

Friday, 20 November 2020

(10.00 am)

LORD JACK McCONNELL (affirmed)

(10.01 am)

[The Inquiry's Hearing on Friday, 20 November 2020 was delayed from its normal start time at 10:00 a.m. due to a global outage of the Cisco Webex video conferencing platform. Once the outage was resolved, the Inquiry's Hearing resumed at approximately 10:33 a.m.]

(10.33 am)

LADY SMITH: We are now able to carry on, but before doing so, I would just like to explain the problem that's been experienced is persisting. It's a global problem with the Webex system, so anybody who is using Webex at the moment is suffering the same problem. It's not our particular systems in this Inquiry.

I hesitate to apologise for that because it's not our fault. However, we do have one recording system in place and a back-up recording system in place, so there will be a transcript from today, but it may take a little while to get that transcript up.

Now, Jack, I'm sorry. You have heard. Very frustrating. But if we can now get back to your evidence, if that's all right with you.

A. Of course.

1 LADY SMITH: We'd like to do that.

2 Mr Peoples.

3 MR PEOPLES: Thank you. Because we have lost a bit of time,
4 can I just say at the outset that, as I said earlier,
5 your evidence in the statement is evidence and will be
6 considered and is part of the evidence, but you'll
7 perhaps appreciate that we'll, because of the
8 constraints of time, particularly of what's happened,
9 focus on what's happened in some of the issues that have
10 arisen in the course of the hearing and are of
11 particular interest, perhaps, to the Inquiry and those
12 who campaigned for the Inquiry.

13 So don't take that as a sign that we're not aware of
14 some of the points that you have made and indeed others
15 have made in your statement, but I wanted to perhaps say
16 that at the beginning because, as I say, we have
17 probably lost about an hour and 20 minutes and perhaps
18 we can focus on some of the issues to try and make
19 progress.

20 A. I fully understand that, and if there's anything I think
21 needs to be said that hasn't been said, I'll make
22 a point of raising it either during our question and
23 answer or if necessary --

24 Q. Yes. Well, if we have that understanding, I'm sure we
25 can make progress.

- 1 A. I'm content with that.
- 2 Q. Perhaps I'll start again. You are Jack McConnell.
- 3 A. Yes.
- 4 Q. You're the Rt Hon Lord McConnell of Glenscorrodale.
5 I think we had taken, in case we didn't catch this
6 before in your background, it was as a mathematics
7 teacher between March 1983 and September 1992. You were
8 then, for a period, General Secretary of the Scottish
9 Labour Party between September 1992 and March 1998 and
10 you were elected to the Scottish Parliament on
11 6 May 1999.
- 12 A. Yes.
- 13 Q. You were First Minister of Scotland from
14 22 November 2001 until 16 May 2007. Since 20 June 2010,
15 you have been a member of the House of Lords in the
16 UK Parliament and you're a member of Her Majesty's Privy
17 Council.
- 18 A. Yes. I should apologise, actually, now that I see that
19 on the screen. It's actually 28 June 2010. I'm not
20 sure how that error has crept in.
- 21 Q. So in terms of before we get to perhaps the focus of
22 today's evidence for my purposes, you can take it that
23 we've heard quite a lot of evidence from ministerial and
24 former ministerial colleagues of yours about action
25 being taken by your administration to improve child

1 protection and children's services during the period you
2 were First Minister and indeed before then. So you can
3 take it we are familiar with a number of initiatives and
4 background to those initiatives, as well as things that
5 were happening between 1992 and indeed the date of the
6 Petition in 2002.

7 So if I can at least, to some extent, just warn you
8 that has already been the subject of quite a lot of
9 evidence so we are familiar with that. I do appreciate
10 that I think a point you seek to make and others have
11 sought to make is that there was a lot going on before
12 this Petition in relation to protection of children in
13 Scotland.

14 A. Yes. If I can just say, I think that was -- it is
15 important to note, although I was not directly involved,
16 that that was pre-devolution as well as post-devolution
17 that the Government had at Westminster, particularly,
18 I think, prior to 1997, if we're giving credit where
19 it's due, the Conservative Government in the late '80s
20 and early '90s was implementing quite significant
21 reforms that were improving the protections and rights
22 that were available, and we then, following 1999, built
23 upon that with a number of new and fresh initiatives,
24 some of which were in response to events; others were
25 long-standing issues that required to be dealt with.

1 So while the work that we were doing as a Government
2 was important, the work that previous governments had
3 done as well was also significant, and I think a lot of
4 that is detailed in my statement; I presume, therefore,
5 in the statements of others and there may be no need to
6 repeat it again today, but it is an important context.

7 LADY SMITH: Yes, indeed, and some of the work was prompted
8 by the United Nations Convention on the Rights of the
9 Child, which gave rise, in many jurisdictions, to
10 wide-ranging fundamental legislation changing the way
11 you could treat children's rights.

12 A. I think that's true, but I also think there was a change
13 in culture in Scotland; that the culture that at least
14 in part gave rise to some of the incidents of abuse that
15 the Inquiry has been studying had changed, I think, in
16 the 1970s and the early 1980s, and Government did
17 respond to that by bringing in new rights and
18 legislative protections and, you know, I think they were
19 right to do that.

20 MR PEOPLES: I think one major piece of legislation before
21 the establishment of the Scottish Parliament, again, it
22 was the Children (Scotland) Act 1995, which I think
23 built on some of the principles of the UN Convention on
24 the Rights of the Child.

25 A. Yes, and I think it was also an attempt to go further

1 than the children's hearing system which had been
2 established in Scotland a couple of decades earlier and
3 was seen as, I think, quite advanced in its time
4 globally, but I think by the 1980s, not least because of
5 the Convention, but by the 1980s and early 1990s, it was
6 seen that the procedures in place in Scotland needed
7 a stronger legislative framework within which to work
8 and the then Conservative Government definitely took
9 that on board.

10 Q. I think we have heard some evidence, indeed, from
11 a previous witness Colin MacLean, that part of the work
12 that your administration became involved in around the
13 piece we are concerned with was a review of the
14 children's hearing system to perhaps look at some of the
15 areas that may be needed to be addressed and improved
16 since --

17 A. Yes. The problem with the children's -- the issues that
18 we were dealing with in relation to the children's
19 hearing system were less connected to the issues that
20 are in front of the Inquiry and more, I think, in
21 response to changes in society. The children's hearing
22 system had worked well, I think, for a couple of
23 decades, but by the time the devolution came about in
24 1999, the hearings, I think -- well, first of all, they
25 were having difficulty recruiting good people to serve

1 on hearings, but, secondly, they were struggling to make
2 a real impact in the lives of the children and be part
3 of a joined-up system in the context of which they were
4 operating, and there was a need for a review of that.

5 But by far the most significant elements were the
6 legislative and administrative changes, the new
7 legislative provisions, in the early part of the decade,
8 2000 to 2010, but also the efforts that were being made
9 across ministerial portfolios to have a far more
10 joined-up and proactive approach to not only preventing
11 any abuse or neglect, which was perhaps even more of
12 an issue by that time, but also ensuring that young
13 people who had either experienced abuse or neglect had
14 as many opportunities as possible to rebuild their lives
15 with proper support from the State locally and
16 nationally.

17 Q. I think, and I'm just going to take this short, but
18 I think as a former teacher you make it clear that you
19 had a particular interest, I think, in educational
20 opportunities and social care services for all children
21 and young people in Scotland, whether living in care
22 settings or their own communities. I won't go into
23 detail as to how you sought to advance those interests
24 because we've heard evidence about that and you've given
25 some evidence today, but that's clearly something you

1 took a keen interest in. I think, as you tell us in
2 your statement, you were in fact Education Minister
3 yourself between October 2000 and November 2001, is that
4 correct?

5 A. Yes. I partly mentioned in some detail that educational
6 background in my statement, because although I had no
7 direct experience at that time with any individual who
8 had experienced child abuse, I did come into contact
9 with the care system for the first time, really, in my
10 life through some of the pupils I was teaching and
11 I became much more aware of the difficulties of living
12 in care than I had ever been before, and that had
13 sparked an interest that then was followed through in
14 following some of the significant media interest in
15 child abuse in the course of the 1990s.

16 When I became Education Minister, I was immediately
17 struck that the section of the department that dealt
18 with these issues of child protection and children's
19 services was seen in some ways as the poor relation of
20 the department and that schools and assessment and
21 curriculum were seen as much more significant, and
22 I tried to rebalance the work of the department and make
23 sure that children's services and child protection were
24 given a higher priority right away and then we carried
25 that through, I think, into my time as First Minister as

1 well.

2 Q. Yes, and I think you said that perhaps the choice of
3 your successor as Education Minister reflected that;
4 that you want to give a higher profile, perhaps, to the
5 looked after children side of things and indeed,
6 Cathy Jamieson had a background in social work, as she
7 told us and we know about, and indeed she had been
8 a panel member on the Edinburgh Inquiry. I think you
9 said that at least was a factor in your choice.

10 A. And I had full confidence in her that in that role, she
11 would make -- she would make an impact inside the
12 department and publicly, yes.

13 Q. Now, if I could move more directly to the matters we are
14 perhaps particularly concerned with. The first matter
15 I'd like to ask you about, and I think you deal with
16 this, to some extent, at paragraph 11 of your written
17 statement, is the issue of the scale of the problem of
18 in care abuse in Scotland, at least historically.

19 You say in that paragraph, I think, that it was your
20 view, whatever others thought, that the known cases, if
21 I could put it that way, and information that was
22 available, represented just the tip of the iceberg. Was
23 that your feeling at the time and, if so, why?

24 A. Well, it was, I suppose, a personal observation and
25 human instinct. It was my gut instinct that abuse would

1 have been taking place in a situation where there was so
2 much secrecy, such a lack of transparency and
3 an opportunity for bad people to do bad things was
4 there.

5 But I also felt quite strongly that those who had
6 come forward and spoken publicly about abuse, whether
7 they had reported it to the police or not, were in many
8 ways the bravest of the brave. Their willingness to
9 come forward and talk about such a difficult topic made
10 them, you know, I think, quite, quite special in many
11 ways. But for every one of them, there are probably,
12 you know, maybe, you know, nine or perhaps even dozens
13 that would not be prepared to come forward and talk
14 about it.

15 So I think I worked on the assumption that the small
16 number of people who were talking about this publicly
17 and the small number who were willing to go to court,
18 a relatively small number, were those who were willing
19 to do so and that there would be many, many, many others
20 who were not willing to do so and had either
21 unfortunately passed away or had stayed silent over the
22 years and maybe their new families didn't know anything
23 about it or were still so traumatised that they just
24 couldn't deal with it in that way.

25 Q. Yes, because the reason I'm asking that of you, and you

1 may be familiar with this, having looked at some of the
2 documents before giving evidence, in the initial
3 briefings with officials there were statements to the
4 effect, whatever was intended, that the problem was
5 neither widespread nor was there evidence of, I think it
6 was, systematic or organised abuse, which I think we
7 understand the difference.

8 But do you recall, perhaps, seeing documents that
9 were saying things along those lines? I think
10 Cathy Jamieson said she didn't obviously accept that and
11 indeed she rejected the initial advice to do nothing, as
12 it were, to say, "No plans for an inquiry, no
13 apologies". You will be familiar with that background?

14 A. Yes, and at the time when Cathy raised this with me,
15 I mean, I was very clear that I supported her view
16 rather than the view that she was being given in
17 official advice. I was in no doubt that there had been
18 abuse and that it almost certainly had been more
19 widespread than was public.

20 Q. So you didn't need any convincing on that?

21 A. Absolutely no convincing on that at all, and I think
22 there's a duty on the part of -- this is a difficult
23 area, obviously. If you're making public policy and
24 it's a difficult area in the court situation, you know,
25 if judges and juries are making judgments, but I -- my

1 instinct would always be to err on the side of believing
2 those who are speaking out rather than those who are
3 covering up, and I think, you know, that was definitely
4 part of my instincts on that occasion in late 2002 when
5 this first started to come to us for decisions.

6 Q. At paragraph 11, you address another point and I just
7 want you to explain what you're saying there. It's the
8 argument that you say that's sometimes put forward that
9 standards were different then in the historical periods
10 and you say what you considered was your position as
11 regards the State's duty towards adult survivors of in
12 care abuse.

13 Can you help us with that? What are you saying in
14 that paragraph about that argument and the State's duty,
15 including the duty when you became First Minister, to
16 deal with these issues?

17 A. Well, the standards issue, I can perhaps give
18 two examples. You know, I think I can choose one
19 example to basic smacking inside families, and perhaps
20 sometimes outside families, including corporal
21 punishment in schools, were very different in the '50s,
22 '60s and '70s than they had been in the '90s or the
23 21st Century, but also attitudes to children of being
24 seen and not heard, for example, the deference to adults
25 in authority. These attitudes changed, of course,

1 through the decades.

2 So whilst standards of that sort have changed, it
3 was perfectly clear to me that in the '50s, '60s and
4 '70s, child abuse, particularly sexual abuse, was not
5 acceptable. The fact that standards have changed in
6 other ways doesn't explain or excuse that, and
7 I therefore felt that even if governments at that time
8 or police officers who received reports or others who
9 received complaints didn't see this as important that we
10 should see it as important that action had not been
11 taken by them and should now be taken in order to try
12 and rectify the situation.

13 Q. You say in paragraph 11, just towards the end, and
14 I'll just read it out:

15 "I believe the so-called standards of society in the
16 1950s and '60s were not an excuse for physical or sexual
17 abuse and that the State had a duty to support those who
18 had suffered the trauma of abuse and the additional
19 trauma of being ignored after reporting."

20 Now, when you talk about the State's duty there,
21 I think you're talking about the State's duty in your
22 time to support people who had been through that
23 experience. Is that what you're saying?

24 A. At all times.

25 Q. Yes. So that duty doesn't disappear or just emerge.

1 That's the duty of the State at any point; to support
2 people who suffer what you'd regard as abuse, whether it
3 was in the '50s or the '60s or in the 2000s.

4 A. The survivors that I met privately at that time said to
5 me that the way in which they were ignored after
6 reporting or trying to deal with their abuse, either at
7 the time or years later, had actually, in their
8 experience, been worse than the initial abuse, and I was
9 very taken by that being said, that the way -- that the
10 traumatic impact of being ignored was actually worse
11 than dealing with the initial abuse and I took that very
12 seriously.

13 Q. When you say what you were told and what they were
14 telling you about the effect of being ignored and not
15 been taken seriously and so forth, when were you hearing
16 these things? Was this before you were a minister? Was
17 this when you are a constituency MP?

18 A. I don't recall meeting any survivors, adult survivors,
19 of child abuse before I was a MSP in 1999. I did visit
20 establishments, you might call them, where those who
21 had -- who were recent survivors of sexual and physical
22 abuse were being assisted by charities to rebuild their
23 lives.

24 I recall a particular visit to a facility being run
25 by a prominent children's charity in -- I'll not be too

1 specific here -- north of Stirling, so northern
2 Scotland, in June actually during the election campaign
3 in 1999 in order to -- the charity wanted to ensure that
4 I was better acquainted with the work that they and
5 others were doing in the most traumatic of
6 circumstances.

7 And during the time that I was there, someone
8 actually ran through the building screaming and I asked
9 what had happened and I was told in some detail what had
10 happened to the two teenage girls who were affected and
11 it had a real impact on me, I have to say. Although
12 I was aware of these problems and you read about them in
13 newspapers, to actually meet people who are dealing with
14 this on a day-to-day basis and to see the individuals
15 affected, it had a real impact on me.

16 But I had never met any adult survivors of historic
17 abuse until I became a MSP. When I became a MSP,
18 I immediately became a minister, so I didn't spend time
19 as a backbench MSP.

20 Q. But you still would have had a constituency.

21 A. Yes, I was just going to say that. The interaction that
22 I had was as a constituency MSP alongside my ministerial
23 duties when some survivors came to see me at my weekly
24 surgeries in order to give me some of this background,
25 and whether that was part of -- the records

1 unfortunately have to be destroyed when you finish as
2 a Member of Parliament for these individuals'
3 constituency cases, so I do not have the names or the
4 dates and so on, but I think it was probably as part of
5 an effort, an advocacy effort, that was linked in some
6 way to the Petition.

7 But I think I've said before in public that I found
8 those discussions in my very small constituency office,
9 face-to-face with people, the most traumatic
10 conversations I have ever had in my life with anybody
11 and I was really affected by the way in which not only
12 people still were living the abuse that had taken place,
13 but, as I said a moment ago, the way they described to
14 me that being ignored when they protested, complained or
15 reported it years later had in fact increased the trauma
16 rather than made it really go away.

17 Q. Can I deal with a separate point that you deal with in
18 paragraph 12 of your statement, but an important point
19 nonetheless. You tell us in that paragraph what your
20 objective was in dealing with survivors and the issues
21 raised by the -- I'm calling it the Daly Petition --

22 A. Yes.

23 Q. -- if I may. Can you explain to us today what that
24 objective was? You deal with it in paragraph 12, if you
25 need to look.

1 A. The -- my objective was to get to a conclusion in this
2 process that in some way gave the survivors
3 an opportunity to record their experiences and influence
4 any aspects of public policy that still required to
5 be -- to be dealt with. There had been significant
6 reforms, as I said, under previous governments and under
7 our Government that had improved the situation in care
8 homes in Scotland. In the year 2002, they were very
9 different from what they had been in decades before.

10 But I felt that if for -- even if there were no
11 further improvements that could be made to public
12 policy, and I didn't believe that everything was
13 perfect, but even if there were no further improvements
14 that could be made, the very experience of being heard
15 was important to these survivors.

16 Q. But you do say that your objective was that those who
17 wished to say things and no doubt to persuade certain
18 things should be done should be treated with respect and
19 dignity and taken seriously after all these years.

20 A. Yep.

21 Q. So does that reflect the sort of way that you wanted --

22 A. Absolutely.

23 Q. -- matters to be dealt with?

24 A. Absolutely.

25 Q. Now, does it follow that you expected officials engaging

1 with survivors to treat them with respect and dignity,
2 to listen to them and to take seriously what they were
3 saying? Would that --

4 A. Officials, ministers, MSPs.

5 Q. Anyone.

6 A. Anybody.

7 Q. Do you know whether that always happened in practice?

8 A. I think there were probably occasions where individuals
9 were not treated as sympathetically or as respectfully
10 as they should have been. I think there were probably
11 more occasions where the way in which the system dealt
12 with the Petition and surrounding issues caused offence,
13 perhaps, more than the personal interaction between
14 officials and MSPs and the survivors.

15 I think most of my experience would be that when
16 survivors had contact with individual members of the
17 Scottish Parliament or after the -- after 2004 when they
18 had direct contact with ministers, because it would have
19 been inappropriate before that, then I think survivors
20 did feel that politicians were listening to them in the
21 main, but it's for them to say that, not me.

22 But I think -- I kind of recall, I suppose, that
23 there were probably times when some officials were
24 better at dealing with this than others.

25 Q. Just picking up on one thing you said, I'm just

1 interested. You said something about inappropriate at
2 a certain stage to have, perhaps, engagement or contact.
3 What were you thinking of when saying that?

4 A. Well, in that example that I gave you about people
5 coming to my constituency surgery, then that's a
6 situation where you cannot turn somebody away,
7 obviously, and it's very important that you listen to
8 them and, if possible, you act on their -- the concerns
9 that they are raising with you.

10 But as ministers, having received the Petition from
11 the Petitions Committee, until that Petition had
12 received its response, proper response, it would have
13 been, I think, inappropriate for members -- ministers to
14 cut across the role of the Petitions Committee. We were
15 in the early days of a Parliament and a
16 Petitions Committee was a very new thing. There hadn't
17 been a Petitions Committee in any Parliament in the UK
18 before, but we were trying very hard to respect the new
19 Parliament and one of its institutions was this
20 Petitions Committee.

21 And when the Petitions Committee had a Petition,
22 I think they would have been angry if we had tried to go
23 and speak to the Petitioners to have a sort of
24 background discussion. So I think until 2004, I think
25 that would probably have been seen as inappropriate by

1 the Parliament.

2 Q. Was that the view you held at that time; that that
3 wouldn't have been an appropriate thing to do to at
4 least --

5 A. I think it was an inappropriate thing to do at the time,
6 yes. It was part of a -- I mean, as I said, what
7 happened was the Petitions Committee would get
8 a petition. They would then -- if it was related to us,
9 they would then submit that Petition to us for comment.

10 Q. Don't worry, Mr McMahon has given evidence and we --

11 A. Absolutely, and I think the -- and at that point,
12 I think our duty is to then to respond to the Committee
13 and for the Committee to receive evidence from the
14 Petitioners rather than us, and I think that would have
15 been -- I mean, that would have been our approach.

16 With hindsight, was that wise? It may have been
17 principled. Was it right in practice? I don't --
18 I think in this case it probably was, actually. I think
19 the important time for engagement between the ministers
20 and survivors was following 2004 when we gave a serious
21 commitment to actually engage with them moving forward.

22 Q. I think you're echoing something that Peter Peacock said
23 in his evidence when I explored with him why there
24 didn't appear from the records to have been any
25 significant engagement, if I can put it that way, with

1 survivors in the earlier years, particularly before the
2 decision on an inquiry had been reached internally, at
3 least. One explanation that he offered was along the
4 lines that you've just said.

5 But I also took up the matter with Colin MacLean and
6 my understanding from him is that in principle, he
7 didn't see any difficulty with -- if you were seeking to
8 respond in canvassing views of survivors generally about
9 the benefits of an inquiry or indeed the downsides of
10 an inquiry. So he didn't appear to be finding the same
11 difficulty and not seeing it as trespassing on the toes
12 of the Committee.

13 Now, I don't know if you were aware of that at the
14 time, but that was his view; that there would have been
15 nothing to stop you seeking general views from the
16 people who were most affected by this issue rather than
17 simply gathering evidence from officials and other
18 sources. Do you see the point?

19 A. Well, I think there are maybe two things I would want to
20 put on the record about that.

21 The first is that I think if officials felt that, it
22 would be helpful for them to speak to survivors in order
23 to provide better balanced advice to ministers. Then
24 I don't think ministers would have stopped them doing
25 that, and if I can say so, maybe with hindsight, if

1 officials had had those conversations, their advice
2 might have been more balanced than quite so consistently
3 pointing in one direction.

4 But I think that in relation to engagement, I would
5 want to say that engagement -- for politicians,
6 engagement is not just formal engagement. So although
7 I think it would have been inappropriate for
8 ministers to be consulting on this Petition with the
9 Petitioners, we were receiving all the time feedback on
10 the views of survivors. There were different views from
11 survivors. There were some who were very supportive of
12 a public inquiry. There were others who were not.

13 Individual MSPs were speaking to survivors in their
14 constituencies and they were letting ministers know what
15 they were hearing and occasionally, ministers would
16 meet, as I had done, meet individual survivors. I think
17 there were other ministers in the correspondence trail.
18 There were other ministers who were not directly
19 involved in these decisions who were meeting survivors
20 in their constituencies.

21 So this was a very live issue at that time. There
22 were a variety of different survivors speaking to
23 a variety of different politicians and the politicians
24 would all have been sharing what they were hearing. So
25 when we were making judgments on the advice that the

1 officials were bringing forward, we weren't just using
2 our instincts or that advice. We were also picking up
3 a flavour for the different views and representations
4 that were coming from different survivors in different
5 parts of the country.

