anyone in that institution, or in that school or -- I might just work with Mr Molloy perhaps about what's the question and answer it.

CHAIR: That would be interesting -- I'm sorry to interrupt your question, but carry on.

COMMISSIONER GIBSON: I suppose part of the emerging picture is how hard it is to bring forward some of these issues, it might take 20 years for many people who are perceived to have some degree of means or some degree of mental capacity or perceived mental capacity. There's other groups of people who don't have that much and whose experience might be missed almost completely. Are you satisfied that those areas, such as people with intellectual learning disabilities in schools, people in disability support services who experience these things, there are mechanisms so that they can share and connect and be brought in a timely way through, if it is torture, to you who have a role in prosecution?

A. Well, I would expect that the Ministry of Education can answer these questions because I'm assuming, maybe wrongly, that disability learning services is something that the Ministry of Education has an oversight of. They don't need to refer to torture complaints to me, they should refer them to the Police. But that is something I can work with. The secretariat is made up of -- is servicing this -- servicing the Crown's response to this Inquiry is made up of all these different agencies, so it's a relatively easy matter to get answers to those, but I'm afraid I don't know them.

Q. A package of, I suppose, safety and justice is dependent on I think that the Crown prosecution guidelines, Police interview guidelines, are you confident that package is fit for purpose for a group of people who have limited means to express themselves, interview, to come forward? And thinking also in particular about people in care where we hear instances of people who are abused in current care settings and how they are -- the balance around keeping them safe, them having their justice needs and desires met, their ability to consent in the context of Convention of the Rights of People With Disabilities. Are you confident there's I suppose both the thinking within the Crown Law Office and the joined up thinking across Government that that safety, justice, consent package is right?

A. I'm afraid I'm just unable to answer that question, I just haven't done the work needed for it. Because I don't -- I'm just not ready, I don't know enough across the system about how those things are addressed. Happy to take it away, although I can answer one part of your question; the prosecution guidelines I have no doubt that most people cannot access them or understand them, they are not for that purpose, they are for prosecutors and Crown Solicitors, so that is not a mechanism I would say was a useful one for people in your

question with disabilities seeking safety, injustice in relation to themselves. I don't put the Solicitor-General-'s guidelines up as part of the answer to that question.

Q. A question not for them to read but do they and Police interview techniques, everything else, sort of compromise their ability to get justice? We heard going back a long time ago credibility of survivors, is there still some structural barriers to some groups of people seeking justice being heard, being kept safe?

A. I'm writing down that question. I don't know the answer. I'm sure there are barriers for some people, but I have to go away and research and talk to my colleagues and come back on a much more formal footing, if I may, because I just can't answer them I'm sorry.

Q. You refer to the post Convention Against Torture environment five years on as being a bit immature, where about 13, 14 years on from Convention on the Rights of People With Disabilities, is there mature thinking, adequate expertise across Government agencies now to deal with these issues for this group of people who perhaps may have missed out more in the past?

A. I have to find the right person to ask those questions of and come back to the Inquiry on that.

Q. Another question, we heard from Dr Janice Wilson, who's now Chair of the Quality and Safety Commission who was Director of Mental Health, that perhaps in 10 years time we might be looking at an inquiry into seclusion, solitary confinement in mental health settings and things like that. She comes from a place of expertise and experience and all that, and I think her evidence indicated that she thought there was a need for an inquiry, something more to look at back in the late 90s when Crown Law had an opinion which stifled that. Are we looking at the same situation again where we know some things are not right, that there is something to look at, but we're delaying the degree of investigation and seeking of justice that's required in this situation?

A. I can only give a general answer to that, which is to say that in my experience I have seen, and I said it earlier today, in two situations material coming to Crown Law, so the last few years, where on the face of the allegations we took the matter up with the agency that instructs us and didn't accept any answer that would be "there isn't something to see here", brought in international obligations to bear, in one case involved the National Preventative Mechanism office holder, in another case resolved in a different way and reported to the Committee. So I don't agree, well, I couldn't agree that generally speaking we are as we were once before. But I wouldn't say, I mean how can I say that everything is perfect, it won't be. Doctor --

Q. Do you accept there might be some work to do around these areas, not just fact--finding about what's happening, but there needs to be some focused --

A. We're very much out of my sphere of influence, I'm sorry, about thinking about mental health treatment and institutions and learning disabilities, that is just -- I have to go and find the answers out before I can answer them.

Q. A final question. You talked about the role of the Solicitor-General- and there was some component where there was an interstate, between State parties component. Just thinking when - I think you said it was in the mid---90s or so that emerged that there was something to look at around what happened in Lake Alice, and at that stage Dr Leeks was practising in Australia. Is there a role for the Crown Law officer who has a role where there is something to look at in alerting other international states there is something that needs to be looked at here, was that communicated at the time?

A. Yes, Crown Law has a role in any extradition processes or mutual assistance between states, so if a person is to be surrendered to New Zealand, Crown Law engages with the relevant party, relevant office party with whom we have an extradition agreement. That didn't happen in this case, but I'm just saying that is one of our roles. I wouldn't have thought Crown Law had a role to say to another country Dr Leeks is working with you, I would have thought that was a Medical Council matter.

Q. Thanks Ms Jagose, that's all my questions.

A. Thank you.

CHAIR: Thank you. Again, I'm sorry for overlooking you on the screen there, but you're finished now and I don't think there are any other questions, so I will continue with my thanks for coming for providing a very comprehensive brief of evidence which I think is very important to lay out the foundations for constitutional arrangements and the way in which the Crown Law Office works. And for being so frank in your acceptance of some of the egregious harms which we all know happens and the Commission is grateful for that. And grateful also for your offer of finding out more based on the questions we've asked you today. So again, thank you very much indeed. We will close the proceedings for the day.

Hearing closes with waiata and karakia mutunga by Ngāti Whātua Ōrākei

Hearing adjourned at 4.41 pm to Tuesday, 29 June 2021 at 10 am