6 Q. The reason I ask that is because if we focus on
7 a particularly key decision on 25 September 2003 when
8 ministers unanimously ruled out an inquiry, or I think
9 it was a full inquiry. We have had some evidence of
10 what that meant at the time. We observed that in the
11 briefing by officials and indeed in the discussion at
12 the meeting itself, there was no indication that there
13 had been the level of engagement that might be necessary
14 to give a balanced opinion or report on the views of
15 survivors on the issues of why an inquiry might be in
16 their best interests or not their best interests.
17 There's nothing really on the records that would show
18 that process happening.

19 I hear what you say, but it does sound as if,
20 looking back, that would have been a step that would
21 have been appropriate, would it not, to have done
22 something more structured to get a reliable position
23 from the perspective of survivors rather than simply
24 maybe a little more anecdotal or perhaps more
25 rough-and-ready, if I can put it that way.

1 Do you see the point I'm taking?

2 A. Well, I mean, I can't speak for the officials who
3 prepared the briefing. I mean, they prepared the
4 briefing on the basis that they felt most appropriate.
5 What I can say though is I think the ministers who were
6 at that meeting -- I wasn't at the meeting, so I don't
7 want to second-guess what people were thinking or saying
8 at the meeting, but I know the people who were there and
9 my instinct would be that they would all be aware of the
10 various representations that were coming via MSPs from
11 survivors and that there were different views amongst
12 the survivors at that time. The Petitioners had a very
13 strong view in one direction, but there were other
14 survivors who were expressing caution about a public
15 inquiry.

16 So my guess is that my colleagues in that meeting,
17 when they were coming up with what was essentially
18 a recommendation to me at the end of the day rather than
19 a final decision, they would -- they would have been
20 aware of the need to balance those different survivors'
21 interests.

22 But I think they were also would have been aware of
23 the fact that they were ministers in Government and they
24 had to make a decision based on the balance of the
25 evidence and the advice that had been put in front of

1 them.

2 LADY SMITH: It would mean, at that meeting, if they were
3 bringing to the table or allowing to bear on their
4 thinking information they had gleaned themselves from
5 their constituencies, they need to make it open,
6 wouldn't they? They would need to tell everybody that
7 that was weighing on them.

8 A. I'm thinking about more about the fact that they and
9 I had received some correspondence from individual MSPs
10 on behalf of constituents, so there were letters in the
11 system, that I think are referred to in some of the
12 documents, where people had made representations, and
13 the sort of conversations I'm referring to are where,
14 you know, in the course of a parliamentary day, people
15 are mixing over coffee and around the chamber and so on,
16 someone might say, "No, I had somebody at my
17 constituency surgery last week really concerned about,
18 you know, this Petition. They felt this, they felt
19 that. What stage is it now in terms of decisions," and
20 maybe ask a minister informally which stage it's at.

21 So a good minister is trying to get a feel for these
22 things all the time, to pick up information. What is on
23 the record are the petition, the letters that had been
24 submitted by individual MSPs and the advice from
25 officials. But when ministers go into a meeting to make

1 a decision, they're bringing with them the knowledge
2 that they have of perhaps, you know, wider debate and
3 their experience in life, which, for example,
4 Cathy Jamieson had in that previous inquiry.

5 LADY SMITH: Does a good minister share knowledge that's
6 specific to the issue with anybody else in the meeting?

7 A. I would have expected my ministerial team to do that,
8 yes.

9 LADY SMITH: One other thing -- let me check -- that you
10 were discussing a few minutes ago with Mr Peoples, it's
11 the difference between talking to somebody in your
12 constituency office about an issue that is
13 outstanding -- in a petition that's outstanding before
14 the PPC as opposed to officials, before advising of
15 their recommendation, gathering information, for
16 example, by consulting with the relevant group.

17 Am I to take it that you're saying there would
18 certainly be discomfort in talking to a person in the
19 constituency office about a matter in a petition that
20 was pending before the PPC, but the same discomfort
21 wouldn't apply to officials doing their homework for
22 their advice in a way that includes consulting with
23 relevant groups?

24 A. For a minister, a constituency surgery is quite
25 a challenging --

1 LADY SMITH: I'm sure.

2 A. -- occasion. Many of the cases that come -- many of the
3 individuals who come with cases to surgeries are
4 requesting assistance with bodies it's very
5 straightforward to then, you know, go through the
6 process of raising a concern with. But in other cases,
7 it's not quite so straightforward. So if I give you --
8 can I give you two examples of that?

9 LADY SMITH: Mm-hmm.

10 A. I was very conscious when survivors came to see me in my
11 surgery that I could not say anything in that surgery
12 that would in any way divulge the decision-making that
13 we were likely to be developing. That would have been
14 inappropriate. I had to try and divorce my ministerial
15 work. Even though I was First Minister and it was --
16 you know, ultimately decisions could be made by me,
17 I had to divorce that from my role as a constituency
18 MSP, listening and learning from the experience and then
19 reporting back afterwards.

20 But there was also the situation where sometimes
21 a minister would receive representations about the work
22 of another minister. So I think, for example, one of
23 the exchanges of letters in the paperwork in front of
24 the Inquiry is the letter from Andy Kerr MSP, who
25 I think, when he wrote the letter, was Minister for

1 Finance and then when he received his reply, which was
2 a bit late, he was by that time Minister for Health,
3 perhaps, or at least close to being in that position.

4 And he was making representations to me as
5 First Minister and to some extent to Peter Peacock as
6 his colleague, ministerial colleague, because somebody
7 had come to his surgery to do that and it was important
8 that he put their concerns on record. It might look to
9 an outsider as a strange thing to be happening amongst
10 people who were meeting almost every day together, but
11 it was part of the process of properly representing
12 a constituent.

13 So I think as ministers in a constituency surgery,
14 you're always trying to create a bit of a Chinese wall
15 between your job as a minister and your job as
16 a constituency MSP. That's entirely different from the
17 role of officials who are not so constrained, either by
18 having the ultimate decision-making responsibility --
19 officials do have more freedom to operate because
20 ultimately they are simply advising ministers and
21 they're not making a decision and being accountable for
22 it, but also because they don't have that dual role as
23 a representative constituency MSP and a minister in
24 government.

25 LADY SMITH: Thank you.

1 A. I hope that's helpful.

2 LADY SMITH: Yes, thank you.

3 MR PEOPLES: Could I ask you just perhaps briefly to -- you
4 may have seen this before and you made the point you
5 were not at the meeting, but can we just look at the
6 note of the meeting, briefly, of 25 September 2003,
7 SGV-000046887. It should come up on the screen for you.

8 A. Yeah.

9 Q. Now, paragraph 2 is the one I'm interested in. We see
10 who is at the meeting. We don't need to worry. We've
11 been through that before. Indeed, we've read
12 paragraph 2 before, but what it's doing is setting out
13 a note of the meeting and recording points made during
14 the course of discussion, which one assumes is intended
15 to reflect the main points that should be recorded that
16 arose from the meeting.

17 I think we were told in the evidence, written
18 evidence, of the official who I think believes he took
19 the notes of that meeting, Gerald Byrne, that generally
20 speaking, what you're trying to do here is capture the
21 discussion amongst the decision-makers rather than what
22 the officials might think. I think that's perhaps
23 a sensible thing to do because they're the people who
24 take the decision at the end of the day.

25 All I would say is that if we look at the first

1 point made in discussion:

2 "A public inquiry was unlikely to help the
3 individuals concerned or indeed help to inform how to
4 improve things in the future. It would be likely to
5 reveal lessons already learned in residential child care
6 in the period."

7 So I'm not seeing there someone making the point at
8 that meeting, at least, that on the issue of an inquiry,
9 there was a range of views among survivors and that that
10 should at least be recorded because that's the
11 experience of the ministers with the background you've
12 described. One is left with the conclusion from the
13 record that at least at that meeting it doesn't appear
14 to be an issue that was raised and to some extent, there
15 seems to be a general acceptance of the recommendations
16 and the briefing on the subject of an inquiry.

17 Would you agree that that's a fair way of looking at
18 that?

19 A. Well, I mean --

20 Q. I know you weren't at the meeting.

21 A. -- I wasn't at the meeting and I certainly didn't write
22 the minute, so I don't know if the minute reflects the
23 full discussion or not. I can't answer that.

24 Q. But it does appear that someone -- they have noted quite
25 a number of points and --

1 LADY SMITH: I do not think that's what Mr Peoples is asking
2 you. He appreciates you weren't at the meeting.
3 I think the point he's making is do you agree that that
4 note doesn't tell us that there was a range of views as
5 to whether or not there should be a public inquiry, or
6 a "full inquiry" is the language they use?

7 A. Yes, sorry, and I apologise if I was not making my point
8 clearly enough.

9 LADY SMITH: That's all right.

10 A. I think it's clear what's contained in the note and not
11 contained in the note, but my point is that given the
12 nature of the record-keeping over the course of a period
13 of years, I don't think it tells us if the note is
14 an adequate reflection of the discussion or not, and
15 I don't know the answer to that because --

16 MR PEOPLES: You have perhaps just --

17 A. It was something ministers were raising with me, so if
18 the individual ministers did not discuss that at the
19 meeting, then I would be surprised because I recall
20 numerous discussions over that two-year period with both
21 Cathy Jamieson and Peter Peacock and other ministers
22 about the fact -- and with officials about the fact that
23 there were different views from different survivors; not
24 just the groups, but individual survivors as well.

25 So if it wasn't raised in that meeting, I would be

1 surprised. If it was raised and not minuted, then
2 that's not an issue that I can comment on.

3 Q. But you're saying that your recollection of the period
4 of November '02 through to this significant meeting in
5 September was that, whatever is recorded here and
6 whatever was discussed at the meeting, your recollection
7 is that you were having discussions, perhaps unminuted,
8 obviously, or informal, but with ministers, indeed
9 officials, which had disclosed that there appeared to
10 be, on an issue of an inquiry, for example, a range of
11 views amongst survivors. That's your recollection of
12 the situation?

13 A. Yeah, and most of those discussions would have been
14 after this meeting took place, but there were --
15 obviously I did have some discussions with
16 Cathy Jamieson around the initial response --

17 Q. I'll come to that in a moment --

18 A. -- to the Petition. Most of my discussions with
19 ministers would have been after this meeting that they
20 held.

21 Q. Yes, because I don't think there's any doubt that by the
22 stage that you got to the debate, for example, on
23 1 December and particularly in the latter half of 2004,
24 there's certainly evidence that was available on record
25 that not every survivor had the same view about the

1 merits of certainly a full inquiry, and we understand
2 that to be a conventional traditional-type inquiry,
3 quite legalistic, representation, cross-examination and
4 so on.

5 But I was really focusing on up to this point,
6 perhaps that discussion wasn't taking place to the same
7 extent and certainly there's no suggestion it was raised
8 at that meeting, as far as the note goes.

9 A. As you have stated, there's nothing in the note of the
10 meeting, but I genuinely don't know what was raised in
11 that --

12 Q. No.

13 A. No.

14 Q. Because the point that people like INCAS might make and
15 may well make at the end of the day in this hearing is
16 that, well, if you want to know what survivors think and
17 what their views are, you go and ask them and they will
18 tell you whether either they're in favour of a full
19 inquiry or in favour of some other form of investigation
20 or not. They'll give you the reasons and they'll tell
21 you whether their needs or needs of people they know who
22 are in the same category are such that an inquiry itself
23 will be beneficial or not.

24 So it's an obvious point to make, is it not, that
25 that's perhaps the best way to tease out what the people

1 most affected want, whether they want an inquiry,
2 whether they want compensation, whether they want
3 an apology, whether they want something else. That's
4 the best way: test it out and you find out what they
5 think.

6 A. Well, I think it would be -- I think it would be fair to
7 say that when ministers were looking at this Petition,
8 they would have been very clear what INCAS and Mr Daly
9 in particular were requesting. The Petition was not
10 a general petition requesting an inquiry. It outlined
11 the remit. It referred crucially to the issue of
12 an apology and so on.

13 So I don't think ministers were in any doubt what
14 INCAS were requesting and I don't -- but also I don't
15 think the decision -- the recommendations, because it
16 wasn't a final decision, the recommendations that were
17 made arising from this meeting of ministers, which were
18 then submitted to me, I don't think those
19 recommendations were made based on a worry that there
20 was a disagreement amongst survivors. I do not think
21 that was the rationale at all. I think some of the
22 ministers in that meaning were aware of that, would have
23 been aware of that and would have taken that into
24 account, but I do not think that that would have been
25 a major factor for them at all.

1 I think the rationale for the group of ministers
2 making the recommendations they did has been explained
3 consistently over the years by them and I understood
4 that rationale, which was in relation to the programme
5 of reforms that had taken place, the impact of the
6 confidence in the system, the feeling that other actions
7 would be -- would help survivors better.

8 And one of the reasons that I intervened to
9 challenge the decisions that had been made in that
10 meeting in September was because I felt that this issue
11 of, as you have rightly pointed out, what survivors felt
12 and wanted was not fully -- was not fully recognised in
13 the recommendations that had come forward.

14 And I'm sure we're going to go on to discuss my
15 response --

16 Q. We are.

17 A. -- but my response was motivated by a desire to listen
18 to what survivors had actually said and build that into
19 our response rather than simply put it to one side
20 because a decision had been made for other reasons.

21 Q. Because the officials up to that point, I think based on
22 the records we've seen, were not supporting a full
23 inquiry or even any other form of investigation into the
24 past. They were saying, "Actually, it's better to be
25 simply forward-looking, trying to look at what we can do

1 now for survivors now in terms of services and improved
2 services and secondly, we don't need an inquiry to
3 improve the system, the child protection system, because
4 we're already doing things that will do that already.
5 Things have been done -- that are done that are doing
6 that. So on either footing, why do we need an inquiry?"

7 That was the sort of thinking that seemed to be in
8 their minds. A point I would make to you is, before we
9 get to your intervention in December '03 after this
10 meeting, is that it might be said that officials and
11 indeed ministers at this meeting very much were taking
12 that position and they weren't maybe asking themselves
13 sufficiently, "Well, what would an inquiry and a look
14 into the past do for survivors themselves? Would it
15 give them something that was missing that would give
16 them closure, give them some other -- a means to say
17 something that they couldn't say in a court case or
18 whatever?" There doesn't seem to have been perhaps
19 an understanding that an inquiry or itself or some other
20 investigation might be welcome and beneficial and part
21 of the needs of survivors.

22 Now, do you take on board that point? Before we get
23 to your intervention, do you see the point that's being
24 made? That doesn't appear to have been something that
25 they really switched on to.

1 A. Well, that was part of the reason for my intervention.

2 Q. Yes. Well, okay, but --

3 A. That's --

4 Q. The short answer.

5 A. Yeah, and I think that's partly why I intervened.

6 I felt that the package was -- that the decisions and
7 the rationale for the decisions was incomplete, which is
8 why I questioned them when they were finally presented
9 to me three months later.

10 LADY SMITH: Let me just check this. You've talked about
11 knowing there was a range of opinion as to a number of
12 things in relation to this Petition, including as to
13 whether there should be an inquiry.

14 Can you recall whether that range of opinion at one
15 end was that some people were hotly opposed to having
16 an inquiry or was it at that end that they weren't
17 pushing for an inquiry, whereas at the other end there
18 were people who were pushing for an inquiry? Do you see
19 what I mean?

20 A. Mm-hmm.

21 LADY SMITH: That your range could be diffident at one end,
22 but strongly pro at the other; anti at one end and
23 strongly pro at the other. Do you remember what it was?

24 A. I would prefer to describe it as "uncomfortable" rather
25 than "anti". I think there were survivors that were

1 uncomfortable. The trauma that people had suffered was
2 phenomenal and having lived with that all their adult
3 lives and, as I say, perhaps in some cases families not
4 knowing, but also just maybe not wanting to go back to
5 it at a certain stage in life. There were some people
6 who were uncomfortable. You know, I think it's
7 impossible to gauge what that balance of opinion was
8 amongst survivors. Absolutely impossible to do that.

9 LADY SMITH: Perhaps some opinions being formed on the basis
10 of assumptions as to --

11 A. To my mind --

12 LADY SMITH: -- the way it would operate; they'd be forced
13 to give evidence, for example.

14 A. Absolutely.

15 LADY SMITH: They wouldn't get anonymity, for example.

16 A. Absolutely, and so, I mean, this -- it is important to
17 stress, I think, that this was a really difficult
18 judgment for everybody involved, because I think this
19 could be ministers who are being very serious about
20 their work and trying to come up with the best overall
21 judgment. I felt that when it was presented to me, it
22 was incomplete, which is why I challenged it.

23 But I absolutely understood the logic behind their
24 decision-making at the time, the rationale. I had
25 perhaps maybe two other reasons that were -- you know,

1 that would have questioned the rationale that they had
2 put forward. One was the need for people to be heard,
3 which I'm sure we'll come onto, but also, as I'm sure
4 we'll come onto as well, I was concerned about other
5 factors, other things, that were going on at the time in
6 the courts and elsewhere.

7 That was perhaps a wider perspective that I had as
8 First Minister, maybe the benefit of having more
9 individual discussions with survivors than some other
10 ministers had had at that point. I'm not sure what the
11 reason for that is, but that was my job as
12 First Minister. My job as First Minister was to try and
13 see the overview and for ministers to give
14 recommendations based on their best judgment to me, but
15 ultimately to allow me to say, "Well, no, we need to do
16 a bit more here".

17 LADY SMITH: Mr Peoples.

18 MR PEOPLES: We've looked at the note and I suppose the
19 point I was trying to get your comment on was -- and
20 I think you probably answered it, but just so we're
21 clear. My point is perhaps there was too narrow a focus
22 both on the part of officials up to that point and on
23 the part of ministers on whether an inquiry would be
24 necessary for the protection of children currently in
25 care and care in the future and perhaps insufficient

1 attention to what it would do for those who had been in
2 care in the past and how important it was to them,
3 whether to move on to closure, to get something else
4 that was beneficial.

5 I just think that perhaps the records suggest that
6 while the needs of survivors are mentioned, it's almost
7 mentioned in passing. It seems to be, "Well, let's look
8 at the system now. Let's see if things have changed and
9 let's move on and do something for them, yes, that will
10 make their lives better, but not bother about the past."

11 We'll come to it. You'll tell me about it. You
12 didn't think that that was the right way forward and you
13 intervened, but is there something in that? Do you
14 think the records certainly are suggesting -- you've
15 seen those records as well.

16 A. I genuinely think that it is hard to know what was said
17 at the meeting. I think that --

18 Q. Well, not just at the meeting.

19 A. Well, it is -- it's not always the case that everything
20 that's recorded about a meeting -- everything that's
21 said at a meeting is recorded. So I -- you know, given
22 some of the poor administration around this that we can
23 see consistently over that two-year period, you know,
24 I don't want to just accept the fact that this document
25 is a complete and accurate record of the discussion that

1 took place.

2 I do think that the meeting is -- was maybe
3 strangely focused on this particular issue of the
4 inquiry to the exclusion of other areas, although there
5 is -- there are recorded decisions about such services
6 that the Government might be able to offer in the years
7 ahead. But having studied the correspondence around it,
8 I think I can maybe just draw your attention to one
9 thing that --

10 Q. By all means.

11 A. -- I think points us -- gives us an idea of the context
12 for this meeting. There is a memo from Colin MacLean to
13 his officials on 10 September which in effect
14 commissions the briefing for this meeting which is then
15 going to be presented to ministers, and it is --
16 I'm guessing that that memo commissioning the briefing
17 is in response to the fact that the Petitions Committee
18 have written to the Government asking for an update on
19 the Petition.

20 LADY SMITH: They were chasing at that stage.

21 MR PEOPLES: Yes, I think I can help you. Yes, I think this
22 is something we looked at with Colin MacLean when he
23 gave his evidence. I think what you may be referring
24 to, if we can just put it up for a moment --

25 A. Yes.

1 Q. -- is SGV-000046949. You may have a copy of this and
2 you can confirm. Is that what you had in mind? It is
3 a discussion between officials where they're trying to
4 identify what they consider the key issues in
5 preparation for giving advice to ministers for the
6 meeting on the 25th. Is that what you had in mind?

7 A. Yes, and for example, you know, I think it's -- it is
8 surprising that that memo doesn't commission advice
9 to -- from officials for ministers beyond the list of
10 issues that are there. So, for example, on the issue of
11 the apology --

12 Q. Yes, there's nothing about that.

13 A. -- it's not mentioned.

14 So when the Petitions Committee write asking for
15 an update on the Petition at the end of August, which
16 then initiates this memo commissioning the briefing that
17 then is going to go to the meeting, I would have
18 expected that briefing to cover all of the outstanding
19 matters contained in the Petition and related issues.

20 Q. Because one of the key issues for the Petitioners, apart
21 from seeking an inquiry, and also, I think,
22 a sympathetic forum to hear experiences, which is not
23 quite the same thing.

24 A. Yes.

25 Q. The third main aim of the Petition, and we don't need to

1 look at it, was for apologies from State bodies and
2 others, if I can put it that way. As you say, it's not
3 seen, despite the context, to be one of the key issues
4 that advice has to be given in relation to. Is that --

5 A. There may well be reasons for that, but that briefing
6 then sets the context for the meeting that I think
7 focuses --

8 Q. On these issues.

9 A. -- and results, perhaps, in this record of the meeting
10 that is very focused as well.

11 Q. We've seen this, you can take it. We did ask the
12 official --

13 A. Yes.

14 Q. -- who was at that discussion and who prepared that
15 email about these matters.

16 Can I just say, just before we leave it, on the
17 question of apology, I think his position was that
18 whatever you may have said at an earlier stage to
19 Cathy Jamieson about your position on an apology and
20 what you wanted to do, he was not aware at that time of
21 your position. I'm not saying that that answers the
22 point you just made, because an apology was still
23 something that the Petition had raised, but he wasn't --
24 I think his evidence was that he didn't have any
25 understanding of what you have told us in your statement

1 you had said in your discussions with Cathy Jamieson at
2 an earlier point in time.

3 So I'm just telling you that for --

4 A. Well, I'm assuming we're going to come on --

5 Q. We will, we will.

6 A. -- to the apology in due course, but I think my -- the
7 point I'm trying to make here, I think, is that the --
8 this record of the meeting, which seems particularly
9 focused on the sort of technical argument around
10 an inquiry rather than the (inaudible) position of the
11 survivors, for example, I think that that is
12 a conclusion of a process that starts with this
13 commissioning or briefing which is all about the Inquiry
14 and those related issues, rather than about the Petition
15 as a whole. I hope I'm explaining that clearly.

16 Q. No, I --

17 A. So I think if you start from the process of calling
18 a meeting that is to address the issues of a petition,
19 but you then focus the attention of the meeting on the
20 issue of a public inquiry, then you end up with a record
21 that doesn't really cover the whole Petition, and
22 I think perhaps that was, in hindsight, and I think
23 perhaps everybody involved in that meeting would,
24 I would imagine, perhaps looking back, wished they had
25 had a wider discussion.

1 LADY SMITH: Jack, would you have expected the Petition
2 itself to have been included in the papers for that
3 meeting?

4 A. Yes, and if I -- yeah, yeah.

5 LADY SMITH: It was short, to the point, succinctly stated.
6 If everybody had had it in front of them, they would
7 have seen the, I think, four principal issues that
8 Chris Daly was raising. Not difficult to understand.

9 A. Mmm. I mean, I think -- I think in the minds of those
10 who were calling the meeting, I think that that meeting
11 is perceived to be a meeting to resolve the issue of the
12 public inquiry and not resolve all of the issues in
13 relation to the Petition. That's my -- I mean, you
14 know, I didn't write the briefing. I did not call the
15 meeting. I wasn't at the meeting and I didn't write the
16 record. Looking back over the paperwork around that
17 meeting, my -- and remembering, you know, some of the
18 discussions afterwards at the time, I think that meeting
19 has been called with a purpose to discuss the issue of
20 the public inquiry.

21 LADY SMITH: You may be right about that on the basis that
22 the February letter -- I think it was February, was it,
23 the letter that went to the Committee -- did say
24 something along the lines of, "Not now, but we are
25 keeping it under consideration so far as the public

1 inquiry matter was concerned". So it may, I suppose,
2 have been thought that was the only outstanding issue,
3 whereas the whole Petition was still pending before the
4 Committee.

5 A. And I'm afraid I haven't got -- I did check through the
6 four large box files that you've sent me in the course
7 of the last three years. I did check every single piece
8 of paper last night, but I couldn't find the letter from
9 the Petitions Committee to the ministers in -- whether
10 it was late August/early September that was asking for
11 the update.

12 MR PEOPLES: I can give it for you.

13 A. That would be helpful.

14 Q. If you could pull up SGV-000046939. It perhaps reflects
15 another problem with this unfortunate chapter that the
16 letter went to the Health Department.

17 A. Yes.

18 Q. To some extent, I think Colin MacLean explained it,
19 although that shouldn't have excused the delay, but it
20 went there first of all, but it seems to have found its
21 way to Health to enable the meeting on the 10th to take
22 place. But you see it's written and it's more about
23 wanting a follow-up to the original response by --

24 A. (inaudible) this ...

25 Q. Yes, sorry, can you scroll it down?

1 LADY SMITH: That's not the letter from -- that's not chaser
2 from the PPC, is it?

3 MR PEOPLES: Yes, it is. It's the PPC's letter to the
4 Health Department on 19 August 2003 --

5 LADY SMITH: Oh, yes, sorry, of course. Trevor Lodge,
6 Health.

7 MR PEOPLES: To Trevor Lodge and he's writing -- well, the
8 assistant clerk to the Committee is writing to
9 Trevor Lodge. This letter did obviously find its way to
10 Education because that's what prompted or triggered, I
11 think, the actions we're looking at.

12 It's just saying really saying, "Well, we sent you
13 a letter in March. You sent us an initial response.
14 You said you were considering things. Can we have
15 a reply now?" That's all it is. It's not really saying
16 any more because it's just chasing up. That seems to
17 have at least had the desired effect of causing
18 officials to think about the matter. A meeting is
19 organised to discuss the issue and a briefing and advice
20 is prepared, but for ministers.

21 So that's the letter that sort of pre -- there was
22 the communication that I think was the last one before
23 10 September from the Committee.

24 A. If I can, my Lady, just -- I'm just reading this quickly
25 here.

1 LADY SMITH: Yes.

2 A. I mean, I think it's partly in reference to the point
3 I was just making. I think it's interesting that in
4 this letter, the Petitions Committee said specifically:

5 "Note with interest that the Executive is
6 considering conducting some form of inquiry ...
7 indications of abuse in institutions in Scotland. The
8 Committee is therefore keen to urge the Executive to
9 develop its thinking on this issue and to provide the
10 Committee with an update on progress early in the new
11 session."

12 So I think again it's possible that Mr MacLean and
13 his colleagues, receiving a letter like that from the
14 Committee, then focused ministerial discussion --

15 MR PEOPLES: On that issue.

16 A. -- on that issue, rather than the wider position.

17 So I don't think anybody is necessarily at fault
18 here. I just think that what happened in September was
19 they ended up focusing on the issue of the inquiry --

20 Q. Or some other forum.

21 A. -- or some other forum, and they -- that group of
22 ministers at that point were not asked to address or
23 even be updated on the situation in relation to the
24 apology and the other matters that were contained in the
25 Petition, because there were other matters as well about

1 the religious orders and their relationship.

2 Q. Yes.

3 A. None of that is referred to in this meeting in September
4 and I think that's perhaps been led by the specific
5 request by the Petitions Committee to update on that
6 issue.

7 LADY SMITH: The clerk only refers back to two of the issues
8 in the Petition, which is why I was thinking that if the
9 papers had the Petition --

10 A. Yes.

11 LADY SMITH: -- and everybody took the trouble to remind
12 themselves of the Petition, they might also have checked
13 through all the issues.

14 Can we just --

15 A. Sorry.

16 LADY SMITH: -- no, there's nothing to apologise for -- go
17 back to the letter of, is it, 17 February, which was the
18 Scottish Executive's letter to the PPC.

19 MR PEOPLES: SGV-000046947 --

20 LADY SMITH: Yes, that's what I thought it was.

21 MR PEOPLES: -- which will show, I think, the initial
22 response, the finalised response. Don't worry about
23 what happened before then. We've had evidence. We know
24 quite why things happened between November and February.
25 So you can take it we're familiar with the background to

1 that.

2 If you scroll down, we'll see the response, the
3 initial response, and I think particularly the first
4 two paragraphs are most relevant for present purposes.

5 They say:

6 "Any case of child abuse is unacceptable. Abuse of
7 vulnerable children in institutions which should provide
8 them with safety is particularly deplorable. The
9 Scottish Executive is considering whether an inquiry of
10 the sort requested [that's by Mr Daly] or some other
11 forum should be established to look into cases of abuse
12 in institutions in Scotland, having regard to the cases
13 coming to light in recent years, and what other role the
14 Executive might take in addressing these cases. It will
15 also consider the experience of institutional child
16 abuse in other countries."

17 So that was the first response.

18 A. Mm-hmm.

19 Q. There hadn't been anything further and there was some
20 chasing up. As you say --

21 LADY SMITH: Can we go down again just to see how it
22 continued?

23 MR PEOPLES: Yes. This is the commitment to saying that
24 steps have been taken. I think we then see a long list
25 of things that are either planned or have happened in

1 recent years, perhaps flagging up or at least putting
2 a marker down to the point you made earlier on about the
3 things that happened since the events which with the
4 Petition was concerned.

5 LADY SMITH: Going on to the way it finishes; after those
6 bullet points, it's just signed off. It's just that.
7 It doesn't address any of the issues in the Petition
8 other than the one about the Inquiry.

9 A. Mm-hmm.

10 LADY SMITH: That wasn't specifically picked up in the
11 Petitions Committee's, PPC's, chaser, nor was it
12 specifically picked up by ministers at the meeting that
13 actually they hadn't answered those other issues and the
14 Petition was still pending before the Committee.

15 As you have rightly said, Jack, there was the matter
16 of the apology --

17 A. Yes.

18 LADY SMITH: -- and the matter of giving people a voice in
19 some forum, enabling them to tell their story. I think
20 there may have been something in the Petition about
21 support for survivors. That's also --

22 A. Yes.

23 LADY SMITH: -- summarised right at the beginning.

24 A. Yes, yes. I am surprised by the lack of reference to
25 the apology over the course of quite a long period of

1 time in the paperwork around this. I was very clear
2 from the first conversations with Cathy Jamieson after
3 she received her first advice on this that there would
4 be an apology.

5 We did want to ensure that any decision to deliver
6 an apology didn't become public by default or be
7 delivered in the wrong way. We did -- from the very
8 beginning, we felt that an apology had to be appropriate
9 in terms of both timing and delivery in order to give
10 a very strong signal to survivors that this was
11 a genuine and heartfelt apology.

12 But I have no idea why none of these -- none of the
13 paperwork on this refers to the fact that a formal
14 decision on that seems to be outstanding. I think it
15 would have been appropriate all the way along for the
16 paperwork to say, you know, once ministers have resolved
17 their decision on a public inquiry, once they have
18 agreed what other actions they are going to take,
19 ministers must return to, or the First Minister or the
20 Cabinet must return to, the issue of an apology and make
21 a full and proper decision on that.

22 Why that's not referred to anywhere, I think is --
23 is a mystery to me. But in my own head, and certainly
24 those who were closest to me around me, there was never
25 any doubt from the very first discussions in late 2002

1 that at the right moment, I would deliver an apology and
2 that would be done by the First Minister and it would be
3 done in the strongest possible terms at that moment.

4 LADY SMITH: Thank you.

5 MR PEOPLES: Just before I leave the meeting of September
6 and the events of September and the possible
7 explanations why the matter was discussed and recorded
8 as noted in the note of the meeting, there was
9 a briefing of 23 September, which came in the name of
10 Colin MacLean, although it was a general briefing by
11 officials, and it was agreed advice, and it had the four
12 options of full inquiry; truth and reconciliation
13 commission; no inquiry but a package of measures,
14 option 3; or to do nothing, and the recommendation was
15 option 3, package of measures, but to defer the issue of
16 compensation until the outcome of test cases that were
17 in the courts at that time.

18 A. Yes.

19 Q. One thing that was said, and we have had a bit of
20 evidence about this, is a statement in the briefing to
21 the effect by officials to ministers who attended this
22 meeting that:

23 "... neither the weight of cases nor the nature of
24 the allegations indicates a systemic failure or
25 organised abuse that might justify a full inquiry."

1 There is no comment in the note of the meeting about
2 that statement, either challenging it or making any
3 other observation about it. But it does appear that
4 even up to that point, whatever your view was, and you
5 have told us what it was, and whatever view
6 Cathy Jamieson had, officials were still, on the face of
7 it, saying to ministers that the weight of cases and the
8 nature of the allegations were not indicative of
9 a systemic failure or indeed that there was evidence of
10 organised abuse in the known cases.

11 That wasn't the view you held, you said, it wasn't
12 the view Cathy Jamieson held, and indeed we have seen in
13 some of the briefings there was quite a lot of
14 information that was known which indicated, on the face
15 of it, that there were quite a lot of allegations over
16 a long period of time.

17 So it's a surprising statement to be made by
18 officials at that point in the process, is it not, given
19 all of that? Why are they saying that --

20 A. I think they were consistent in their advice, but we
21 were also consistent in our response to that.

22 Q. Can I just say this as well, though, having seen what is
23 written there, and I have just read it out to you,
24 Colin MacLean in giving evidence said, well, that may be
25 there, but in fact officials didn't intend to say that;

1 they actually recognised it was a widespread problem,
2 they recognised there were major systemic failings
3 historically, so in fact -- I don't know quite how he
4 expressed it ultimately, in his own language, but
5 somehow that what is there said shouldn't really be
6 taken as meaning that the officials actually believed
7 the problem was not widespread or serious enough to
8 warrant any form of investigation and so forth.

9 So do you find that a bit puzzling, that they are
10 now saying this? Because that is not what they say in
11 the briefings.

12 A. Obviously I wasn't here yesterday and I haven't seen the
13 transcript of what Mr MacLean said --

14 Q. I'm just trying -- I don't think I'm being unfair.
15 I think I've summarised it sufficiently for present
16 purposes. I just want your observation on that. If he
17 is telling you that from November onwards of 2002,
18 officials were not thinking that the problem was
19 isolated, or other than evidence of a widespread
20 problem ...

21 LADY SMITH: Sorry, I think you've just said they were not
22 thinking it was isolated. They were saying they were
23 not thinking it was widespread, or, such as there was
24 information about the problem, that it was indicative of
25 systemic failure.

1 MR PEOPLES: They said they thought the evidence was that
2 the abuse was widespread. They thought that there was
3 an indication of systemic failures which were quite
4 major. I think in fact it's said in Colin MacLean's
5 statement that that was the position, and he then seemed
6 to say that, well, what is said there isn't really
7 a true reflection of what officials were thinking.

8 LADY SMITH: Yes, it's what was being communicated --

9 MR PEOPLES: But what is recorded seems to be the exact
10 opposite of what he is telling us they were thinking.

11 A. As I say, I'm not responsible -- I was very clear about
12 a number of things when I was First Minister, and
13 I think I have tried to put some of that in my witness
14 statement. I wanted civil servants to tell us what they
15 thought, to give us the strongest advice they could give
16 us, preferably balanced, but also honest in terms of
17 their view. But I was always very clear that it was for
18 ministers to make decisions, not the civil servants --

19 Q. -- advice?

20 A. Sorry?

21 Q. You want correct advice, and if an official said that
22 a problem is widespread or believes it to be widespread,
23 you would expect them in a briefing to say "We accept
24 it's a widespread problem but, for other reasons,
25 we don't think there should be a public inquiry".

1 That's the way --

2 A. I wasn't here yesterday so I am not going to comment on
3 Mr MacLean's evidence yesterday. But I would expect
4 officials to be honest, and "correct" is a difficult
5 word, but honest in their advice to ministers, but I
6 also expected ministers to make decisions based on their
7 judgment. And ultimately I saw my role as
8 First Minister to be a check on that, to make sure that
9 ministers were taking into account all of the relevant
10 factors in making those decisions. More often than not
11 I wouldn't intervene, but when I felt I had to
12 intervene, as I did on this case, then I was always
13 happy to do so.

14 And I expected those who were around me as
15 First Minister, for example, including at ministerial
16 level the Lord Advocate, to be frank with me with their
17 advice as well. I didn't want people to hold back on
18 that. And I would be surprised if people are giving
19 advice they don't believe in, that would be a surprise.

20 Q. I don't think that is what you said, in fairness, to
21 him. I think he said that what was expressed didn't
22 in fact reflect their thinking at the time or their view
23 on --

24 A. He would have to explain that to you --

25 Q. Well, he tried to. Ultimately we have to judge what he

1 said, but I think, in fairness, he was I think saying
2 "We didn't start from the position that the abuse was
3 other than widespread, and it was not for that reason --
4 there wasn't a conclusion about the serious nature of
5 the allegations or how widespread the problem was, that
6 wasn't the basis for our conclusion that a full inquiry
7 was inappropriate".

8 We can look at it and try and reconcile that with
9 what is said, but all I am saying is that it seems the
10 record and the position being at least advanced in the
11 papers to ministers is saying something rather
12 different, whatever the explanation for that might be,
13 whether it's bad use of language --

14 A. I can only really speak for the ministers and I don't
15 think -- although I challenged the recommendation the
16 ministers gave, it has always been my understanding that
17 the rationale behind the ministers' recommendation was
18 not to minimise what had happened. The rationale behind
19 the ministers' recommendation was that they felt, partly
20 because of the seriousness of what had happened, that
21 a public inquiry was not the way to deal with this and
22 they wanted to make an alternative set of
23 recommendations.

24 I challenged that and I proposed an alternative, but
25 I don't think their recommendation to me was based on

1 a belief that this was not widespread.

2 Q. No, and I think that is what both ministers
3 Cathy Jamieson and Peter Peacock told us, that whatever
4 officials were saying and what they meant to say or what
5 they did say, their own view was the same as yours, that
6 we are not start on the footing that this is not
7 a widespread problem or that these allegations are other
8 than serious, so don't think that I am suggesting
9 otherwise to you today. So that was their position.
10 Although it is perhaps unfortunate that in the note of
11 the meeting, those ministers didn't in fact say and have
12 it recorded, "Well, what you are telling us in the
13 briefing isn't our experience". It might have been
14 nicer to see some challenge to that statement in the
15 note of the meeting but it's not there, but --

16 A. I don't think the record-keeping on this has been good
17 from the very beginning.

18 Q. You have a bit of a problem with record-keeping
19 generally which I think is clear --

20 A. I'm not happy about it at all.

21 Q. No.

22 LADY SMITH: I think, was it in that note, that we read both
23 this sentence we have debated about not widespread, or
24 widespread, not systemic or systematic or whatever, but
25 also the information that by then there had been the

1 De La Salle convictions, Ross Harper had told them they
2 had 300-odd cases in the pipeline, it was accepted there
3 were likely to be more, it was not looking like any
4 small problem, and hence, no doubt, your recollection
5 that this felt like the tip of the iceberg. And
6 of course there was also the reference to, I think,
7 outstanding issues in relation to Sisters of Nazareth in
8 Kilmarnock, St Ninian's, Christian Brothers, more
9 De La Salle cases and so on.

10 A. Yes.

11 LADY SMITH: And what was coming out from Ireland about what
12 had happened there, providers who had also been
13 providers in Scotland and abroad earlier, Canada, and it
14 was beginning to bubble up in Australia and south of the
15 border.

16 A. Yes.

17 MR PEOPLES: So there was plenty of evidence of a widespread
18 problem whatever the cause might have been?

19 A. I wasn't in any doubt.

20 Q. I am not suggesting you were, as you have told us. But
21 I am just saying the officials are using statements
22 which don't appear to be supported by even the
23 information they are giving in briefings about the scale
24 of the problem.

25 The other thing I would just say, before I leave

1 this document, the briefing, is that in the discussion
2 section of the briefing -- maybe I could put that up for
3 you if it is not the one we have. SGV-000046937. This
4 is the briefing of 23 September 2003, and I think we
5 have seen this before. I appreciate that -- in fact it
6 might have been sent to your office, just a routine
7 copy.

8 In the discussion section at paragraph 2, one thing
9 that is raised in the discussion is:

10 "The pressure for the Executive to act on this issue
11 has not been intense. Aside from the Petition to the
12 Parliament and the two stories in the Sunday Mail, there
13 has not been widespread Parliamentary or press interest.
14 It is noticeable that the cross-party group has not
15 taken up the case and the Sunday Mail story attracted
16 less than 20 requests to see our files from former
17 List D schools. The criminal convictions so far have
18 been isolated and no evidence has emerged of widespread
19 organised abuse at Scottish institutions."

20 Now, it is clear from an earlier report of the
21 Public Petitions Committee that they did seek the views
22 of the cross-party group on adult survivors of childhood
23 sexual abuse and it is clear that they said the response
24 was that they supported the holding of an inquiry and
25 the making of relevant apologies. So that was incorrect

1 information given to ministers. What effect it had in
2 the decision-making process is no doubt a matter for
3 speculation, but that shouldn't have happened, that was
4 quite important information. If they are making a point
5 about the degree of interest and whether that is
6 relevant to the decision to be taken, you have to get it
7 right, do you accept?

8 A. If it is the case that ministers were reporting
9 something -- sorry, officials were reporting something
10 to ministers that was inaccurate, then that is obviously
11 not a good situation to be in, but it is not
12 inconsistent with the overall pattern, I think, of
13 administration in this issue over two years, if that is
14 indeed the case.

15 But I would like -- can I just say one thing on
16 that, though. I don't think at any time ministerial
17 decision-making on these issues was affected by the
18 level of public profile of the issues. We were aware of
19 the wider context in Ireland and elsewhere, we were
20 aware of the increasing number of court cases, we were
21 aware of a number of journalists diligently pursuing
22 issues, some of which came to the fore many, many years
23 later. But the judgments that we were making on the
24 Apology, the Inquiry, on compensation, on handling of
25 the court case, and so on, at all times those judgments

1 were being made on the basis of trying to do the right
2 thing by the survivors and by those who might go into
3 care in the future and need any protection.

4 So while these things are noted in briefings for
5 ministers, they are not necessarily decisive and
6 shouldn't be seen as --

7 Q. No, and I am not putting that point to you. I am just
8 making the observation that you have a key briefing on
9 a big issue and it's incorrect information. And that is
10 conceded, because I think we put up the report of the
11 PPC yesterday. So I'm not giving you something on
12 a hypothetical basis; it was wrong, the information on
13 that point.

14 Clearly if one is looking at the public interest and
15 whether there are concerns about, for example, the
16 childcare system and deciding whether the public have
17 got concerns that might warrant consideration of
18 an inquiry, the degree to which there is publicity and
19 discussion of an issue might be a relevant
20 consideration, but it is not driven by, presumably, how
21 many newspaper reports there are or what a particular
22 group happens to believe is the right thing to do, is
23 that ...

24 A. Absolutely not. And the conversations that we were
25 having as ministers at that time, I don't recall that

1 ever being raised as an issue. We were looking at this
2 seriously, methodically, trying to balance a whole range
3 of different -- I wrote some of them down last night.
4 There were court cases on one side, there were different
5 balances of opinion amongst survivors on another, there
6 were issues about confidence in the system being raised
7 with us, there were issues about the Inquiries Act being
8 out-of-date and needing to be modernised. There was the
9 whole situation with the churches, there was a respect
10 for the Petitions Committee in Parliament and doing
11 things under due process, all the protection work that
12 was going on pre-1999 and post-1999.

13 All of these different factors were being balanced.
14 But the core decision-making on this at every stage by
15 ministers was about trying to do the right thing, not
16 about trying to impress the public or respond to public
17 opinion or cover anything up or mislead anybody, it
18 was -- and sometimes people got these decisions right
19 and sometimes they didn't get them right, but they --
20 while these are issues, and I think there may well be
21 issues in the quality of advice that was coming forward,
22 I think the majority of people who were involved in this
23 were trying to achieve the right outcome whether they
24 were agreeing with me or not at the time.

25 Q. And they didn't at all times. One thing I might just

1 raise now, and I don't want to spend a lot of time on
2 it, is that from the point of view of the advice and
3 indeed how quickly the advice was given. There was
4 a bit of delay as we can discuss in due course, but
5 ironically the initial briefing to Cathy Jamieson on
6 13 November was given over a relatively short timescale.
7 I think the letter came in October 2002, officials
8 across the board were consulted, including OSSE, and
9 indeed OSSE was saying "Don't mention the word
10 'apology'". And you get the response we saw earlier
11 today and the advice back is "No plans for an inquiry
12 and there is not a basis for an apology", I think that
13 was the initial advice that came to Cathy Jamieson. She
14 rejected it.

15 But do you have a comment on that? Do you think
16 that was unduly quick? We will talk about delay later
17 on, but was that not rather quick to just dismiss the
18 whole idea?

19 A. I think it would have been unduly quick if that was
20 a final decision. If somebody had had delegated powers
21 to reply to the Committee, and they had turned it around
22 that quickly and sent off a reply, then I think that
23 would have been unduly quick. But what they were doing
24 at that stage was providing initial advice to ministers,
25 they were wrong in that advice, but they were providing

1 advice to ministers, and it was for the ministers then
2 to decide if that reply initial -- that initial proposal
3 from the officials was the right one and no further
4 action was required or whether to take it further.

5 That is what Cathy did. She used her judgment,
6 that's why she was appointed as a minister, she used
7 that experience and judgment to say "No, this doesn't
8 feel right. We need to look into --"

9 Q. I entirely agree with that, except she did make the
10 point in her statement, or indeed in evidence, that you
11 rely heavily on advice because you are a minister,
12 a busy minister in a big department, and had she been
13 perhaps less experienced in this field, who knows, she
14 might have just said "Okay, the officials have looked at
15 it, it's advice across the board. Let's run it and
16 let's send it off to the Committee", and that is the end
17 of the story. Fortunately in her case she didn't do
18 that, but that was always a possibility?

19 A. Absolutely. And hindsight is a great thing, but looking
20 back I am very glad I appointed her. Sometimes
21 hindsight works positively as well as negatively. But
22 she was the right person in the job at that time to make
23 that judgment but others might not have made the same
24 judgment.

25 Q. It's just as well she was there with that background.

1 A. Yes. It's also not impossible that you would have had
2 a situation where perhaps that advice might have gone to
3 a deputy minister and been signed off quickly without
4 even the Cabinet minister knowing about it. So it was
5 fortuitous in many ways that -- and based on my
6 experience as minister of the previous year, I had
7 decided to redesign the department a bit and give her
8 that role, but I didn't foresee at that time that it was
9 going to have those consequences.

10 Q. You are not claiming the gift of foresight?

11 A. No, I'm definitely not claiming anything from that, just
12 that she was a good minister and she did the right
13 thing.

14 Q. Because I think the point generally is it's not just
15 this issue; you do have to rely to a large extent in
16 a busy administration on advice and often that advice is
17 followed, whether for good reason or whatever. So it's
18 quite an important matter, and maybe it's a difficult
19 thing for a minister to -- they have to appreciate that
20 they maybe have to think, themselves independently, what
21 is the right thing to do, as you say?

22 A. That is why you need strong, experienced Cabinet
23 ministers, and --

24 Q. Okay --

25 A. -- I will leave you to draw whatever conclusions you

1 want from that, and at other times ... One thing I would
2 say is that is important in the initial advice you get
3 from officials, but it is also important as a discussion
4 on an item progresses. In this case, for example, there
5 was a challenge I think ongoing to get comprehensive
6 advice on the implications of each of the different
7 elements here. There was some fairly comprehensive
8 advice provided on the inquiry which we didn't always
9 agree with but we were getting. But I think the
10 paperwork shows there was never really a full scale
11 analysis of the potential for different compensation
12 schemes. There were lots of comments on the Apology,
13 but there is not at any point a full briefing saying
14 "Here's all the arguments for and against and the
15 balance --"

16 Q. On these issues --

17 A. "-- of judgment on those issues". And I think that
18 is -- and at times we were asking for that and not
19 necessarily getting it.

20 So I think as a minister your job is not only to
21 analyse the advice that you get at the very beginning
22 but to request advice as well, and sometimes the system
23 just doesn't have the capacity to provide it to you, and
24 that makes judgments difficult as well.

25 Q. I'm going to put another point to you that arose late

1 yesterday in Colin MacLean's evidence. He wasn't
2 responsible for the initial briefing although he was --
3 he had oversight and was the boss of the person who was
4 co-ordinating the advice and presenting it to ministers
5 on 13 November. I think at one point in his evidence he
6 described his role at that point as very much seeing
7 that appropriate process had been observed, that we had
8 gone through this process of taking feedback and
9 comments, including from OSSE, the apology, for example,
10 and what would be said in the initial response, and that
11 all was done. I think he presumably was satisfied that
12 whatever advice was given and whatever the minister's
13 reaction to that was that the process had been as it
14 should.

15 But he also said towards the end of his evidence
16 that he had an uneasy feeling that there are sometimes
17 situations where I think you get confronted with what is
18 a potentially big issue and that perhaps you are
19 personally uncomfortable with the direction of travel or
20 that you maybe should think whether a particular policy
21 is the right way forward, that this issue will not go
22 away, it will come back to haunt you or continue or
23 persist. I think there was a flavour of that towards
24 the end of his evidence, but I don't think he spoke out
25 at the beginning or indeed maybe at any point voicing

1 that concern.

2 Can I ask you this: if that was his dilemma, if you
3 like, would you have felt it was something that you
4 would have liked to have heard at the beginning from
5 a senior civil servant if you were a minister? To just
6 say, "Minister, I am not disagreeing, I understand the
7 rationale, the process is fine, but to me I am a little
8 uneasy where this might end up unless we are very
9 careful about the approach we take". Would you have
10 preferred to have heard that than not heard it?

11 A. In my experience, senior officials in the departments,
12 perhaps above the grade of those who were writing most
13 of the briefings and sending it to ministers, would have
14 those sorts of discussions with ministers, including,
15 I have to say, Mr MacLean, who is a very good
16 professional civil servant, and who had those sorts of
17 discussions with me around the school examination system
18 when we were trying to solve that in 2001. So yes,
19 those sorts of discussions would be normal --

20 Q. And you would have preferred a discussion like that. If
21 that was his thoughts at the time, you would have
22 preferred him to say "Minister", or to you, if it was in
23 discussions, "just let me give you my own thoughts".

24 I think at some point he may have been concerned
25 that, well, you don't want, as a senior civil servant,

1 to say this is my view, because you worry that those who
2 are being consulted might think, well, if that is what
3 he thinks, we had better make sure we fall into line.

4 There might be an element of that --

5 A. Again it goes back to my point about honest advice. You
6 are constantly having a balance I think, as a senior
7 civil servant as well as a minister, between trying to
8 make sure people are honest with you what they feel, but
9 also recognise your role in ultimately having to make
10 those decisions.

11 Q. I suppose what he could have done, if he wasn't wanting
12 to worry his more junior colleagues and let them have
13 their own say, he could still have had a private
14 discussion with you or the minister to say, "Well, yes,
15 this advice, but can we just have a chat about this as
16 well". That could happen and that does happen, does it
17 not?

18 A. And the other way around, that sometimes as a minister
19 you would get papers from more junior officials, a
20 collective view from them, timetable a private
21 discussion with the permanent secretary or the head of
22 department to say "I am just a bit uneasy about this.
23 What do you think, privately?"

24 So these sorts of discussions do definitely take
25 place, but I don't know what else was happening in the

1 department at the time, the other pressures that were on
2 people and so on. If he had those concerns, I'm sure
3 that Cathy would have found it helpful to have heard
4 those concerns from him. I don't think knowing about
5 his concerns on that at that stage would have, if they
6 had existed, would have changed the instinctive reaction
7 both Cathy and I had to the initial paper which was --

8 Q. I don't think --

9 A. Cathy's response to that, Cathy Jamieson's response to
10 that initial paper was within 24 hours, almost. It was
11 very immediate, very instinctive. That was partly her
12 own reaction but also she knew that would be mine as
13 well.

14 Q. I think his reaction was probably along the same lines.
15 I think that was why I was making the point that he
16 might have felt, yes, maybe this is something we need to
17 look at closely or carefully.

18 Can I just finish off, because I am conscious of the
19 time, going back to something you said in paragraph 12
20 about dealing with survivors and issues raised by the
21 Daly Petition and how they should be treated with
22 respect and dignity and listened to and taken seriously.
23 I asked you some questions about that. There were
24 a couple of other questions I was going to ask and
25 I will just ask them now, if I may.

1 To your knowledge, was any guidance and/or training
2 given to officials who might have to engage directly
3 with survivors? I know we are in the early stages and
4 things have moved on trauma-following practices and so
5 on, but are you aware whether they were given some kind
6 of guidance or training about how they should engage
7 with survivors?

8 A. I'm not aware of anything in that regard, no.

9 Q. But if you don't know, and you have said very fairly you
10 don't, do you consider that might have been
11 an appropriate step to have taken, given the situation,
12 this particular situation? You have to know a bit about
13 the situation; people who feel they haven't been
14 listened to, haven't been taken seriously, are quite
15 damaged permanently by their experiences, but they want
16 to get dialogue, they want to be heard and listened to,
17 but you have to have some understanding of their
18 perspective. Do you think that would have been
19 an appropriate thing to do?

20 A. I think -- I can see how some training in that situation
21 would be helpful, but I also -- I would hope that when
22 people are being appointed to particular positions with
23 particular policy responsibilities that that kind of
24 affinity would be part of the judgment about who gets
25 appointed to which position, but again events can over

1 take decisions. So if people were appointed to
2 positions in the department to deal with these issues in
3 advance of the Petition, and this then unfolding as
4 a dialogue with survivors, then I can see how there
5 might have been --

6 Q. But it's a good idea I take it --

7 A. -- a difference between --

8 Q. It is a good idea to give people training or guidance --

9 A. I think so, yes. I think if the Inquiry was to make
10 some comments on that, I think that would be very
11 helpful. There are situations though I think that
12 probably it is difficult to anticipate. So for example,
13 as an elected politician meeting survivors in this
14 situation, you really are drawing on your personal
15 experience and instincts and, while I hope when I met
16 survivors I was sympathetic and handled the situation
17 appropriately, I can see how others might have found
18 that really either very challenging and maybe not
19 handled it so well or maybe being traumatised by it and
20 it affecting them -- I was quite traumatised by it but
21 I was able to continue to carry on. But I can see how
22 some people, hearing about these things in that detail
23 for the first time, both officials and elected
24 politicians might find that to be quite disturbing.

25 Q. Yes, that is the other sign of the coin. You --

1 A. There is a welfare issue there --

2 Q. Yes, it is a welfare issue for the person having the
3 engagement. The people being engaged with -- you need
4 some skills perhaps on training and guidance, but you
5 also need to have regard to the fact that people who
6 have not had that experience of dealing with that
7 situation directly may also have to be equipped in case
8 they have --

9 A. Absolutely, and that would be true far beyond this
10 immediate issue in front of the Inquiry. That could be
11 true in a lot of other areas as well.

12 LADY SMITH: You will no doubt appreciate, Jack, that we
13 rigorously follow a trauma-informed practice in this
14 Inquiry and have taken a great deal of trouble to learn,
15 keep learning, keep reflecting on what the right way is
16 to proceed in that regard.

17 I think we will break now for lunch. Given the time
18 we have lost this morning, it would be helpful if we
19 could start again at 1.45 pm. If people could be ready
20 for then. Thank you.

21 (1.01 pm)

22 (The short adjournment)

23 (1.45 pm)

24 LADY SMITH: Are you ready to carry on, Jack?

25 A. Of course.

1 LADY SMITH: Mr Peoples.

2 MR PEOPLES: My Lady, good afternoon.

3 Can we turn to the issue of the Apology. I think
4 you set out in paragraph 13 your position that in
5 relation to the Apology, which was one of the aims of
6 the Petition:

7 "I was determined from the outset to ensure that
8 a proper apology was delivered in Parliament by me as
9 First Minister and was not minimised by an announcement
10 in any other form."

11 Can I just ask you about that. You tell us, and
12 I don't want to go to the detail of the statement, but
13 I think you tell us that you had some form of
14 conversation or discussion with Cathy Jamieson who had
15 alerted you to the Petition, indeed I think probably
16 around the time of the advice in November, and her
17 position on that. It was to the effect that you reached
18 some sort of agreement that you would work towards
19 an apology at the appropriate time. Is that really what
20 the gist of the discussion was on that question?

21 A. Yes. There wasn't any formal decision at that time but
22 we were in broad agreement between the two of us, yes.

23 Q. Obviously there was -- Cathy Jamieson's position, as the
24 records show, was she wanted a bit of time to consider
25 a range of issues arising out of non-recent abuse of

1 children in care and wanted a bit of time to do that
2 a gather more information and have discussions and so
3 forth. Why were you able, at that point, between you,
4 to decide that whatever else was done in relation to
5 these issues, an apology was an appropriate thing to do,
6 as you say, at the appropriate time.

7 What made you say, well, we are going to have to
8 work towards an apology whatever else we do? What was
9 the thinking and why did you think that?

10 A. It was just quite clear to me that obviously the
11 survivors had suffered horrific abuse, they had been let
12 down by those running the institutions, they had been
13 let down by the relatively limited inspection and
14 oversight regime that was in place back then, but they
15 had also subsequently been let down, pretty much decade
16 after decade, by people not listening to them. So I was
17 actually probably -- in the first conversations
18 I probably had to just double-check there hadn't been
19 an apology before. There was an element of surprise,
20 almost, that when all the new legislation was being
21 passed on children's rights and protections back in the
22 1980s and 1990s that maybe somebody had actually
23 apologised in the past.

24 But I was very clear that if an apology hadn't been
25 delivered in the past that it was long overdue, it was

1 something that people needed to hear. It was partly for
2 the survivors, but it was also to give a very strong
3 signal to systems, nationally and locally, that this was
4 never going to be tolerated again. So it was a signal
5 as well as a recognition.

6 Q. At that stage, and we will come to issues that arose
7 about wording later on, had you in mind the making of
8 an apology on behalf of the State?

9 A. I don't think we discussed that sort of detail at that
10 stage, no.

11 Q. I know you say it is detail, but ultimately it became
12 a matter of some importance?

13 A. Absolutely, yes. I don't recall -- I certainly don't
14 recall resolving that issue at that stage. I think what
15 was obvious at that stage was that there were quite
16 complicated issues around the issue of an inquiry or
17 a forum and, looking at the Petition as a whole, that
18 had to be dealt with first, so that we couldn't just
19 pick out one part of the Petition and deal with it.
20 I couldn't just go into Parliament that January and make
21 an apology, that we needed to try and deal with this as
22 a whole.

23 Q. At that stage, and I am just focusing on that just now,
24 was the issue of the ongoing litigation against
25 the Executive something that you at least had in mind

1 when these discussions were taking place that might have
2 a bearing on (a) an apology, and (b) other actions that
3 might be taken?

4 A. At that stage, not that I recall.

5 Q. Because I think I referred you this morning to the fact
6 that when the initial briefing was being put together by
7 officials, which Cathy Jamieson wasn't happy with, there
8 was advice coming in from the legal -- in-house lawyers
9 to the effect that "Don't use the word 'apology',
10 because we have litigation and it might be construed as
11 an admission of liability". Is that -- that wasn't
12 something you were conscious of at that time, would it
13 be fair to say?

14 A. Not in detail. I mean, I don't think -- the issues for
15 me around the litigation, and again it would be
16 an instinctive thing in 2002 and it became a more
17 developed analysis by 2004, the issue for me around
18 litigation was not so much that somebody somewhere,
19 including us, might have to be involved in compensation
20 for those who were survivors, or the families of the
21 deceased, but who was responsible? And even the
22 Petition itself was very clear that there were other
23 bodies as well as Government in this tapestry of
24 responsibility.

25 So from the beginning I was aware of the fact that

1 we had to handle this in the right way, both from the
2 point of view of presentation, which was important, that
3 the Apology is a presentational event, but also from the
4 point of view of the implications of timing and other
5 factors would have to be taken into account. So I would
6 have expected advice to follow in due course, but at the
7 time, in principle, instinctively, an apology seemed
8 like the right thing to do.

9 LADY SMITH: Jack, when you say the issue for you is not so
10 much that somebody somewhere, including
11 the Scottish Executive, might have to be involved in
12 compensation, what do you mean by "involved in
13 compensation"?

14 A. I assumed all along in the course of the discussions on
15 this that the victims had a right to some redress for
16 what they had experienced. The issue that was up for
17 question was whether that right would be addressed in
18 a court setting and whether or not that right would be
19 against both the institutions that had been directly
20 responsible for them and/or the State at a national or
21 a local level. Or even actually, given that it was the
22 early days of devolution at one stage, a discussion
23 about any national responsibility being the
24 responsibility of the Scottish Government or even
25 the UK Government as a predecessor authority.

1 All these discussions were part of the mix. But the
2 idea that people might get some compensation or redress
3 for what had been done to them, and the way they had
4 been treated subsequently, was in my mind not really in
5 doubt. The only thing that was in doubt was how to make
6 that happen in the correct way, legally and from
7 a governance point of view.

8 LADY SMITH: That list of possible outcomes that you just
9 referred to would include you -- not you personally, the
10 Scottish Government -- picking up the entirety of the
11 tab, if I can use that colloquialism. So let's cut to
12 the chase: did it bother you that that was
13 a possibility?

14 A. The only thing that bothered me about that option was
15 that those who had been directly responsible for the
16 institutions where the abuse had taken place, who had
17 almost certainly been involved in significant cover-up
18 and, in many cases, who had denied that ever since and
19 therefore put these survivors through so much trauma
20 over decades, would be, I think in the words of the
21 Lord Advocate, potentially off the hook.

22 So the actuality of compensation and how much of
23 that compensation might be the responsibility of the
24 State was not a factor. What was a factor was that
25 I believed that for the institutions to learn the right

1 lessons from this and never be involved in this again,
2 then they needed to be part of the solution. And that
3 affected my judgment both on compensation and on the
4 apology.

5 LADY SMITH: Thank you. Mr Peoples.

6 MR PEOPLES: Before 2004, when there was quite a lot more on
7 record of the issue of an apology being considered --

8 A. Eventually.

9 Q. Eventually. Who, apart from Cathy Jamieson in the early
10 days, at the outset, did you tell what your position on
11 the apology was? Who were you saying this to apart from
12 her? I think -- I may have picked you up wrongly, but
13 I thought you maybe indicated you were telling other
14 people. Were you telling other ministers, officials or
15 what? What you have said in paragraph 13, that you were
16 determined from the outset to work towards an apology.
17 Who was privy to this?

18 A. I think people in my own office would have been aware of
19 that. People who were involved in occasional
20 discussions on this. I don't recall ever personally
21 meeting with the officials in the different departments,
22 the solicitors or the Education and Children's
23 Department officials or -- I think health officials,
24 for example, were involved in this quite a bit from time
25 to time as well.

1 So I don't remember ever personally being in
2 a meeting situation with them where I might have
3 mentioned this, but I do recall discussing it with
4 Cathy, and I am almost certain people around me in my
5 own office would have been aware that was my general
6 intention, possibly maybe even people in my press
7 office, so that they were careful that what they said
8 didn't dismiss the idea of an apology to the media, if
9 they were asked the question, for example.

10 My worry at that time would have been I think not so
11 much that the in principle decision to give an apology
12 would have crept out in an unseemly or inappropriate
13 way, but more that people speaking on my behalf might
14 have dismissed the idea of an apology because that was
15 the historic position of Government, rather than left
16 open the option.

17 So my best guess would be, and I don't recall this
18 in detail, I am afraid, my best guess would be that the
19 people closest to me in my private office and probably
20 the senior people responsible for my media relationships
21 would have been aware in order that they did not make
22 a mistake in handling this when they were asked by
23 a media outlet.

24 Q. I suppose this is fortuitous, the fact that OSSE were
25 saying to the officials "Don't advise the minister to

1 include within the initial briefing any expression of
2 regret because of the ongoing litigation", that
3 obviously fitted with your thinking on an apology
4 because it would mean that it wouldn't say anything that
5 would cut across you saying an apology at the
6 appropriate time. But they didn't know that, did
7 they --

8 A. I think we were meaning different things.

9 Q. What do you think they were meaning?

10 A. I think their advice -- if I read it accurately, their
11 advice was about protecting the Government from undue
12 financial ... in other outcomes. Whereas my concern in
13 relation to the Apology was primarily to make sure it
14 was done in the right way at the right time but, in
15 relation to issues such as compensation, was to make
16 sure the responsibility lay with the right people,
17 including the devolved Government in Scotland. Not
18 necessarily to protect the devolved Government from
19 financial liabilities, but to make sure that others who
20 had clear responsibilities in this didn't just pay for
21 past mistakes, but learned lessons from that by paying
22 for past mistakes.

23 Q. I am not going to take you to -- I will just read what
24 it said. The initial response Cathy Jamieson was
25 unhappy with, apart from saying it had no plans to hold

1 an inquiry, said:

2 "The Scottish Executive also considers a general
3 apology on behalf of public institutions to victims of
4 child abuse would not be justified at this time."

5 That probably wasn't your thinking -- they may not
6 have known that, but that wasn't your thinking. You
7 probably thought there was a justification, though it
8 had to be worked through and developed, no doubt. But
9 is that fair comment, that that wouldn't have
10 represented your thinking? Well, let's --

11 A. Just to be clear, that paragraph you are reading to me,
12 that is from the advice that was given to Cathy Jamieson
13 that she then rejected with my support.

14 Q. But you see what I am saying. They were -- if that had
15 gone through, slipped the net, if you like, if
16 Cathy Jamieson hadn't been the minister, and she had
17 just gone along with it, that might have cut cross your
18 thinking?

19 A. I would have overruled it.

20 Q. Do you think -- if you had seen it?

21 A. If I had seen it.

22 Q. But we know in fact it nearly did go through the net
23 because indeed the response that was revised went on to
24 the Committee on 19 November but was pulled back because
25 you asked your adviser, Jeane Freeman, for comments, and

1 it led to the response being withdrawn from the
2 Committee on the 19th and then resubmitted on
3 17 February. So there was just maybe a bit of good
4 fortune because --

5 A. Yes. We would have got to the right place eventually.

6 Q. Okay, but you wouldn't have been happy --

7 A. I would have been raging. Very angry.

8 Q. If that statement had gone to the Committee you would
9 have been saying "But look, I have had discussions", or
10 "This is my view and I haven't been consulted", or "I
11 haven't been given the opportunity to comment on this
12 and I am not happy", is that what you're --

13 A. Yes. To some extent as First Minister you have to
14 appoint people to your Cabinet that you can trust to
15 have the antennae to alert you to areas they know you
16 have an interest in. That sometimes goes wrong. But in
17 the main I think those I appointed as First Minister had
18 that antennae, and Cathy was one of them, and she
19 spotted immediately, very quickly, there was a problem
20 with this recommendation and alerted me to it.

21 If she hadn't done that or if it had slipped past
22 her in some way, because the procedures weren't properly
23 followed, then I suspect she would have been as angry as
24 I was, probably. Or I would have been, I wasn't
25 obviously -- not on that occasion. I was later, but --

1 Q. In terms of who was made aware of your views on an
2 apology and what the strategy or direction should be on
3 that matter, you have mentioned it is something you
4 think you would have discussed with your private office
5 or individuals within that office? And perhaps with the
6 press office. The special adviser, Jeane Freeman?

7 A. I would have expected at least some of the special
8 advisers to be aware of my thinking on this, and we
9 were -- we were involved in almost daily informal
10 conversations about things that were around the system.
11 Again I would have trusted Jeane to know what my
12 instincts would be on this, that was partly why she was
13 in the position she was in.

14 Q. The other individual I am interested if you had
15 a conversation with about this matter at that stage was
16 either of the law officers, the Lord Advocate or the
17 Solicitor General. Would they have been --

18 A. Yes, not at that stage, no.

19 Q. So they --

20 A. Not that I recall anyway, no.

21 Q. Your clearest recollection is you had the discussion
22 with Cathy Jamieson?

23 A. Yes.

24 Q. And you are thinking it's likely others might have been
25 aware --

1 A. Yes.

2 Q. -- within your office and perhaps a slightly wider
3 circle at that stage. I think it perhaps -- it appears
4 to be the case there is no record of your position on
5 the question of an apology prior to 2004, not just at
6 that time but prior to 2004. Does that surprise and
7 disappoint you?

8 A. It's not so much that that surprises me. The thing that
9 surprises me is that at no stage in any document between
10 November 2002 and pretty much November 2004 do any of
11 the officials write in a note to themselves, never mind
12 to ministers, in all the hundreds of exchanges there are
13 amongst them, do they write "Where are we with the
14 Apology?"

15 Q. Or even maybe to know --

16 A. "Can we get some briefing on the Apology? What do
17 ministers think about the Apology? Why is this still
18 outstanding? Is it still outstanding?" It's almost as
19 if the whole Scottish Civil Service believed the Apology
20 had been given in January 2002 and it had been dealt
21 with.

22 It seems to me very, very strange. I can understand
23 why, because of the way -- the sort of decision that we
24 might be going to take, and it was important that this
25 was a significant event, and we didn't want the Apology

1 to be something that was delivered in a letter to the
2 Petitions Committee or a deputy minister going to the
3 Petitions Committee or somebody briefing a newspaper.
4 We didn't want it done like that, we wanted the
5 survivors treated with respect. So when the Apology
6 came it had to be done properly, in the right place at
7 the right time.

8 So I can understand why there is not a minute
9 somewhere from my office on my instruction to say "Tell
10 them we are going to deliver the Apology and we will
11 deal with the other things and come back to it", or
12 a minute from Cathy through her office to say "We are
13 going to deliver this Apology but we will come back to
14 it once we have dealt with the issues around the
15 Inquiry", and so on.

16 I can understand why those notes don't exist if that
17 was because people just didn't want to kickstart
18 something that might then come out inappropriately.
19 What I don't understand is why in February, in the
20 correspondence around the first communication back to
21 the Petitions Committee in September, when all of these
22 briefings we were discussing in the earlier session were
23 being prepared for the meeting of ministers in
24 November/December, when a briefing was being prepared to
25 submit a note to me on the outcome of that meeting, and

1 then in May and June 2004 when there was all sorts of
2 briefings and arguments and rows going on about the way
3 this had been handled behind the scenes. At no point
4 does anybody say "What is the decision on the Apology?"

5 So my assumption therefore -- I am pretty clear in
6 my own mind that my assumption all through that would
7 have been, given my position at the very beginning, that
8 those that needed to know knew what my view was.

9 LADY SMITH: Jack, it wasn't just a question of your view so
10 far as the Petition was concerned because the Apology
11 issue was, as I recall it, really threefold: should the
12 Parliament be making an apology? Should the State be
13 apologising? Or should Parliament be apologising on
14 behalf of the State? Should the State be apologising?
15 Should the religious organisations be urged to
16 apologise? And that is a completely separate issue
17 which doesn't seem ever to have been addressed, isn't
18 that right?

19 A. I genuinely am surprised that these issues are not
20 addressed in any -- clearly they have not been addressed
21 in a minute to ministers, because we can see from the
22 way the discussion develops in November/December 2004
23 that that happened around that time. But the thing that
24 I was probably even more surprised by was the fact that
25 there are all these, as I say, hundreds of exchanges,

1 almost, emails and briefings and points made between
2 officials in different departments on the issues around
3 the Petition over those two years. And I haven't found
4 a reference in any of those communications to "Wait
5 a minute, we haven't got a decision yet on the Apology",
6 or "We need to go to ministers to get some decisions on
7 the Apology. Here are the three issues, and here are
8 the issues we might want some briefing on before we do
9 that".

10 LADY SMITH: Or even people at these meetings, on the
11 assumption they were, or their assistants, provided with
12 a copy of the Petition and of the papers liaising as
13 between themselves what are we doing about this?

14 A. I genuinely -- this is not a level of engagement that
15 I would have had as First Minister, and in my own mind
16 I was absolutely sure about where we were heading. I
17 was frustrated by the time it was taking us to get
18 there, but I genuinely am a bit bamboozled by the fact
19 this is just never mentioned. My assumption at the time
20 would have been, and I am pretty sure the assumption of
21 people around me would have been, that somewhere in the
22 organisation this is being considered or even just noted
23 as an outstanding issue to come back to at the end of
24 the process. And I can't explain why that has not
25 happened. Hopefully others have been able to shed some

1 light on that.

2 MR PEOPLES: I will try and see if I can understand. What
3 you are saying is you are not surprised that the
4 discussion you had, the informal discussion on your
5 position, as stated to Cathy Jamieson and perhaps
6 others, was not the matter of a minute or a record as
7 such.

8 Taking it more broadly, though, should your position
9 on an apology prior to 2004 have been at some stage put
10 on the record? Is that your position?

11 A. No, that is not really what I am saying --

12 Q. I just want to know if --

13 A. It's not, no. I think -- I can understand why there
14 wasn't a recording of a formal decision to deliver
15 an apology, because as soon as you make that decision
16 you have the potential for it to be perhaps
17 inadvertently released in a way that I think would have
18 been insulting to the survivors, so we were very keen to
19 handle this carefully. That is why -- my assumption is
20 that is why there is no formal recording of a decision
21 from November 2002 onwards, if you like from the top
22 down.

23 The thing that I don't understand is why, in the
24 various briefings that were written and in the
25 communications between officials in different

1 departments and so on, there isn't even like sort of
2 a paragraph occasionally saying "The Apology was part of
3 this Petition. At some point we need to prepare an
4 appropriate briefing for ministers on this and get
5 a formal decision made. We know there have been
6 informal discussions but we want a formal decision, and
7 we will deal with that once we have dealt with the
8 decisions on the Inquiry". That doesn't seem to appear
9 anywhere in the documentation and I don't know the
10 reason for that omission at that level.

11 Q. Basically you are saying that whatever knowledge people
12 had of your position, whether they knew it or not,
13 someone should have asked the question, because one of
14 the aims of the Petition was apologies from State bodies
15 and others. Someone between November 2002 and late 2004
16 should have been asking that question, saying that that
17 is one of the key issues, and in that way perhaps find
18 out, if they didn't already know, what your position was
19 and no doubt work in line with that and take account of
20 it. Is that the point you are making, that you would
21 have expected that to be done at some stage, and
22 you can't find any evidence that that was done?

23 A. And what would have happened in that situation, I am
24 absolutely certain, is the submission might have come to
25 me, it might have come via a minister with the

1 recommendation, the minister might have discussed with
2 me the recommendation before they make it to me to make
3 sure they are on the right lines. But eventually
4 a paper would have come to me. If it had been too far
5 in advance of the formal decision needing to be made, we
6 might have minuted back from my office that that was
7 a matter that was going to be considered at the right
8 stage when all other decisions on the Petition had been
9 made, but perhaps a conversation might have taken place
10 between my office and others to say, you know, he is
11 minded to make an apology but we are not going to
12 formalise this yet because we want to do the right
13 thing.

14 So that would have happened but, as I say,
15 I don't -- I just don't understand why that issue --
16 it's not so much again that it's not raised, it's
17 more -- the thing that has really surprised me is there
18 is not like a list of outstanding issues in these
19 briefings, and it becomes very focused on the issue of
20 the inquiry and something has triggered that. The only
21 thing I can think of is the thing I referred to earlier,
22 which was the letter from the Petitions Committee
23 in August 2003. But it does seem to me strange that so
24 much official attention was drawn into considering the
25 issue of an inquiry or a forum or those issues, and

1 almost no communications, even between themselves in
2 private, covered the issues of compensation or apology.

3 Q. Can I ask you this then: if this hadn't been raised and
4 the question hadn't been asked and you are not seeing
5 this, and you have seen the revised briefing, you have
6 had the minute from Peter Peacock in December 2003
7 asking "Are you okay with the decision that was taken",
8 or the "recommendation" I think is your expression,
9 "that was taken at 25 September 2003?" If you get all
10 of that, what you did do in, and you have told us this
11 morning why you did it, you came up with what I call the
12 fifth option, an independent person, which was looking
13 backwards, which wasn't something that so far had been
14 either considered or decided as part of the response.
15 But it was seen as part of the response to the Petition
16 and you made that comment.

17 Now, it might be said maybe that was a good time, if
18 you didn't say anything about an apology, for you and
19 your office to say, "The First Minister has seen all of
20 this and he has two comments. One, have you considered
21 the fifth option? And secondly, what about the Apology?
22 I have had a long and consistent view that an apology
23 should be given at the appropriate time, you have not
24 addressed this at all, go back and think about it and
25 come back to me". I think you accept that wasn't said

1 in your comments on 22 December 2003 when you saw what
2 the meeting had decided, is that fair comment? And do
3 you think you should have done now, in retrospect?

4 A. I think I would answer that by pointing towards the
5 minute that my office were replying to on that occasion.
6 Let me just get this -- so I receive a minute from --

7 Q. I can put --

8 A. -- Peter Peacock on 18 December.

9 Q. I will put it up because I do not think it is a document
10 we have actually looked at this week. It's
11 SGV-000046936, I think that is the one you have in mind.

12 A. Okay.

13 Q. Do you have that?

14 A. Yes.

15 Q. I think you wanted to make reference to that?

16 A. That is very focused on this issue, again, of the public
17 inquiry or truth and reconciliation commission or issues
18 of that sort. It is not -- and, interestingly, it is
19 not even described in the purpose in this minute. It is
20 not described as a minute to recommend decisions on all
21 of the issues that come out of this Petition. It
22 references the Petition but it also references
23 outstanding correspondence from some MSPs, and so on.
24 So again I don't think it is surprising that in the
25 reply from my office they just go back and say that

1 I want this fifth option looked at, and that they don't
2 say "Where are we with the other aspects in the
3 Petition? The compensation, the churches, the apology",
4 and so on. I think at that point there was this very,
5 very specific focus of attention on how to resolve this
6 issue of the request for a public inquiry or some other
7 forum, and the ministerial response, rejection, really,
8 of that option.

9 The reason that we replied so quickly at the time
10 and so specifically was because of my concern that this
11 recommendation was not allowing for an option where the
12 survivors could be heard. So I wanted to get that back
13 into the system quickly. So there is a reply from me
14 via my office in the days that follow that --

15 Q. Can I put that up, if I may. It's the response to the
16 minute of 18 December and if I could do that. It's
17 SGV-000046922, I hope. If we scroll halfway down,
18 I think we are seeing what was the response of
19 officials. But this says, and this is to the private
20 secretary to the Minister for Education, David Stewart,
21 from Martin Ritchie who was your assistant private
22 secretary, and it reads:

23 "The First Minister has seen Mr Peacock's minute of
24 18 December and associated papers and has commented ..."

25 And I quote from this:

1 "Are the 4 options in the minute of 23 September the
2 only options? Have ministers considered appointing
3 an expert (without a working group or committee) to
4 review the position on recent developments and recommend
5 any procedural changes which might be advisable to
6 reassure people now?"

7 So it does seem from that record that you had
8 a chance to look at these papers and come back with this
9 comment that is relayed through your assistant private
10 secretary, which I think is the normal way these things
11 would be done?

12 A. Yes.

13 Q. Fine. So all I am saying is maybe there was a missed
14 opportunity there. If you had picked up the fact there
15 has been too much of a focus on some of the aims of the
16 Petition and not others, there was an opportunity for
17 you at that point to say "Hang on, what about the
18 Apology? I am not seeing anything there and my views on
19 this are well-known or, if they are not well-known, I am
20 telling you now this is what I think, and we should
21 address this as well". Do you accept that now, it is
22 easy no doubt to say with hindsight, but do you accept
23 there was an opportunity there that might have allowed
24 this matter to be maybe fully considered at that time or
25 should have been? We will find out there was a delay

- 1 for other reasons, but ...
- 2 A. It might have been helpful to ask where they were on the
3 whole Petition, for example. But that specific minute
4 from Peter Peacock was essentially asking for my
5 judgment on the recommendations that had come out of the
6 ministerial meeting in September. I was concerned about
7 the decision at that meeting and that was why they got
8 this response. There was still no doubt in my mind that
9 once we had resolved this issue we would return to the
10 issue of the Apology. What I was not aware of at that
11 time was that -- and it didn't particularly seem to be
12 in anybody else's mind, not just in terms of what
13 the decision might be, but in terms of it still being
14 there as an issue to be dealt with.
- 15 Q. Yes, because I don't think I am doing a disservice,
16 because I think I asked Colin MacLean, one of the senior
17 civil servants on this matter. And I think, so far as
18 he was concerned, his position was that he wasn't aware
19 of your position until 2004, perhaps more towards the
20 back end of 2004 rather than the beginning. So he
21 appears to have been in ignorance of what you had said
22 at the outset. And so it does appear that maybe you
23 were working on the assumption that they did know but it
24 would appear they didn't know?
- 25 A. My point is they didn't necessarily need to know. What

1 they did need to know themselves is that in preparing
2 the final Scottish Government response to the
3 Petition --

4 Q. They should --

5 A. -- they had to cover the whole Petition. And what
6 surprises me really throughout the whole of that -- not
7 just that three-month period towards -- four-month
8 period towards the end of 2003, but then subsequently
9 again in May and June 2004 --

10 Q. It wasn't covered --

11 A. -- there doesn't seem to be a wider perspective on the
12 whole Petition. Whereas very much in my head from the
13 very beginning I saw the Petition as a whole rather than
14 just particular strands of it. I also saw it in a wider
15 context, because it was a very complex wider context as
16 well.

17 Q. There's another matter I would just like to ask, because
18 one of the things I think I did ask Colin MacLean as to
19 how they interpreted your comments, when they finally
20 came around to addressing them, was did they understand
21 what was in your mind and your thinking when you put
22 this option, fifth option on the table? And you have
23 said, I think, if I am correct, a few moments ago, that
24 one of the considerations you had in mind in putting it
25 forward was that it was something that might allow

1 survivors to be heard?

2 A. Uh-huh.

3 Q. Or a way in which they could be heard. So do I take it
4 that so far as you were concerned at that stage, what
5 you had in mind was some form of independent person
6 carrying out some form of review into the past, looking
7 at systems and other matters, but also engaging and
8 listening to survivors who had experienced abuse in the
9 past? Was that in your mind at that stage?

10 A. Yes.

11 Q. Were you thinking of a general or open forum to which
12 survivors could go at that time, in the sense of it
13 wasn't a matter of simply approaching one or two people
14 who might be prominent, or whatever, but it was
15 an opportunity to have effectively a forum, a listening
16 forum, where someone could listen to their accounts.
17 Was that what you had in mind?

18 A. Yes, and by this point the issue that we discussed this
19 morning about the differing views amongst survivors was
20 perhaps a bit more prominent in our discussions, and we
21 were aware that there were survivors who didn't want
22 a public hearing but who might be prepared to talk to
23 a private hearing. So there were different options
24 being thought about. This idea of a fifth option --
25 I was listening to what the ministers were saying, the

1 ministers had assessed the evidence and the advice they
2 had got from officials. In at least one case,
3 Cathy Jamieson, they were using their own experience of
4 previous inquiries, and they had made a unanimous
5 recommendation. And I think it was five or six
6 ministers at that meeting, all of whom I had a very
7 strong level of trust in, had recommended unanimously to
8 me that the idea of a full public inquiry at that stage
9 was not something that they felt was appropriate.

10 They had also recommended that some kind of truth
11 and reconciliation commission was also inappropriate.
12 I probed a bit on that informally with them at the time
13 and one of the reasons I was given was that there were
14 survivors who didn't want to talk in public but who
15 might be prepared to come along if it was in private.
16 And I was thinking what do we do here? I'm still
17 thinking how do we find a forum for these survivors?
18 How do we find somewhere they can be listened to? So
19 I -- and I therefore inject this proposal into their
20 considerations.

21 But I am also thinking about the fact that we don't
22 want to give a complete final rejection to the idea of
23 a public inquiry because there may come a day when
24 a public inquiry is actually needed, because the factors
25 in my mind were not really the same as those that were

1 troubling the ministers. As I understand it, the
2 ministers' main reasons for their recommendation not to
3 have an inquiry were around the fact there had already
4 been a number of reforms, the fact an inquiry would be
5 time-consuming and might delay actually providing
6 services for victims and survivors, and the fact that it
7 might be a very formal process and not actually produce
8 much progress.

9 In my mind there were two things that I perhaps
10 focused on in broadly accepting their recommendation but
11 suggesting an alternative, and one was the fact that we
12 had this big programme of reform work going on and maybe
13 affecting confidence in that reform programme by having
14 an inquiry would be a bad thing. But I was also very
15 conscious of these court cases taking place, and that we
16 needed to make sure that we didn't do anything that
17 would complicate the situation in court, because there
18 were survivors who had been brave enough to go to court
19 and take on the legal challenge, and I felt they needed
20 to have their day in court and I wanted to see if the
21 court was going to allow them to do that, so -- and at
22 that point if necessary perhaps return to the idea of a
23 public inquiry.

24 So I didn't want to close off the idea of a public
25 inquiry completely and have no alternative option

1 because at some point we might want to come back to it.

2 Q. Just one more point about your thinking at that time.
3 Would it be fair to say that your comments about
4 the idea were somewhat embryonic, because you weren't
5 really fleshing out in detail precisely how a review
6 would operate, but you are telling us at least in
7 general terms you had in mind there would be some
8 opportunity for survivors in general, perhaps, to go to
9 this person and give accounts of their experiences.

10 I only ask you that because I think one of the limbs
11 of the Daly Petition was not just an inquiry but to have
12 a place where they could have a sympathetic and
13 listening forum, perhaps a non-judgmental forum, if you
14 like, as opposed to an inquiry which might look at
15 allegations and have to consider competing positions.
16 Did you pick that up from the Petition, I don't know if
17 you did, at the beginning? It was a separate request --

18 A. Probably, but I couldn't put my hand on my heart and say
19 that is where the idea came from. The idea probably
20 came out of a bit of discussion, probably me talking to
21 Peter Peacock, me talking to people in my office, I had
22 one or two contacts in children's charities that
23 I regarded as real experts in this whole area and
24 occasionally I would speak to them for advice. So I had
25 people that I spoke to for advice on this kind of issue.

1 So I couldn't say hand on heart I was inspired by
2 reading the Petition and spotting something that others
3 hadn't spotted, that is not -- I am not claiming that at
4 all, but the Petition may well have flagged it up as
5 an option that I then explored with others.

6 Q. But when you were looking at something that people could
7 go to be listened to --

8 A. Yes.

9 Q. -- you weren't thinking of an independent person, or
10 were you, I just want to know, a person who would listen
11 to what were on one view allegations, and then gather
12 other evidence and make findings; you were looking at
13 something that people could go to to tell their story?

14 A. Yes.

15 Q. That was what you --

16 A. It takes me back to my very first -- probably one of my
17 first answers today. I was really struck that the
18 survivors that I met in my view were more traumatised by
19 being ignored than they were by the original abuse.

20 When I heard about the recommendation from
21 the ministerial meeting, my instinctive reaction at the
22 time was we can't go back and tell these people there is
23 nowhere for them to go, that was my -- I felt, and it
24 was a very powerful feeling, it wasn't one that --
25 I wasn't logically thinking through this in every

1 aspect, but my human reaction to the recommendation from
2 the ministerial meeting was that we cannot go back and
3 tell these survivors there is going to be nowhere for
4 them to tell their story.

5 Q. One might say you have already got a position on
6 an apology. I think your position on compensation was
7 that is an issue that would have to be tackled, indeed
8 it might involve State responsibility either in whole or
9 in part. You want a forum that people can go to. What
10 about an investigation into allegations, testing and
11 findings? You don't seem -- you didn't dissent from the
12 ministerial decision on 25 September on the issue of
13 a full inquiry, is that fair comment? You didn't come
14 back and say "I disagree with your position on a full
15 inquiry". So were you going along with that at that
16 stage?

17 A. At that stage, yes, but holding out the possibility that
18 at some point we might need to go back to it. And the
19 reason for that was very clear, that I felt that
20 an inquiry would be less effective at getting at the
21 truth, with all due respect to the current Inquiry,
22 your Ladyship, I thought an inquiry would be less
23 effective at getting at the truth of the individual
24 allegations and what had happened than a formal court
25 hearing would be, therefore I was holding out the hope

1 that the court would allow people to have their day in
2 court. Even if that appeared to be an unlikely outcome
3 of the court cases, I felt we had to give that
4 opportunity to people, that if people -- that the best
5 way for people to get the right judgment and then to get
6 redress was if they could be heard in a court of law,
7 and that we shouldn't compromise that.

8 Q. Because I think it was perhaps observed at the time of
9 the Petition when it was lodged, by some officials at
10 least, that it bore more than a passing resemblance in
11 its demands or calls to the Irish model that had already
12 been announced. There was an apology by the Taoiseach,
13 Bertie Ahern, on behalf of the State, there was
14 an investigations committee to do an investigation into
15 allegations and make findings and listen to evidence.
16 There was a confidential committee to listen to people
17 without that process. And there was also a redress
18 board to provide compensation and to make awards in that
19 respect. So that was quite a large package, the Irish
20 model?

21 A. Yes.

22 Q. And the Petition it would appear may have had that in
23 mind when it was submitted. You are saying that at
24 least as at December 2003, without ruling out at some
25 point perhaps an inquiry, you were going some distance,

1 at least so far as your position was concerned, in
2 trying to do something similar, not necessarily all
3 together, you were thinking of an apology, you were
4 thinking of a listening forum, and you had compensation
5 in the background, but not necessarily in the context of
6 a full public inquiry process, is that --

7 A. Yes, I think -- others may have said this before me,
8 I don't know, but I think it is important to
9 differentiate between the situation in Scotland and the
10 situation in Ireland. Firstly, we had had these
11 significant changes in legislation in child protection
12 and so on in Scotland in the 1980s and 1990s, long
13 before I was in Government, not necessarily replicated
14 in Ireland. The relationship between the Church and the
15 State in Ireland is very different from the relationship
16 in Scotland --

17 Q. Just help us with that because some might not
18 appreciate -- is the point you are making that the
19 relationship was different in Scotland to Ireland?

20 A. I think inquiries in Ireland expose just how close the
21 relationship was between Church and State and that both
22 were involved in cover-up. And whereas that might have
23 been the case in Scotland at a local level, with either
24 police officers or inspectors of premises not following
25 through with complaints, I don't think there has ever

1 been any suggestion at a national level in Scotland that
2 Church and Government were effectively colluding in
3 covering up what was going on, and I think in Ireland it
4 became pretty clear that that had been part of the
5 picture.

6 So I think in Ireland they had a particularly -- a
7 particular situation that they had to deal with in their
8 own terms partly to resolve that issue of the
9 relationship between Church and State in the public
10 mind. In Scotland I think it was a different scenario
11 but the principles were still the same: the need for
12 people to be heard, the need for people to have redress,
13 if possible the need for people to have appropriate
14 legal -- not legal protection, but appropriate legal
15 action to be taken for justice, and an apology to signal
16 that people understood what had happened and the
17 significance of it.

18 So while the individual components were not
19 dissimilar, the context in which they were coming
20 forward was I think slightly different. So when
21 I studied -- and I did at the time study what had
22 happened in Ireland and elsewhere, we were able to learn
23 from that experience. I felt we had to devise our own
24 Scottish position on this and not just copy what had
25 happened.

1 Q. It might be observed, and of course I don't know how far
2 you took this into account, that some of the providers
3 in Ireland were also providers in Scotland over the same
4 period, and some might say if that was happening in
5 Ireland, it was all part of a general order, for
6 example, a religious order operating in both
7 jurisdictions, perhaps your analysis might be open to
8 question or at least it might be worthy of
9 an investigation. Did that cross your mind that
10 perhaps, although you thought there were differences,
11 maybe there weren't after all? Did that enter your
12 thinking at that stage?

13 A. These things did cross my mind. But my conclusion was
14 the people who would be most likely to get to the bottom
15 of that were those investigating criminal activity, if
16 the court would allow cases to be heard. So while
17 an inquiry might be able to look at that, the most
18 effective way to look at that was for criminal
19 investigation and court process.

20 Q. A court might not be able in a compensation claim to do
21 more than look at the allegations and the harm caused
22 and make findings. It may not look at a wider question
23 of cover up, for example, unless it had some actionable
24 basis and had some recognisable harm caused as a result.
25 It may be that someone could do that, but to some extent

1 a court is constrained by legal issues which can be
2 sometimes narrower, and if you are looking at the wider
3 question of responsibility and accountability it may be
4 an inquiry is a better forum to do that, and is that
5 something that crossed your mind?

6 A. Yes, but it was important to get the order right. So
7 if -- certainly the advice I was given at the time by
8 people I trusted in terms of their advice, that if those
9 broader inquiries took place in advance of the court
10 cases they might prejudice the court cases, whereas if
11 the court cases took place first then they might
12 illuminate the process of investigating and uncovering
13 wider issues.

14 Q. Were the law officers, because certainly the Solicitor
15 General was at the meeting on 25 September 2003, and
16 I think we do see later on, and we have had some
17 evidence there was quite a bit of advice coming both
18 from law officers and OSSE, the in-house legal advisers.
19 Was that a theme that was coming through and being put
20 to you all the time, that do not do anything outwith the
21 justice system that might potentially prejudice that
22 system, so don't run things in parallel for fear that
23 something that happens in an inquiry context or other
24 forum might have knock-on effects for the justice
25 system? Was that something that you were aware of being

1 told?

2 A. I don't recall discussing this with the then
3 Solicitor General, future Lord Advocate at that time,
4 Elish Angiolini, but I do recall discussing that with
5 Colin Boyd, the Lord Advocate, whose judgment I took
6 very seriously. I had made some changes in Government
7 when I became First Minister to make the position of the
8 law officers more independent of the political nature of
9 the Cabinet. Elish Angiolini, for example, had never
10 been a political figure of any kind, and she was brought
11 in as Solicitor General to be a more independent figure
12 than perhaps those who had held the law officer
13 positions in the past. Colin Boyd was a strong
14 supporter of that approach.

15 So we had developed a relationship that was slightly
16 more independent of the maybe more political
17 relationship that law officers and Government ministers
18 had had in the past. So when I got legal advice from
19 Colin Boyd, which I did regularly, informally as well as
20 formally, I did tend to take that advice on board. And
21 he was advising me all the way through this process that
22 it was important to follow the due legal process in the
23 cases that were already underway on both sides of the
24 argument in order to resolve them and then decide what
25 we had to do to fill in the gaps.

1 Q. Can I maybe ask you a different question. Obviously you
2 have reflected on the time taken to consider and decide
3 the various issues and make decisions and make them
4 public, and I think you probably already indicated that
5 it took too long to make some key decisions, is that
6 fair comment, that that is your position? That some of
7 these matters ought to have been the subject of decision
8 and public announcement earlier than happened?

9 A. That is not just a reflection based on hindsight but
10 would be a reflection of my response at that time.
11 There are only a few but there are a couple of examples,
12 I think, in the paperwork of my office, dropping a note
13 to somebody saying "Where is this?"

14 Q. We know that your comments in December were not picked
15 up -- well, they were picked up initially --

16 A. Yes, I was just going to --

17 Q. -- but then there was a delay of about three months.

18 A. Yes. When I found out in May 2004 that on top of the
19 delays that had already happened, virtually no work had
20 been done on the proposal that I had put into the mix
21 in December, I think those who were in my office that
22 day probably remember the explosion. To say I was not
23 happy would be a serious understatement.

24 Q. You would be unhappy for another reason, I think. Not
25 only was a submission on that matter produced on 20 May,

1 but just around the same time, on the 17th, the Convener
2 was writing to you personally expressing extreme
3 disappointment that the Committee had not received
4 a response, and I'm sure that didn't --

5 A. I'm not sure if he mentioned this, but at the time he
6 was writing the letter he also told me that he was going
7 to have to write to me. And that is what I mean by --
8 the explosion was not in relation to any briefing from
9 an official three days later, it was in relation
10 to finding out that not only had we not replied but then
11 there hadn't even been any work done on it.

12 Q. Can I put that letter up so we have it as part of the
13 sequence of events. A letter to you on 17 May from the
14 Convener, SGV-000046908.

15 Briefly, I don't want to take up too much time, all
16 I would say is -- you might be able to help me here?

17 A. It is my handwriting in the top right-hand corner where
18 "now" is underlined twice.

19 Q. I am not familiar with who is saying what here. Can you
20 tell me what you are saying?

21 A. The letter is to me, and I am guessing, I can't see the
22 bottom, but I am guessing from Michael McMahon as
23 Convener of the Committee. I'm not sure if anybody
24 refers the letter to me, but that is my handwriting at
25 the top right-hand corner. And it says for those who,

1 like almost everybody in the world, struggle to read my
2 handwriting, "urgent advice now", underlined twice,
3 "from department please", "dept" is "department, "what
4 is going on?"

5 I was staggered to discover this was still
6 outstanding. And the comment below that, "PS/ED" from
7 "OKPS/FM", "OK" is Owen Kelly, who was my principal
8 private secretary, so that is private secretary to
9 First Minister. "PS/ED" would be the private secretary
10 to Peter Peacock, Education Department. And Owen again
11 underlines the word "urgent". He writes "to note this
12 request for urgent advice".

13 So I think the message went down through the system:
14 what on earth has happened here? This is still
15 outstanding. And I think I was particularly -- you can
16 see I have circled the paragraph about the number of
17 times the Committee have sent reminders, which is
18 probably the thing that infuriated me most. It wasn't
19 just that somebody had felt this needed more time to be
20 dealt with, but reminders had been sent and they hadn't
21 even received a reply.

22 I think there's two things about this. One is that
23 these delays, cumulatively, probably contributed to
24 about a twelve-month delay overall in the Apology and
25 the Parliamentary debate. If you look back through the

1 period between the autumn of 2002 and the end of 2004,
2 Cathy Jamieson gets advice from the department as
3 Education and Young Persons Minister. She replies
4 I think, if I am right, within 24 hours.

5 Q. She had the advice by 14 November and a revised
6 submission was produced --

7 A. She goes back immediately to them and says "This is not
8 good enough and I want another look at this". It then
9 takes I think three months --

10 Q. I think your office at that point did step in and say
11 you wanted Jeane Freeman's comments, and I think
12 obviously we were getting towards the Christmas period,
13 and there seems to have been some activity in January
14 involving discussions between Jeane Freeman and
15 Cathy Jamieson, and perhaps going into February, which
16 produced some sort of agreed position that was reflected
17 in the document we saw earlier today on 17 February was
18 sent to the Committee?

19 A. I think there are explanations for each individual delay
20 but the point I would like to make is the cumulative
21 impact of the delays. So you have that initial delay of
22 about three months between Cathy's intervention and the
23 reply to the Committee. There is then the
24 understandable delay around the election, I think, both
25 from the Parliamentary point of view and from the

1 Government point of view. The Petitions Committee then
2 unfortunately I think maybe takes three months or
3 something to get established after the election, but
4 again that is part of the procedure. But from the point
5 where they come back to the Government for an update
6 in August and the ministerial meeting in September,
7 there is then another delay of three months up until --

8 LADY SMITH: If I remember rightly, the Committee actually
9 wrote before the election --

10 A. Yes, they did.

11 LADY SMITH: -- saying "We appreciate the election is about
12 to intervene so we will give until June".

13 A. They should have had something soon after the election,
14 even just an acknowledgement to say that new ministers
15 have been appointed and they are now looking at this.
16 I couldn't agree more.

17 MR PEOPLES: I think they considered --

18 A. Let me just finish the point I am making, if that is
19 okay.

20 LADY SMITH: Go on.

21 A. You then have a three-month delay between the September
22 and the December, between September meeting of ministers
23 and the minute to me in December, which is then turned
24 around in I think about three days, four days, and then
25 this five-month delay to me, when the Committee finally

1 writes this letter to me, and there is a sort of flurry
2 of activity in May and June 2004 that produces Peter's
3 submission to the Committee.

4 Whatever the individual reasons might have been
5 along the way for some of those delays, that is
6 essentially, if put those different delays together,
7 almost a twelve-month delay. I think if all this had
8 been dealt with properly in the autumn/winter of 2003,
9 I think the whole process would have been significantly
10 better received by everybody involved. So I think the
11 cumulative impact of that is substantial.

12 But I draw one lesson from that, and I do want to
13 make this point because I think it might be helpful for
14 the Inquiry. In the early years of the new devolved
15 Parliament and devolved Government, systems were put
16 in place to deal with some of the pressures that might
17 be on ministers to keep track of decisions and
18 correspondence. So, for example, ministerial
19 correspondence, there were centrally co-ordinated
20 systems for checking that letters that had come in were
21 given to the right departments for ministers to reply
22 and that ministers had replied. Ministerial questions
23 submitted by Members of the Scottish Parliament would
24 come in, they would be centrally co-ordinated, and there
25 would be a regular check on whether deadlines were being

1 met. And from Donald Dewar onwards, First Ministers
2 would check with individual ministers if they were
3 missing too many of these deadlines.

4 LADY SMITH: Who set the deadlines?

5 A. In relation to questions from Parliament, there were
6 formal deadlines or at least targets that had been set
7 by the Parliament for when ministers had to reply. In
8 terms of correspondence to ministers and replies from
9 ministers, we had set targets ourselves for how quickly
10 to turn around what were called -- you see "GF" referred
11 to regularly in the papers, green folders I think they
12 were called. They came in great big green folders that
13 filled your box every night. But there was nothing of
14 that sort in relation to the Public Petitions Committee
15 which was, as I say, a unique and new body.

16 LADY SMITH: But they were setting their own deadlines.

17 A. They were setting their own deadlines. And I think
18 perhaps -- I don't know if this is in place these days
19 in the Scottish Government, I suspect perhaps not even
20 in place to this day, but it does seem to me that
21 internal -- an internal tracking system inside
22 Government at that time that recorded when petitions
23 were being sent to ministers and which department they
24 had been sent to, and then recorded centrally the
25 correspondence back from the relevant minister, would

1 have avoided all of this.

2 So I don't know if that is in place today in the
3 Scottish Government, but it seems to me to be one of
4 the lessons that might come out of this Inquiry at the
5 end of the day that the Public Petitions Committee,
6 because of the nature of these petitions and the need
7 for a Government response to them, there should be some
8 sort of central tracking system inside the
9 Scottish Government and, with hindsight, I wish we had
10 had that in place.

11 MR PEOPLES: I am sure we will be told. No doubt those who
12 will be listening to what you have said can no doubt
13 tell us the answer.

14 I think you mentioned the issue between March of
15 2003 -- the Committee did come back, they considered it
16 in March, they wanted a response --

17 A. Yes.

18 Q. -- and they sent a letter at that time, and then they
19 followed up with further correspondence. And there was
20 a letter in August 2003, it did go to the wrong
21 department I think initially, but it found its way to
22 the right department. And then that led to the meeting
23 in September that you talked about this morning with
24 officials and the ministerial meeting.

25 One point is of course there was an election, and

1 one can take account of that and what happened in the
2 run-up, and Colin MacLean told us about that, but one
3 consequence of the election was your party was returned
4 to power in a coalition. You had a change of Minister
5 for Education, Cathy Jamieson moved to Justice and
6 Peter Peacock moved into Education. It appears he
7 didn't really become aware of the Petition and the
8 issues until about late August, and he couldn't recall
9 getting a briefing just around the time he took over
10 from his predecessor on this matter. Should that have
11 happened? I know it's stretching your memory now --

12 A. Possibly. I have not seen the briefings that were given
13 to new ministers at that time, obviously, as part of
14 this process. It's possible that he should have. It's
15 also possible his deputy might have because, whereas
16 Cathy Jamieson as the Cabinet Minister had taken the
17 specific responsibility for issues around child
18 protection and so on as Cabinet Minister, and not
19 allocated them to her deputy in the split between the
20 two of them, Peter had a large programme of school
21 reorganisation, reform, and he had taken that
22 responsibility and delegated the child protection
23 elements to his deputy, so it's possible that officials
24 may have briefed his deputy at that time. But I think
25 it is disappointing that it took another reminder from

1 the Petitions Committee in August before it came back on
2 to the agenda again.

3 Q. Can I move to another topic now, if I may.

4 A. Actually, can I just say something about that issue that
5 comes into my mind about that process around the
6 election. Again, I hope it is helpful to the Inquiry to
7 make these occasional suggestions. But it does seem to
8 me that in a situation like this, where something as
9 sensitive as a petition on a very sensitive subject like
10 this, is left essentially in a holding position in
11 advance of an election, that in the Government, not
12 relying on the Parliament and the Petitions Committee to
13 send a reminder but in the Government, at the time of
14 handover between one Government and another, or one
15 minister and another pre and post an election, there
16 should be some kind of formal process for recording
17 things like public petitions that are still outstanding
18 from the previous administration. And it might be --
19 again I suspect that probably, even to this day, is not
20 in place and it might be the sort of thing the Inquiry
21 might want to address in its outcomes at the end.

22 LADY SMITH: Just following through, thinking on that, are
23 you seeing these as standing alone and of course
24 separately from unfinished work in relation to the
25 policies of the outgoing Government? That is

1 a different category. But this is outstanding work in
2 relation to matters that have been brought to the
3 Parliament by members of the public through a system
4 which enables them directly to go to the Parliament
5 without having had to go through their MSP.

6 A. Yes, and I think -- there will be unfinished policy
7 business going on in Government at the time of an
8 election.

9 LADY SMITH: Inevitably.

10 A. That is then never returned to by the incoming
11 Government if it is of a different shape and shade.
12 However, this is not ongoing policy work, this is
13 ongoing policy work in response to a public petition in
14 front of the Petitions Committee of the
15 Scottish Parliament and I think therefore it is of
16 a slightly different nature. And at the point when
17 Government comes to a halt for purdah at an election
18 period and the Parliament comes to the end of a session,
19 at that point I think not only should the Parliament but
20 maybe the Government as well note the outstanding items
21 of Parliamentary business that still require to be dealt
22 with and they should be immediately drawn to the
23 attention of the new First Minister and ministers,
24 whether they are of the same party or not, after the
25 election.

1 And I think that this is all -- certainly back then
2 it was very new, but even now, twenty years on,
3 I suspect that procedure is not automatically in place,
4 and I think it would be a good outcome of this inquiry
5 if something like that was to help prevent issues in the
6 future.

7 MR PEOPLES: I think another message is that you are unhappy
8 with the state of the record-keeping in relation to this
9 issue, you have already said that and I think it is
10 pretty clear, so clearly you have a concern that there
11 should be good quality record-keeping of decisions and
12 the process of decision-making so that we don't maybe
13 get into the problems we faced in trying to piece
14 together some of the things that were happening in this
15 period in relation to this issue. Is that something
16 that -- you have to be eternally vigilant about keeping
17 proper records.

18 A. I think as a minister you are in a very difficult
19 position really because you are relying on the permanent
20 Civil Service for their record-keeping, for their
21 archiving of material as well, I know how difficult it
22 was for the Inquiry in the early days to even collect
23 the information you have. I saw the first package of
24 briefings, I'm not sure if I am meant to say this, but
25 I remember our first discussions, Mr Peoples, and me

1 highlighting to you a number of documents I thought were
2 missing that you then had to go back and ask the
3 Scottish Government for. That wasn't really anybody's
4 fault in 2017, and I completely sympathise with the
5 scale of challenge to the Civil Service in terms of the
6 early days of devolution. They were suddenly hit with
7 a whole new system of accountable Government that hadn't
8 been in place before. It was very different from the
9 old what were called the mandarins in the
10 Scottish Office who governed while the ministers were
11 down in London all week.

12 So the volume of work did dramatically increase very
13 quickly and I'm not sure the capacity was there to
14 handle it. I was very worried right from the very
15 beginning, when I was Minister for Finance and had some
16 responsibility for the Civil Service, that things like
17 record-keeping, archiving -- archiving is a very big
18 issue in government. If you don't process the archiving
19 and the record-keeping properly you can't possibly keep
20 the historical institutional knowledge that you need to
21 make judgments on issues like this, which go back
22 through several decades. So anything that this Inquiry
23 can recommend -- I'm not sure what the current situation
24 is today in the Scottish Government, but anything
25 the Inquiry can recommend that improves and sets a high

1 bar, a high standard, for archiving and record-keeping
2 I think would be extremely helpful for Scottish
3 governance.

4 Q. I think Tom Shaw to some extent in his review did
5 highlight the problem of record-keeping and records and
6 public records, and indeed there was a review of public
7 record legislation and there was new legislation in 2011
8 as a result of that.

9 A. Yes.

10 Q. So at least maybe some good has come of that, although
11 maybe one still has to, at the coalface, make sure the
12 record-keeping systems do work as planned and that they
13 are appropriately catalogued and centralised so the
14 information is more readily available. Would that be
15 something you would clearly endorse? That you should be
16 able to get information quicker if you were
17 First Minister and said "Tell me about this problem,
18 tell me what the position is historically", you would
19 have liked someone to be able to come back to you
20 quickly and say "We have a centralised place where this
21 information is stored and this is what it's telling us"?

22 A. Yes.

23 Q. That is the ideal, I suppose?

24 A. Yes. Firstly, you want to have very good records, you
25 want to have a good clear system for being able to

1 access them, but you also want a culture I think of
2 taking these things seriously. It's difficult in
3 Government because people are blown around by events,
4 I understand that, and the best people are always under
5 pressure because they are the ones that get asked to do
6 the most work. But I do find -- I am just looking again
7 at this letter in front of me from Michael McMahon MSP
8 where we started this conversation. There are five
9 reminders.

10 Q. Yes, a lot.

11 A. Into the system. Culturally did nobody think at some
12 point that this is becoming a bit of a problem here, we
13 are now on our fifth reminder? So to some extent the
14 culture of the organisation is important as well.
15 Again, as a minister, you couldn't help lead that
16 culture, but you are relying to some extent on the
17 professionalism of the service. And I have to say I,
18 over the longer period of time, worry sometimes that
19 concepts of modernising the Civil Service and so on
20 ignore some of these important traditions of
21 professionalism that did mark things like archiving in
22 the past.

23 Q. I think we're about to have a break, but can I finish
24 off with one point you are making about record-keeping.
25 I suppose one factor that has to be factored in is that

1 we are now in the era of Freedom of Information, and to
2 some extent those that know that they may be asked to
3 produce records of decisions and things around public
4 records, it presents for them perhaps at times a
5 dilemma: how much do we write down? How much do we
6 discuss? What do we record?

7 So it's a fact that will have to be -- the realities
8 of that would have to be considered, that people must
9 understand that they should still be able to make
10 records that will stand scrutiny but they should be full
11 records, accurate records, of relevant decisions, is
12 that -- would you agree with that, that that should
13 still happen? Freedom of Information shouldn't suppress
14 proper record-keeping?

15 A. Absolutely. And I want to be very clear to the Inquiry
16 that I don't think there is any evidence, and
17 I certainly have absolutely no knowledge, of people
18 deliberately not recording anything in the course of
19 these two years of discussions that we are going over
20 here in order to --

21 Q. I'm not --

22 A. No, I think it's important to say in order to avoid
23 scrutiny. I think if there are omissions in the
24 record-keeping, they are omissions. I don't think in
25 all the correspondence that I have seen anybody at any

1 point says "Let's do this but not mention it to anybody
2 else", or anything like that. It's important to put
3 that on the record.

4 LADY SMITH: Jack, let me assure you nobody is suggesting in
5 evidence, whether orally or in writing, at least so far,
6 that FOI thoughts played any part in decisions as to
7 what should or shouldn't be recorded.

8 Mr Peoples already alluded to the fact that we have
9 a break, just a short one, at this stage, Jack, if that
10 is all right with you. So I will do that now and resume
11 very soon.

12 (3.05 pm)

13 (A short break)

14 (3.20 pm)

15 LADY SMITH: Mr Peoples.

16 MR PEOPLES: Jack, I would like to move on to explore
17 a couple of things you say in paragraph 14, and I think
18 this deals with some issues that we have already had
19 a bit of evidence on. You say at paragraph 14, in
20 relation to a public inquiry and a compensation scheme,
21 you wanted to ensure that these options were not ruled
22 out but that:

23 "... decisions on them followed the due legal
24 process of cases before the courts and the review of the
25 application of time bars."

1 I think that is a reference, is it, to a review by
2 the Scottish Law Commission?

3 A. Yes.

4 Q. That is what you had in mind.

5 And you also say, and I will maybe ask you a few
6 questions about this statement in paragraph 14, that you
7 also wanted to:

8 "... engage others beyond Government who had to take
9 responsibility for their inaction over these decades."

10 So these were things you wanted to happen, and you
11 set out when you saw or what you saw as the order of
12 events, if you like, when you would consider some of
13 these issues.

14 Just the same question as I did about the Apology:
15 who were you saying this to within Government? Were you
16 telling your ministers, your officials, or both, that
17 these were -- this was the way you wanted things to be
18 done, or this was the direction in which you were
19 headed, and that was how this should be taken into
20 account in actions and decisions and timing of actions?

21 Who were you saying all of these things to that you
22 have said in paragraph 14, and when?

23 A. I think pretty much anybody who was talking to me about
24 it. In terms of the issue of following due legal
25 process, I did have discussions with the Lord Advocate

1 as I mentioned earlier. I had discussions with
2 Cathy Jamieson about that and with Peter Peacock about
3 that, I also had discussions with Cathy Jamieson about
4 the review of both time bar and prescription. It was
5 important again to follow due process inside the
6 Government, not just follow due legal process. So
7 although I had an interest in this and I had an opinion
8 on it, it was very much a supportive opinion, because to
9 refer matters to the Law Commission, for example, the
10 Justice Minister had to take the lead in that. So when
11 Cathy Jamieson made those referrals, she made them not
12 on behalf of the Cabinet or me but as Minister for
13 Justice. But I was aware she was doing it and she was
14 keeping me informed and she was aware of my opinion.

15 In the discussions around the recommendations that
16 came out of the ministerial meeting, any -- I wasn't
17 involved in individual discussions about all of those
18 ministers, but those that I did discuss it with were
19 aware that they were having to push me to agree that we
20 didn't agree a public inquiry. That was very much their
21 opinion, that we shouldn't have a public inquiry at that
22 point, but that I was questioning that recommendation
23 and probing on it because I still had a bit of sympathy
24 for the idea that we might need to do that at some
25 stage, and we certainly needed in the short-term to have

1 some sort of forum.

2 Q. In your discussions with the ministers who had been
3 taking these decisions you were at least questioning,
4 you put it. But I think I put it in terms of your
5 comments in December 2003, on the recommendations as you
6 say of the ministers, you weren't dissenting or formally
7 recording that you disagreed, but you are saying in the
8 discussions that you were having around that time you,
9 well, to use your words, were questioning. Were you
10 saying, I think you say in your statement, that
11 basically not at the moment but not never. Is that
12 the position?

13 A. Yes, that is very accurate. I felt that on balance the
14 recommendation from the ministers, which was I think
15 made for the right reasons and after due consideration,
16 combined with the fact that the court cases and those
17 issues around the legal options, wider legal options
18 were outstanding, that on balance that therefore meant
19 that I should go along with the recommendation from the
20 ministers, but I wanted to push them to consider another
21 option because I didn't want to close off the
22 opportunity for survivors to be heard.

23 If we had been in a situation where the ministers
24 had not been unanimous, let's say. Say the ministerial
25 meeting had a real strong difference of opinion and it

1 had come to me to resolve that, I might well have taken
2 a different view, I can't be certain about that, but the
3 fact they were unanimous did have an impact on me. And
4 if there hadn't been legal cases in front of the courts
5 and issues happening around that, and the only decision
6 had been solely based on that rationale that
7 the ministers had had for rejecting a public inquiry
8 around reforms already in place, the nature of a
9 technical legal inquiry and so on, formal inquiry and so
10 on, I might have pushed back and called a meeting to
11 discuss their recommendation, and so on. But those two
12 things combined, the fact that they were unanimous and
13 the fact that there was an opportunity to come back to
14 a public inquiry, if it was required, if all the other
15 legal options failed, then that persuaded me at that
16 time to simply add in the fifth option and see if we
17 could get some progress on that instead.

- 18 Q. Were you bearing in mind, because you told us earlier
19 I think at least one of the law officers, and no doubt
20 others with some legal background, were trying to
21 no doubt persuade that the best sequence would be court
22 cases first and any inquiry afterwards would be better,
23 because that way you avoid any potential prejudice to
24 the justice system or the proceedings that might be --
- 25 A. That was the conversation I was having with Colin Boyd.

1 The Lord Advocate and I were in fairly regular
2 conversation about a range of issues, and I sought his
3 advice a lot, and he was certainly putting that point to
4 me and was persuasive in doing so.

5 Q. I will come back a little bit about "letting others off
6 the hook", I think was the expression that was used, and
7 it seems to have been something that troubled you, that
8 that result might be an outcome if certain actions were
9 taken at the wrong time, including an apology?

10 A. Yes.

11 Q. You said this morning, and I don't know whether this was
12 in the same context in relation to engagement, but you
13 said this morning something along the lines of "there
14 was the whole issue with the churches". I wonder if it
15 is connected to this statement about engagement with
16 others who were perhaps thought to have more
17 responsibility for the abuse that was being complained
18 of, either through inaction, cover up or for whatever
19 reason, or just direct responsibility in terms of
20 control and care of the children. What was the whole
21 issue with the churches? Was it bound up with this
22 question of having to have engagement with others beyond
23 Government? Was that part of your thinking; that that
24 had to be something that had to be done?

25 A. Absolutely. The original petition had mentioned this.

1 This was not something that -- it was something that
2 I had felt strongly about in the past but the fact that
3 it was specifically raised in the Petition I think meant
4 that we couldn't take no responsibility for that in
5 responding to the Petition. So again both in relation
6 to decisions around an inquiry but perhaps more
7 particularly in relation to decisions around the
8 Apology, I did not want to -- and the Lord Advocate had
9 reminded me of this very clearly the day before I made
10 the statement, I did not want to let those organisations
11 off the hook, and I was quite clear that this was going
12 to be a difficult thing to make progress with. It was
13 quite clear from discussions I had with Cardinal O'Brien
14 at the time that the Church were not going to be
15 voluntarily stepping up to the plate here.

16 Q. Was this before the debate or after the debate?

17 A. It is the sort of thing that would occasionally be
18 mentioned. We never had any formal meetings on this
19 specific topic but he and I would meet from time to time
20 and cover a range of topics.

21 Q. But was this covered before the debate itself when the
22 Apology was made or was it more after the debate?

23 A. I couldn't be specific about that. I suspect probably
24 over a period of time possibly both, but I genuinely
25 couldn't be specific about the exact timings. But I was

1 conscious -- I knew the Hierarchy of the churches well
2 and we were in regular contact and I knew that there was
3 an institutional resistance to accepting this
4 responsibility.

5 Q. What was he saying? I'm not wanting chapter and verse,
6 but what was the gist of what you were getting from
7 Cardinal O'Brien, who was presumably to some extent
8 a spokesman, if you like, or the leading bishop in
9 Scotland for the Catholic Hierarchy? We know the
10 difference between the authority of the Hierarchy and
11 the diocesan bishops, but what was he saying to you in
12 broad terms about responsibility or issues of apology or
13 compensation or inquiries? What was the gist of ...?

14 A. Cardinal O'Brien was very adept at listening. So we
15 would discuss things. He would raise things with me and
16 I would raise things with him and his way of dealing
17 with these things was normally to say "I hear what you
18 say and I'll have a think about that." If I remember
19 rightly at the time there were other bishops, maybe more
20 in the west of Scotland, who were a bit more definitive
21 on some of these issues. But, again, I wasn't in direct
22 contact with them. I remember at the time hearing that
23 or reading that individuals who were within the Church
24 Hierarchy had a slightly more dismissive approach to the
25 survivors, but I wasn't engaged in those conversations.

1 LADY SMITH: Jack, I have heard it said that -- and I think
2 it was suggested it was he at some point gave
3 an indication this was not anything to do with the
4 Church, you are talking about individual religious
5 orders, go and talk to Rome. That has been suggested by
6 some witnesses. Equally I have had evidence that their
7 autonomy is such that it would always have been a matter
8 of talking to the order. End of story. But do you
9 remember him going that far at all?

10 A. I don't remember Cardinal O'Brien going that far, but
11 I think Archbishop Mario might have been slightly
12 stronger in his response. But not to me personally.
13 I don't recall a discussion with him, with me directly.

14 LADY SMITH: That would have been Mario Conti?

15 A. Yes.

16 MR PEOPLES: I think I can help you. I think her Ladyship
17 has in mind at least as one source of that that
18 Michael McMahon, when he gave evidence, who said he is
19 a practising Catholic and indeed he had a position
20 within the Church --

21 A. He did, yes.

22 Q. -- had had discussions with -- I don't know whether he
23 specifically said Cardinal O'Brien, but he had
24 discussions along those very lines; that the response
25 was that the bishops and the Catholic Hierarchy had no

1 jurisdiction over the religious orders who were based in
2 their dioceses and that they were answerable to Rome.
3 That was the sort of message he was getting back. He
4 was disappointed that the Church as a whole was not
5 taking greater responsibility for the issue and being
6 more supportive of survivors, and that was the sense he
7 got, and I think he made that clear in his evidence, in
8 writing and to us when he was here on Tuesday. So were
9 you getting, without saying --

10 A. That was my general impression. I'm not saying that
11 anybody said that directly to me, but I was aware that
12 that was the general position of the Hierarchy. I hoped
13 in the aftermath of an apology from me on behalf of the
14 people of Scotland that that would have an influence
15 over churches; that they would feel a public pressure to
16 fall in behind and say something similar. In the event,
17 I don't think it did in fact happen but --

18 Q. You say that in your statement. Just on that point
19 then, around this time, without trying to pin down exact
20 timescales, you and Michael McMahon and maybe others
21 were having those informal discussions which was giving
22 you a sense of what the Catholic Church in Scotland was
23 thinking and what their attitude was to various matters,
24 including responsibility, apology and so forth, and it
25 doesn't sound as if you were getting very positive

1 feedback at that stage before the Apology that you made
2 was given on 1 December. But is that really the nature
3 of the engagement at that stage? Because the records
4 would suggest that, prior to 1 December, engagement in
5 any formal sense was more limited because -- and indeed
6 I am thinking particularly about Peter Peacock on
7 18 November 2004, and this may be something you can
8 recall or not, sent a letter round to care providers,
9 and indeed I think some would be the orders and he may
10 have sent it to the Church, encouraging these
11 organisations to follow the example of
12 the Scottish Executive and open or give access to their
13 files and records, and he sent a letter round not that
14 long before the debate. So to that extent he was
15 pushing the matter, that particular issue, but I don't
16 get any sense that on some of the other big questions,
17 like "What's your attitude to an inquiry?", "Would you
18 like to dip into your pocket and contribute to
19 a compensation scheme?", "Would you be prepared to make
20 an unqualified apology?", that there was much in the way
21 of formal engagement between the Executive on the one
22 hand and the Church and the religious orders and other
23 churches and so forth on the other. Would that be fair
24 comment?

25 A. Yes, I think we were operating under an impression that

1 there was a reluctance to accept responsibility, for
2 whatever reasons, but that, following our decisions and
3 my announcement of the Apology, that that might move the
4 public debate to a place where they felt under pressure
5 to move their positions.

6 Q. So if I put it this way, and I don't want to overstate
7 it, but was one difficulty with certain wording of
8 apologies that might convey responsibility, was one
9 difficulty at that time for the Executive that there was
10 no real sign that the others that you wanted to engage
11 with, including the Church, the orders and so forth,
12 there was no sign that they were willing to accept
13 responsibility and perhaps willing to contribute to any
14 compensation scheme that might be put on the table for
15 discussion and that that perhaps was a factor in the
16 wording of the Apology and the approach taken because
17 the Executive at that time considered, and I think the
18 Lord Advocate was saying something along these lines,
19 that the care providers, if I can put it generally, were
20 seen to be primarily responsible for the past abuse?
21 Was that the thinking at the time? There was
22 a difficulty but that was seen as the primary source of
23 responsibility?

24 A. I think, as the Inquiry is aware, I did receive advice
25 on 30 November from the Lord Advocate in written form

1 that an apology at that time that could be deemed to
2 accept full responsibility by the State might allow
3 those who had responsibilities in this to evade those
4 responsibilities, and I took that really seriously. It
5 was coming from him and I think it was sincere. So in
6 framing -- not just the individual sentence of the
7 Apology but the overall statement within which the
8 Apology was contained, I wanted to not only send
9 a signal to the survivors that they had been heard and
10 not only send a signal to Scotland that this was
11 unacceptable, but to send a signal to the churches and
12 other care providers that had such a momentum behind it
13 that they would find it very difficult to avoid becoming
14 part of the solution. In the event, for whatever
15 reason, they did manage to, at least at that time, avoid
16 that outcome. But it was a strategy, I suppose, to try
17 and maybe force them to engage more than they were doing
18 previously.

19 Q. Was there a concern or even perhaps a fear at that time
20 that it wasn't a good idea to engage publicly on these
21 matters with the churches?

22 A. Not necessarily, no. Again, I think the reason there
23 wasn't any formal engagement in advance of
24 the statements that December would almost certainly have
25 been that we made a judgment that they were more likely

1 to have a positive engagement after the statement than
2 before it, because they clearly hadn't felt enough
3 pressure up until then. And it was a hope -- it was
4 only a hope, but it was a hope that the statement might
5 then produce a more positive response from them.

6 Q. Yes, and against --

7 A. There wasn't any difficulty in challenging them
8 publicly, and what we said about it being unacceptable,
9 that was worded to send a very strong signal to them, as
10 well as everybody else, that you couldn't just pass the
11 buck on this to previous orders or management or
12 whatever, that you had to accept responsibility.

13 Q. You kind of knew their position at that stage and what
14 it was likely to be if you did raise these matters; that
15 they were going to be tricky about issues like apology,
16 responsibility, paying up, particularly when they were
17 defending the same cases you were defending?

18 A. Yes, absolutely.

19 Q. So that was presumably a factor --

20 A. That was a factor but it was also a reason why,
21 for example, we didn't want to cut across the court
22 cases, because cutting across the court cases might have
23 let them off the hook as well. So in different aspects
24 of the decision-making on this we didn't want to let
25 anybody off the hook. Everybody should take their

1 responsibilities was my view at the time.

2 Q. Yes, you would take the courts' outcome on legal
3 responsibility and, if the State was held liable, you
4 would take the consequence. If the State wasn't held
5 liable, would you still have accepted a responsibility
6 towards survivors and, if so, in what circumstances?

7 A. I think that would have been a judgment call at the
8 time. If the court had put liability firmly on the
9 orders or the successors for whatever abuse or outcomes
10 had taken place at the time, then I think that would
11 have been significant, but it would not necessarily have
12 meant that we didn't have some responsibility to
13 contribute to the redress. So I think we would have
14 assessed that situation depending on what the outcome
15 was in the court.

16 Q. Because there is the argument, whatever the niceties of
17 the legal position, the argument that I think you
18 probably heard before, and it has been said before that
19 these children were in the care of the orders and
20 others, were placed there --

21 A. By the State, absolutely.

22 Q. -- by the State, and the State had a continuing
23 responsibility for them, and indeed there were some
24 legal responsibilities attached to that and, therefore,
25 it should be the State that should be stepping in to

1 assist them and, if necessary, to compensate them for
2 what happened to them. Was that something that you had
3 any difficulty with?

4 A. No.

5 Q. Personally?

6 A. No.

7 LADY SMITH: Jack, I don't know if you are aware, but the
8 current leaders of some religious orders sitting exactly
9 where you are sitting at the moment in this Inquiry said
10 in terms they do not dispute the accounts of abuse
11 applicants have given and have apologised for it. It
12 has taken some years. Maybe you started the ball
13 rolling.

14 MR PEOPLES: If I can just go back to paragraph 14, just to
15 explore a couple of other things there. I have asked
16 you about engagement and what you had in mind about
17 engaging with others, and you have explained that. On
18 the other aspect, about the sort of sequence of events,
19 if you like, and when you might look at (a) compensation
20 and (b) an inquiry, or perhaps both together, is that
21 I would just like to ask you this: a public inquiry, if
22 I can put it this way and you may dispute the language,
23 but it was unanimously ruled out by your ministers on
24 25 September 2003. It was a decision you didn't express
25 any written disagreement with in December 2003, and so

1 that decision effectively was made at that stage,
2 whatever the future might hold, and that was done well
3 before the outcome of the test cases and before the
4 Scottish Law Commission reported on its review of
5 prescription and limitation, and I just wonder how
6 easily that sits with what you said about what your view
7 was about the order of events. Because it looks as if
8 you have jumped the gun. You have said, "Well, the
9 cases are still ongoing, but we are going to make the
10 decision on the inquiry nonetheless." How do you
11 respond to that?

12 A. Even at that stage, never mind a year later or six
13 months later when the letter went to the Committee, the
14 response to the Petition was already pretty overdue. So
15 I think coming to some conclusions was important at that
16 stage. I didn't think that ruling out a public inquiry
17 at that stage meant that it would be ruled out, should
18 circumstances change. If, for example, there was
19 an outcome to the court cases that we didn't like. But
20 also there was the opportunity at that point to push
21 a fifth option of having some kind of opportunity for
22 people to be heard, that wouldn't compromise a future
23 inquiry and wouldn't compromise the court cases. So it
24 was a balanced judgment at the time. I was getting
25 a unanimous recommendation from the ministers that

1 seemed based on good intentions, not bad intentions.
2 The court cases were ongoing, so if they came to a halt
3 and didn't resolve issues, then there was an opportunity
4 to return to the idea of a public inquiry and, in the
5 meantime, there was another option that I felt had some
6 merit, which was to provide a rapporteur, the name that
7 was eventually used, that would give people a chance to
8 be heard and would help with some of the trauma and
9 challenges that people were facing because they had
10 never been heard before.

11 Q. Can I just address this point then, just bearing in mind
12 that you have said several times that your thinking
13 in December 2003 in producing the fifth option was to --
14 you had in mind an independent person who would be
15 a listening forum and would hear experiences of
16 survivors. Was the Shaw Review, in the event, the
17 review you had in mind in December 2003? Because the
18 remit didn't allow engagement or listening to survivors
19 as a general class and indeed, even when there was some
20 relaxation of the remit in 2006, it was simply to allow
21 a limited degree of engagement with individual survivors
22 to get some flavour of the experiences that they had
23 gone through in residential care. So it seems it was
24 essentially in the event a systemic review, not
25 an investigation into allegations of abuse and whether

1 treatment of children in particular institutions or
2 indeed a forum for listening to the experience of
3 survivors, so it was neither an investigation or inquiry
4 in that sense nor a listening forum, it was a systemic
5 review in essence. Was that very different to what you
6 had actually had in mind and, if so, why didn't you step
7 in and say, "Hang on, this is not what I want"?

8 A. I think if you go back to that proposal
9 in December 2003, ministers had recommended not just
10 against a formal public inquiry but against a forum as
11 well. I didn't go back to them in December 2003 and
12 say, "I accept your recommendation on an inquiry, but
13 I'm not accepting this recommendation on a forum",
14 I took what they had put to me and suggested a different
15 option. So the fact that that option developed into
16 a rapporteur which was looking at systemic abuse and
17 listening to some survivors wasn't a million miles away
18 from the sort of broad idea that I had in my head when
19 I made the suggestion. But it wasn't a thought through
20 detailed proposal at that stage. It should have been
21 thought through in detail over the next few months, and
22 it wasn't, but at that stage it wasn't something that
23 I had fleshed out the bones on but it was a concept of
24 someone who could listen to some people, was the sort of
25 broad area that I was looking for.

1 Q. I think you say at various points in your written
2 statement that the option you had in mind would involve
3 an independent person listening to the histories of
4 survivors and, to an extent, Tom Shaw did. But, as
5 I say, not -- it wasn't like "Time To Be Heard",
6 a listening forum that you could go to generally. It
7 wasn't like the National Confidential Forum. It never
8 really reached those heights. I am just wondering
9 whether, having seen the records and indeed seeing the
10 concerns raised about the "rapporteur" proposal that
11 were coming thick and fast in the run-up to the debate,
12 particularly from your legal advisers, OSSE in
13 particular, I think not so much the Lord Advocate,
14 whether effectively your idea, your bigger idea of
15 a listening forum, was scuppered by those who raised the
16 concerns because either they didn't want that proposal
17 to see the light of day or, secondly, if failing that
18 they wanted a very carefully and narrowly worded remit.
19 And that is probably what happened, was it not?

20 A. It's not easy to be definitive about what people were
21 thinking when they were resisting a proposal from the
22 First Minister. But I think there was an institutional
23 resistance to this idea that there were survivors out
24 there that deserved to be listened to, even after all
25 these years, and I think -- I don't know why that was

1 the case. I don't know whether it was just a fear of
2 the legal implications of what people might hear or
3 whether -- I think in the case of some officials it was
4 a genuine judgment that such a listening exercise might
5 be counterproductive rather than a positive experience
6 for the survivors. I wouldn't want to imply that people
7 were malicious or bad in resisting this internally.

8 There is no doubt that Peter Peacock in particular
9 faced institutional resistance to his attempts to flesh
10 out the bones on this. There is a very interesting --
11 I'm not sure I have it with me. At one point there is
12 quite an interesting email from Rachel, who was his
13 private secretary, spelling out what the Minister was
14 looking for in this rapporteur, and it's quite clear
15 Peter has got a pretty clear idea of what he wants to
16 see happen. Then there is a sort of months-long battle
17 over securing that. I wasn't directly involved at that
18 time but I do recall from time to time him saying to me
19 "I am still battling on this, I am getting there", and
20 me saying "If you ever need my support or a memo from
21 the First Minister's office", just let me know. But he
22 was happy to deal with it. But there did seem to be
23 a resistance.

24 To be honest, at the end of the day what mattered to
25 me was what ministers were deciding rather than the

1 resistance they had along the way, and I think what
2 eventually happened was quite a good balanced judgment
3 between a review that looked at the system, which
4 probably was quite important at that stage, and
5 a listening exercise for some people.

6 LADY SMITH: Jack, help me with this. If I had become this
7 rapporteur you had in mind at that stage, what actually
8 would I have been doing?

9 A. I think you would have -- it was key, and I think this
10 was part of the flesh on the bones, that you would have
11 been looking at and making as much of a judgment as was
12 possible about whether the abuse that had taken place
13 was -- I think the phrase used at the time was "systemic
14 or systematic", and I think he did look at that. You
15 would have been looking at --

16 LADY SMITH: How would I have done that? In your mind, what
17 were you envisaging this person --

18 A. I think part of that is -- although there had never been
19 a public inquiry there had been a lot of reporting in
20 documentation over what had happened over the years, and
21 someone who was experienced enough, I think, could
22 observe from that, and from listening to survivors and
23 potentially others, what their judgment would be and
24 report back on that judgment. It was never going to be
25 as definitive as a court case or a public inquiry, but

1 it was an opportunity for someone who was an expert to
2 express an opinion and a judgment. And alongside that
3 it was an opportunity for those, particularly those who
4 were most vocal, to share with somebody who had some
5 authority to report not only what they had experienced
6 by their thoughts about that, their observations about
7 that and why it had happened, to inform his judgment.

8 LADY SMITH: So there would be a fact-finding exercise of
9 new, there would be a review of facts that had already
10 been found by other review groups, inquiries, whatever,
11 and advice going to ministers about what had been found
12 and what recommendations might be made, something like
13 that?

14 A. Yes, it was -- in terms of outcomes, I would have hoped
15 that somebody with sufficient expertise who reviewed
16 everything that was already available, plus listened --
17 in addition, listened to survivors who might be able to
18 add knowledge and understanding to that, would give them
19 an opportunity to identify gaps in what we were already
20 doing that might still need to be filled. So it wasn't
21 an exercise that was designed to secure redress or
22 justice, it was an exercise that was designed to improve
23 the situation from where we were as the court cases
24 progressed and came to a final conclusion which I think
25 the principal one did in April 2007.

1 LADY SMITH: But this rapporteur wouldn't be affected at all
2 by the progress of the litigations. It would be nothing
3 to do with this rapporteur.

4 A. Yes, absolutely.

5 LADY SMITH: So that is sounding a bit like what I am doing
6 here, Jack, isn't it? Yes.

7 Mr Peoples.

8 MR PEOPLES: But you had in mind a listening forum, not
9 a forum that would necessarily have power to determine
10 the truth or otherwise of what they were hearing.

11 A. Yes.

12 Q. They would listen sympathetically. They weren't
13 listening to allegations and counter-allegations and
14 making findings. So that is what you had in mind then?

15 A. Yes.

16 Q. All I was putting to you, and I think there is some
17 basis for saying this, is that in the event what you
18 got, perhaps in part due to the concerns raised by
19 others which we can see records of: Crown Agent, OSSE in
20 particular. Richard Henderson wrote a long note to the
21 minister, who came back fighting and said "No, I am
22 still keen on this idea and I am going to do it", that
23 you got something that was maybe a lot more watered
24 down. It did listen to survivors in the end, not
25 through the remit but through a request in 2006, but

1 even then it wasn't perhaps what we would term
2 a listening forum of the kind that Chris Daly asked for
3 in 2002 that anyone could go to and say "This is the way
4 I am going to get some sort of benefit. I want to talk
5 to someone who will listen, and listen sympathetically,
6 and that is my way of benefiting. I don't want to go to
7 an investigation, I don't want to go to court". That
8 wasn't what happened?

9 A. Absolutely.

10 Q. Can I ask you about the other matter of compensation and
11 the relationship with the test cases and the review. We
12 have already seen the test cases -- well, the test case
13 in Kelly, which you may or may not be familiar with, was
14 to do with prescription.

15 A. Yes.

16 Q. It had run its course by July 2004.

17 A. 2004, yes.

18 Q. So the prescription claims had gone -- or the arguments
19 about why these claims should still be brought had been
20 looked at and determined against claimants. So there
21 was no legal avenue for them from July 2004, and
22 arguably there was never really any legal argument, but
23 they tried to develop an argument that would get around
24 the legislation and it failed.

25 So by July 2004 the pre-1964 claimants, including

1 people with convictions, had no recourse to law. So
2 that is one category. We have the other category in the
3 Hendron case. We're facing two hurdles, one is
4 limitation?

5 A. Yes.

6 Q. Which was a defence that your Executive and other
7 defenders were taking, I think in your case on legal
8 advice, high legal advice from the law officer, who
9 disagreed with Peter Peacock I think, or explained why
10 he disagreed. And the other hurdle was that there was
11 a defence on liability based on the merits of the legal
12 liability the Executive was also running, and that was
13 still running in 2004 and continued to run for some
14 time, that was the Hendron case. So there were two
15 strands there, prescribed claims and the limitation
16 problems.

17 So I am just wanting to go back to something --

18 A. And running alongside that, the two reviews by the
19 Law Commission.

20 Q. I want to come to that. Can I just remind you of what
21 you said at paragraph 17 of your witness statement. It
22 was your:

23 "... consistent view as First Minister that if the
24 outcome of M v Hendron ..."

25 That was one of the cases we just talked about.

1 "... was to deny the survivors an opportunity
2 through the courts for a hearing and possible redress,
3 this ..."

4 And I think you mean the Scottish Law Commission.

5 "... did not propose reforms that would lead to
6 historic cases being heard before the courts. There
7 should be then a full inquiry to provide that
8 opportunity, including consideration of compensation.
9 I was therefore very disappointed when the Minister for
10 Children and Early Years ..."

11 That's Adam Ingram I think then.

12 "... on 7 February 2008 announced that this would
13 not be outcome. I made this view clear publicly at the
14 time."

15 Can I just put to you something here. You were out
16 of office by then in terms of you had lost the election
17 in May 2007, and can I perhaps put this to you: some
18 might respond to that evidence by using a famous quote
19 taken from an entirely different context, and it's
20 frequently misquoted, which is "He would say that,
21 wouldn't he?" So how would you respond to that? You
22 are no longer in power so it's much easier to say "Had
23 I still been in power I would have made these things
24 happen, I would have had an inquiry, I would have looked
25 at compensation, and everything would have been done in

1 2008". How do you answer any critics in my question
2 that that would have happened, or you are only saying it
3 now because ...

4 A. I did say it in 2008.

5 Q. Why were you saying it in 2008?

6 A. In fact, if I remember rightly, I tried to say it on the
7 day when the statement was made, but I think maybe I
8 wasn't called to speak which seemed strange at the time.

9 It's not possible for me to prove that that is what
10 I would have done if I was still First Minister
11 in February 2008 because I wasn't. But I can say
12 absolutely, hand on heart, that if the Hendron case had
13 for example concluded in the autumn of 2006, if by that
14 time we had both reports from the Law Commission, I am
15 absolutely certain that before the spring of 2007 we
16 would have begun the process of a public inquiry that
17 would have looked at compensation. I am absolutely
18 certain about that. I don't have any doubts that that
19 would have been my judgment at that point. Because all
20 of the arguments that were most significant to me for
21 not having a public inquiry that could lead to and would
22 initiate the process of agreeing a compensation scheme
23 would have been -- because I saw again that being part
24 of a process, not two completely independent decisions,
25 would have been put to one side, and that would have

1 been my judgment at the time.

2 Q. Can I --

3 A. I remember being frustrated because the court judgment
4 came out in the middle of the election campaign in the
5 spring of 2007 and it would have been inappropriate to
6 comment on it at that time in the middle of an election
7 campaign, but thinking, you know, this is, you know, the
8 worst possible time for this to happen, because if it
9 had happened even a couple of months ago we could have
10 given a signal about what our response was to that.

11 Q. Can I put something to you then based on what you have
12 told me on the conditions which might have had to emerge
13 where an inquiry might have happened and compensation
14 might have happened?

15 A. Yes.

16 Q. In July 2004, the case of Kelly produced a legal outcome
17 that denied pre-1964 victims of abuse an opportunity for
18 a hearing and possible redress. I am just echoing your
19 words. Around April 2005, the Scottish Law Commission
20 indicated to your administration that it would provide
21 early definitive advice recommending no change in the
22 law to allow prescribed claims to be brought. Your
23 ministers, having considered that offer, did not take it
24 up. Peter Peacock simply ran with the other review on
25 limitation. Did you know that? Did you know that that

1 was how things had unfolded at the time, that they had
2 defined the offer of early advice -- you see where I am
3 going? If the door is legally shut, the Commission is
4 saying no to change in law, what is to stop
5 a compensation scheme coming in for the pre-1964
6 survivors of abuse, like the Kelly people, who have no
7 day in court and may have very good grounds for saying,
8 "Well, do something. Be as good as your word. Do the
9 right thing --"

10 A. I think -- sorry to interrupt. I think the judgment we
11 made at the time was that it would have been
12 inappropriate -- and this is one of those judgments,
13 difficult to say whether it was a right or a wrong
14 judgment -- but it would have been inappropriate to take
15 forward a compensation scheme for the pre-1964 cases
16 without dealing with the situation as a whole. So if we
17 had gone ahead then with a partial scheme or a partial
18 response to that, based on the situation with
19 prescription, that would have seemed very unfair to
20 those who were affected by time bar.

21 Q. But you thought the time bar issue could be resolved by
22 the review on limitation. You didn't know they were
23 going to report in terms that would rule that out. You
24 said the policy was let the courts decide these things
25 and we will not --

1 A. We couldn't be certain of that. That is what we hoped
2 would happen.

3 Q. You could certain --

4 A. But I think if we had -- I think at the time we felt if
5 we announced what was essentially a scheme for some
6 people but not for others, and we were taking two
7 different approaches, even if that was the way the court
8 cases had worked out in consequence, and even the
9 reviews had worked out in consequence, then we would
10 have -- that would have seemed unfair to people. So it
11 was a judgment call at the time, that we wanted to do
12 the two hand-in-hand.

13 Q. Would it, though? Because you can distinguish them on
14 your approach that there is still hope that the legal
15 system will have a solution for one class, but there is
16 no hope on the other, and indeed I think there was some
17 evidence given to people in the run-up to the debate
18 that, well, survivors are concerned about apologies and
19 some investigation, and on compensation maybe opinions
20 are more divided, but one thing they don't seem to be
21 divided on is those who have no legal resource should
22 have some access to compensation, if that was what you
23 were being told. I am just querying why you make this
24 distinction?

25 A. I think both judgments would have had some logic to them

1 and we chose one rather than the other. It would have
2 been possible for us to deal with those affected by
3 prescription ahead of those affected by time bar,
4 because time bar was still in the front of the courts
5 and limitation was still in front of the commission.
6 The other alternative was to try -- was to keep the two
7 closely linked and to deal with them both at the same
8 time and to see both unfold, not just one, before taking
9 any further steps. That was -- I think either judgment
10 could have been perceived to have been unfair on one
11 group or the other. So I think that was the rationale
12 at the time.

13 LADY SMITH: Jack, wasn't it also possible that, so far as
14 the pre-1964 cases were concerned, there would be
15 a significantly higher cohort of older people?

16 A. That would have been a factor, I am sure, in those
17 discussions, and therefore that might have pointed
18 towards a greater degree of urgency in that case. As
19 I say, I think the judgment made at the time was to see
20 this as -- or maybe because the debate around the public
21 inquiry and compensation and so on had been conducted as
22 a whole prior to 2004 rather than the two separate
23 groups of people. With the benefit of hindsight,
24 perhaps that is a judgment that could have gone in the
25 other direction more easily than it did.

1 MR PEOPLES: The other point I would just like to ask you to
2 comment upon. It appears that in telling the Public
3 Petitions Committee in September 2004 and the
4 Scottish Parliament in December 2004 that there was
5 a review by the Law Commission on -- admittedly, I think
6 the word "limitation" was used, but it seems apparent
7 both from the evidence we have heard and from indeed the
8 contributions to the debate on 1 December, including
9 from the current First Minister, that they or someone at
10 least picked up the idea that the Law Commission in 2004
11 was actively considering the whole issue, including
12 prescription, when in fact all they had been asked to do
13 in 2004 was to look at limitation. Did you know that at
14 the time of the debate or was that something you learned
15 of afterwards?

16 A. It's difficult to be precise about this. I think
17 I learned about it afterwards rather than before.

18 Q. If you had known that and you had realised the first
19 reference in 2004 was confined to the limitation, and
20 the second reference was to give the Law Commission
21 a chance to consider the prescription issue, as
22 her Ladyship said, for the older claimants, what would
23 your reaction have been? Would you have been thinking,
24 well, why didn't we do both at the same time? Because
25 you have said --

- 1 A. Or even the other way around --
- 2 Q. Yes, exactly.
- 3 A. -- which may have made more --
- 4 Q. So if you wanted to look at them together, the logic
5 would be that either you take a single reference of both
6 or, as you say, if you are looking to prioritise, you
7 take the second reference first, and that didn't happen.
8 Was that a mistake?
- 9 A. I think it was a mistake, yes. I think when we
10 discovered there had been that mistake, I think Cathy
11 rectified it, but I think it was at the time, yes.
- 12 Q. The only other thing I think I would want to ask you --
13 I'm not going to go into the Apology, I think we know
14 that the Lord Advocate stepped in on 30 November and
15 said that the wording as it stands, "on behalf of the
16 Government in Scotland and the people of Scotland", is
17 going to potentially create difficulties, it might be
18 construed as an admission of liability. And at that
19 stage you weren't really wanting that to be the
20 interpretation put on your words, were you? Because you
21 didn't want at that stage to publicly accept
22 responsibility (a) because court cases were running, and
23 (b) because you didn't want to let others off the hook?
- 24 A. Yes, both of those things were factors that were
25 important. The scale of compensation, scale of

1 liability was not a factor in my mind. It was a factor
2 in the advice we were getting but it was not a factor in
3 my mind.

4 Can I just say one other thing about the Apology?
5 Because I did consider at that time including in the
6 statement, and I think I actually did say something
7 along the lines of "I hope others will follow", or words
8 that effect. And we did discuss at the time, although
9 I don't think any of this is in writing, toughening up
10 that part of the statement and making a very explicit
11 call to churches and others to follow suit. But it was
12 felt, to come back to this concept of an apology that
13 makes an impact both on the survivors and the people of
14 Scotland, it was felt that if, within the statement, in
15 addition to apologising on behalf of the people of
16 Scotland, I then put in a call to the churches to do the
17 same thing, and was very specific about that, then the
18 message that would have gone out from the statement
19 would have been First Minister calls on the churches to
20 do it, rather than the fact that the First Minister was
21 doing it himself.

22 Q. So it would have diverted from the main message?

23 A. Yes. So we didn't include that. We did toy with the
24 idea of putting that in, and I think the correspondence
25 shows there was informal contact with the churches at

1 that time behind the scenes, but we didn't include that
2 publicly in the statement, again for the best of reasons
3 rather than to avoid the subject.

4 LADY SMITH: Jack, I don't want to take too long over this
5 at this stage of the day, but I do have to ask you: were
6 you comfortable with this phrase, "the people of
7 Scotland"?

8 A. Was I comfortable with it? I was to some extent, yes.

9 LADY SMITH: What did you think you meant by it?

10 A. I wanted -- I did feel Scotland had moved on from a time
11 when this was covered up and had happened in this way
12 without proper public attention to it and proper action
13 by authorities when it was reported to them. So
14 I did -- I did want to speak on behalf of the people of
15 Scotland, because I felt this was more than just about
16 institutions, it was about the whole country accepting
17 some responsibility but sending a signal to the
18 survivors that people were on their side. But I was
19 a bit uncomfortable with that fact that, because of the
20 advice and the potential to let others off the hook,
21 I couldn't say that it was on behalf of the State.

22 Because the State -- as earlier pointed out by
23 Mr Peoples, these children, as they were at the time,
24 were in the care of the State. So I was -- I think
25 your Ladyship can probably see from the correspondence

1 and the debates that took place at the time I was uneasy
2 about where we would get to. We had a bit of
3 a challenge and a debate behind the scenes. But when
4 I resolved that it would be inappropriate at that point
5 to let others off the hook, I was at that point
6 comfortable with making the statement. But the
7 phraseology wasn't ideal because ultimately it would
8 have been better to be in a stronger position. In fact
9 the ideal position on the day would have been to say
10 "and I am delighted that this morning others have
11 accepted their responsibility as well", or something
12 like that.

13 LADY SMITH: You can see why the advice about not using the
14 term "State" was given, it's rather like a corporate
15 entity, that is not the individuals within it. But this
16 language, "the people of Scotland", as you know, was
17 seen by some at the time certainly as being quite
18 inappropriate because of the number of people in
19 Scotland in 2004 who could say "This was nothing to do
20 with me. I accept terrible things happened, of course
21 I am a decent individual and I feel awful if abuse did
22 happen, but I can't apologise for it because I wasn't
23 responsible for it".

24 A. I have to say I didn't get that feedback at the time.
25 All the feedback at the time, the response from all of

1 the politicians, including the current First Minister
2 who spoke following me that afternoon, every single one
3 welcomed the statement and its terms, not just the fact
4 that a statement had been made. Mr Daly welcomed it
5 I think three weeks later at the Committee. There was
6 a very good response publicly to it.

7 I didn't get any -- although I myself was constantly
8 torn by this issue of what was the strongest statement
9 we could make, in the days that followed there wasn't
10 a reaction on any level of resistance to what had been
11 said either from people who felt the apology should not
12 have been made on their behalf, because they were part
13 of the "people of Scotland", or from those who felt
14 a stronger apology should have been made.

15 LADY SMITH: I will stop this very, very shortly. I do
16 understand from some evidence that some people, on
17 reflection, who were survivors, felt "I am not saying
18 the people of Scotland that were being referred to did
19 this to me. I know who did this to me", and it was this
20 institution, that nun, that carer in Quarriers,
21 Aberlour, Barnardo's, the people we have heard from,
22 whatever. Difficult.

23 A. Yes, I understand. I completely understand that.

24 I completely understand that.

25 MR PEOPLES: Can I just finish this little bit then. But

1 they were saying "The State" -- the people that make up
2 the State or the Executive or the Government, whatever
3 you want to call it, and they don't really distinguish
4 between Central and Local Government in these matters I
5 think for this purpose -- "they were the people that put
6 us in", and therefore, if you are representing the State
7 for the time being, then that is what they were wanting.
8 They wanted you to step up like Bertie Ahern and say
9 that, that the State is taking some responsibility for
10 this even if they are not taking all of the
11 responsibility. I think that is the point that perhaps
12 others, on reflection, raised and might then use as
13 criticism of the words used.

14 The second point I would like to check with you is
15 had Colin Boyd not sent his email on 30 November, which
16 had resulted in removing the words "the Government in
17 Scotland", would you have delivered an apology with
18 those words included? If he hadn't written that email
19 would you have been happy to deliver the statement with
20 those word left in?

21 LADY SMITH: Those words being the ones that ended up being
22 deleted --

23 MR PEOPLES: Yes, the deleted words. If it was an apology
24 on behalf of -- even if you said "on behalf of the
25 Government in Scotland and the people of Scotland",

1 which I think was the formulation that Colin Boyd looked
2 at and said "I have just seen the draft", and he gives
3 you his concerns. And that results in "the Government
4 in Scotland" being removed at the last minute and you
5 deliver an apology without those words in. Had he not
6 written that email at that time, would you have been
7 happy to deliver the text with "the Government in
8 Scotland" included.

9 A. Can I address both of those points? Because your first
10 point was about partial responsibility.

11 Q. Yes, go on.

12 A. I did consider at the time whether it would have been
13 helpful to include "Government", to put it in, but to
14 put that in some sort of caveat terms, and I felt that
15 would be unhelpful, I don't think any caveats on the day
16 were appropriate. So what we said had to be clear and
17 firm, it couldn't be caveated. So to say "Government",
18 but recognising that it wasn't all our responsibility
19 wouldn't have been appropriate, or any formulation of
20 that sort.

21 On the second point about the minute from the
22 Lord Advocate, I think I can say hand on heart that he
23 is the only person who could have persuaded me to take
24 those words out.

25 Q. That is fair enough. Can I say though now -- you said

1 you had other thoughts in 2008 --

2 A. Sorry, if I could also say that if he had only included
3 in that minute his first point about the compensation
4 and not included his final paragraph, that probably
5 wouldn't have persuaded me either.

6 Q. Ultimately in 2008, apart from you making some -- giving
7 some reaction to Adam Ingram's statement of what he did
8 and didn't say at that point, and we have discussed
9 that, Lord Hope of Craighead in the House of Lords in
10 Bowden v The Poor Sisters of Nazareth and Others, in
11 opening his speech at paragraph 4, said this:

12 "The appellants have drawn attention to the fact
13 that on 1 December 2004, the then First Minister
14 Jack McConnell made a public apology for what had
15 happened in these institutions. It must be stressed,
16 however, that this was a purely political initiative.
17 It has no legal significance whatsoever."

18 So it does appear that the concerns that prompted
19 the email were perhaps in the end not true concerns or
20 not real concerns because he was saying that you judge
21 these matters in accordance with law, and the fact that
22 someone might apologise in the generality of the terms
23 that you delivered the Apology would not have legal
24 consequences, and I think that was the point he was
25 making. Because I think the appellants in that case

1 sought to found on that apology in their arguments in
2 the House of Lords, and that was Lord Hope's response as
3 part of his judgment.

4 So it is unfortunate that you didn't maybe have
5 those words beside you in 2004, is it not?

6 A. Lord Hope has great wisdom and I would always hesitate
7 to qualify it in any way. We don't know what he would
8 have said if I had used a different form of words on
9 1 December.

10 Q. If you had admitted liability and said "We are being
11 sued. We admit liability", or "We accept we were
12 negligent or in breach of duty, or our predecessors
13 were", or something along those lines, I fully accept
14 the point you are making, and indeed the current
15 Apologies Act accepts those words can be evidentially
16 significant. But you didn't say that, you were saying
17 a much more general thing in a much more general way, if
18 I can put it that way. I don't want to debate it but
19 I am just saying there are differences.

20 A. He might have said something different if I had used the
21 word "Government". So I think at the time, if you are
22 given strong legal advice by a Lord Advocate that you
23 trust who hasn't been part of the sort of institutional
24 resistance to some of the decisions that we were making
25 on this, and who is generally, and had been in my

1 experience, a Lord Advocate who sought to help me
2 achieve legally my outcomes rather than block them, when
3 he gave advice like that I took it very seriously --

4 Q. I am not suggesting you shouldn't have done.

5 A. No, I am just saying it was -- that was the situation
6 that we had faced with that quite firm advice, which
7 I then subsequently discussed with him following his
8 minute, then a judgment had to be made. And while I was
9 resistant to that, I felt that on the day that was the
10 option that had to be chosen.

11 Q. He didn't have the gift of foresight either so maybe
12 that is the answer.

13 Can I just lastly now, because I am conscious
14 that -- I want to just put this point to you that
15 I think you have had an opportunity to read the
16 Scottish Government report that has been prepared to
17 assist the Inquiry. It is a long report and clearly it
18 raises issues, but you weren't directly involved in the
19 events. The only matter I would like to raise with you
20 is that having read that report, which I think you have
21 done, I am assuming, there is one chapter which responds
22 to evidence given to this inquiry by Helen Holland,
23 David Whelan and Chris Daly, and in the report there
24 is -- they have set out there were certain criticisms
25 during that evidence of Scottish Government over the

1 years. It's not detailed criticism in breaking it down
2 in criticism, and it may not entirely relate to one
3 period rather than another, but there is some form of
4 acknowledgement that there were deficiencies over the
5 years both in perhaps the way that survivors were
6 sometimes treated and also in the way sometimes that
7 survivors were or were not consulted. And I just
8 wondered whether you took any issue with that.

9 I appreciate you didn't contribute to this report, it
10 does relate to your period as First Minister, and do you
11 have any quarrel with an acceptance or acknowledgement
12 along those lines in very broad terms? It's not naming
13 individuals or specifically identifying who might be the
14 object of criticism, I just want to see whether you --
15 I think some of the evidence you have given probably
16 gives me the answer, but can I just see, just in
17 fairness to you, since you didn't write the report or
18 were asked to contribute to it directly, did you have
19 any difficulties -- I can take you to the passages if
20 you would like, but ...

21 A. I think it is entirely unacceptable that it took from
22 August 2002 to December 2004 to properly respond in full
23 to the original Petition. There are parts of the delays
24 and the way that things were handled at that time that
25 have rational explanation, but there are many that do

1 not, and I think given the sensitivity of the subject
2 matter and the trauma previously experienced by those on
3 whose behalf Chris Daly had submitted the Petition, the
4 whole process should have been handled more sensitively
5 and with a greater degree of urgency. And I want to be
6 absolutely crystal clear about that. I also think that
7 after 2004, while there were moments when the engagement
8 with survivors was positive and while there were good
9 initiatives taken in some cases to support survivors and
10 to continue the process of reform, and I think Tom Shaw
11 was a good appointment and a good person for the job and
12 produced a good report, again over that three-year
13 period between 2004 and 2007 when we were still in
14 office the continual delays and uncertainties over the
15 way these subjects were handled was also again
16 unacceptable. There are lessons to be learned from both
17 periods. Some of them I have mentioned to the Inquiry.
18 Some of them we just all learned personally at the time.
19 At the core of this is a group of individuals who
20 suffered abuse and who were traumatised by that
21 experience and by the way they have been treated since
22 and we should not have added to that. We should have
23 dealt with it more effectively.

24 MR PEOPLES: I think that is all I have for you today.

25 I appreciate it has been a long day. We had the hiccup

1 in the morning, so it has maybe delayed us. We might
2 have finished on time. I hope I have addressed most of
3 the questions that were submitted to me, unless anyone
4 has any problems.

5 LADY SMITH: Are there any outstanding applications for
6 questions? No.

7 MR PEOPLES: So that completes my questions. I thank you
8 very much for coming today and for being patient with my
9 questions.

10 LADY SMITH: Jack, thank you very much. Let me echo those
11 thanks as well, not just for being here but for all the
12 work that has gone into helping us with your written
13 statement as well and being so prepared to be challenged
14 and questioned today as you have been. It is really
15 helpful to me in what I am doing here and I am grateful
16 to you for that.

17 A. May I just say, your Ladyship, that I genuinely welcome
18 this Inquiry and I admire the work that has been done so
19 far, the rigour with which the collection of evidence
20 and then the actual hearings have taken place in
21 difficult circumstances, particularly this year. I hope
22 that the Inquiry at the end of the day not only provides
23 some help to those who were originally affected by this
24 most horrific of situations, but is able to learn
25 lessons, even at this late stage, all these decades on,

1 that can ensure that Government performs better in the
2 future, and I wish you well in that task.

3 LADY SMITH: Thank you very much. Can I assure you I think
4 we are learning every day and it will go on. So I am
5 now able to let you go, Jack. It has been a long day
6 and you are no doubt ready to get away. Thank you.

7 (The witness withdrew)

8 LADY SMITH: That completes our evidence for this week. We
9 resume on Tuesday at 10 o'clock and we will be running
10 through probably the whole of next week with evidence,
11 is that right?

12 MR PEOPLES: Yes. We will have evidence probably every day
13 from Tuesday to Friday and, as I said in the opening
14 statement, we would like to complete the evidential part
15 of this hearing on Friday, if at all possible. We are
16 running to time at the moment, despite the hiccups. So
17 hopefully that may continue.

18 LADY SMITH: I think the running order is now on the
19 website. If it is not there yet, it will be there very
20 shortly. Thank you all very much. I hope you have
21 a good weekend and I will be back here on Tuesday.

22 (4.31 pm)

23 (The Inquiry adjourned until 10.00 am on Tuesday,

24 24 November 2020)

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LORD JACK McCONNELL (affirmed)1

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